

# NARF

# Review

## Native American Rights Fund

### Repatriation Act Protects Native Burial Remains and Artifacts

#### Introduction

The Smithsonian Institution is often fondly referred to as the "nation's attic." While this description seems benign and generally positive, a more sinister aspect clouds that appellation for Indian people. Recently, Indians learned that the national attic holds the single largest collection of Native American human remains in the United States.

This fact was first brought to light in the summer of 1986, when a number of Northern Cheyenne chiefs visited Washington D.C. During the course of their visit they arranged to tour the Smithsonian Institution's Cheyenne collection at the National Museum of Natural History. "As we were walking out," a Northern Cheyenne woman who worked on Capitol Hill later recalled, "we saw [the] huge ceilings in the room, with row upon row of drawers. Someone remarked that there must be a lot of Indian stuff in those drawers. Quite casually, a curator with us said, "Oh, this is where we keep the skeletal remains," and he told us how many -- 18,500. Everyone was shocked."<sup>1</sup>

This discovery by a small group of visiting Northern Cheyenne chiefs helped generate a national Indian movement that eventually resulted in the enactment of Public Law 101-601, the "Native American Graves Protection and Repatriation Act (NAGPRA)." This law contains several significant provisions. First, it requires that federal agencies and private museums which receive federal funding must inventory

their collections of Native American human remains and associated funerary objects. Where known, the tribe of origin must then be notified and, upon request of the tribe, the ancestral remains and funerary objects must be returned for reburial or other disposition by the tribe. Second, the legislation makes clear that Indian tribes own or control human remains and cultural items which are excavated or discovered on tribal land or federal land (where certain criteria are met) and that they alone have the right to determine disposition of Indian human remains and cultural items discovered in these areas. Third, the legislation prohibits the trafficking of

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Native American human remains and (prospective) cultural items where the items are obtained in violation of the Act. Fourth and last, the legislation requires that federal agencies and private museums which receive federal funds must create a summary of unassociated funerary objects, sacred objects, or objects of cultural patrimony in their possession. Upon request of the tribe, an item must be returned if a tribe can prove cultural affiliation or prove prior ownership or control and also provide some evidence that the museum did not acquire the item with the consent of the legal owner. The NAGPRA represents a major federal shift away from viewing Native American human remains as "archeological resources" or "federal property" alone. Instead, the government is slowly beginning to view these remains as Native Americans do -- as our ancestors. As the following section indicates, this change is long overdue.

#### **The Pre-NAGPRA Federal Policy: Your Grandparents Are Our Property**

It may be hard to imagine that our government has had a firm policy which encouraged the acquisition and retention of Native American human remains--but that is the case. Prior to the passage of NAGPRA, Native American dead which were discovered on federal lands became the "property" of the United States. [(Antiquities Act of 1906, 16 USC 432)] Under the Antiquities Act, untold thousands of Native remains discovered during construction of federal projects or during scientific excavations were turned over by law to state and federal museums. While some might dismiss these as isolated instances which were regrettable but necessary, other acquisitions of Native American ancestral remains were the direct result of an even more nefarious federal policy.

In 1868, for example, the Surgeon General of the United States ordered army personnel to procure as many Indian crania as possible for the Army Medical Museum. Under that order, the heads of more than 4000 Indians were taken from battlefields, prisoner camps and hospitals, and from fresh Indian graves or burial scaffolds

across the country. These remains are, with the exception of the skulls of 16 Blackfeet and two Modoc people, still stored in the Smithsonian's Natural History Museum.<sup>2</sup> NARF currently represents the Pawnee Tribe to recover crania of slain warriors that were taken under that order.

More recently, in the 1930's, a Smithsonian anthropologist travelled to Kodiak Island, Alaska and, over the objections of the Native residents, removed more than three hundred human remains from a burial site located next to the village. NARF currently represents the Larsen Bay Tribal Council in its efforts to secure these remains.

NARF had also received documented complaints that Indian human remains were being sold at flea markets throughout the South; that Indian burial grounds were being sold to pot hunters for the artifacts that they contained and that items such as peace medals and other cultural items, which NARF believes could not have legally entered the market, were being sold to private collectors and museums.

In addition to this commercial exploitation, NARF knew that federal agencies, particularly the Smithsonian Institution, were refusing to cooperate with requests, based solely upon humanitarian grounds, from tribes who had demanded the return of the remains of their ancestors for reburial.

In supporting the early repatriation effort, NARF ran headlong into academic and museum interests who believed that Indian human remains were not entitled to the same respect accorded non-Indian remains, but instead existed primarily for the advancement of science. Although NARF had no accurate count of the total number of Indian human remains held by federal agencies, we were sure that they numbered in the hundreds of thousands. NARF knew that the Smithsonian had alone approximately 18,500 Indian human remains and that several other agencies had remains as well.<sup>3</sup>

Over the years, NARF and many individual tribes have been working to change laws at the state level regarding the protection of Indian burial sites. All too often, however, the academic and private collectors have been suc-

cessful in defeating or watering down of these state legislative solutions. Also, passage of state statutes affording differing degrees of protection led to inconsistent standards and confusion. Clearly, a federal solution was called for.

### The Struggle to Enact NAGPRA

Many years of legislative effort and several earlier unsuccessful bills preceded the passage of NAGPRA last fall.

In 1986, Senator John Melcher (D. Mont.) introduced S. 2952, which would have provided a forum for dispute resolution between tribes and museums. Unlike NAGPRA, it did not require museums to repatriate human remains. Nevertheless, NARF supported the legislation as a good first step in the process of full repatriation.

The Melcher bill, despite its modest scope, was strongly opposed by museum interests and was ultimately unsuccessful due to this opposition. Indian interests generally applauded the goals of the legislation but felt that the legislation did not go far enough. The Melcher bill did, however, heighten Indian awareness that ancestors' remains were taken and kept from them. It served to galvanize Indian efforts to secure better legislation in the future.

NARF formed a Native American coalition with the National Congress of American Indians (NCAI) and the Association on American Indian Affairs, along with numerous tribal leaders. During the next four years, the Native American coalition worked hard to build congressional and public support for the repatriation effort. NARF worked closely with a museum panel to recommend a legislative approach to Congress which would address the concerns voiced by the competing interest groups.

This panel met several times during 1989. Its final report was issued in February of 1990. In general, it favored the Indian repatriation effort and stated that the human rights principle should govern the resolution of the issue, although some members of the museum community disassociated themselves from the recommendations.

Congressman Udall had introduced legislation in the 100th Congress which addressed the

repatriation issue but due to opposition the bill had not moved very far. NARF's first real opportunity to advance the repatriation cause occurred when Senator Inouye introduced a bill which created a National Museum of the American Indian. This museum, which will occupy the last available building site on the Mall in Washington, D.C., was intended to house the Heye collection now located in New York City. Due to financial constraints, New York was unable to adequately house this collection. After an extended and somewhat acrimonious conflict between the State of New York and the Smithsonian; it was finally agreed that the bulk of the Heye collection would go to the new museum on the Mall.

The museum bill had broad bipartisan support and swift passage was assured. Indian repatriation supporters saw this as a prime opportunity to secure passage of the repatriation requirements of the Udall bill -- at least with regard to the major collection of Indian remains held by the Smithsonian. After prolonged negotiations between Smithsonian representatives, NCAI and NARF an historic agreement was reached: the Smithsonian agreed to inclusion of a repatriation section within the legislation creating the National Museum of the American Indian.

Although the Indian museum legislation was a major victory for the repatriation effort, given the Smithsonian's massive collection of Indian remains, the bill applied *only* to the Smithsonian, and it did not address return of cultural items. The Native American coalition continued its efforts and worked hard in support of other legislation sponsored by Senators Inouye and McCain and Congressman Udall, among others, which required all federal agencies and private museums which received federal funds to repatriate human remains. The bill also added a repatriation requirement for cultural items which had been illegally taken from Indian tribes.

In this effort, the Native American coalition was strongly opposed by the Antique Tribal Art Dealers Association, an organization composed largely of non-Indian art dealers. James Reed, the president of this organization, stated that "If

the museums have no legitimate right to these pieces, then the next assumption might be that private persons have even less right."<sup>4</sup> Perhaps more to the point, the antique dealers expressed concern that the bill would require a greater showing of ownership than the old laws, which in turn might have hampered their ability to sell items to museums and private collectors. In addition, museum pieces helped establish market prices for items sold privately. Clearly, the bill threatened the unrestricted style of business that had enabled art dealers to command premium prices for Indian artifacts.

Other major opponents to the repatriation effort were the museum and the archeological communities. Their concerns were not monetarily motivated, but rather centered on protection of their existing collections of cultural items. To their credit, the museum community did not fundamentally disagree with the notion of repatriation of Native American human remains, but they were concerned about the efforts to repossess cultural items which they felt had been legally obtained but which might not have an adequate paper chain of title. The archeological community was concerned that collections with great scientific value might be lost to public study forever.

Despite major misgivings on both sides, the members of the Native American coalition and the museum and archeology interests were able to overcome their differences and support passage of NAGPRA.

### Conclusion

The Native American Graves Protection and Repatriation Act revolutionized federal policy concerning Native American human remains. For the first time, Congress has accepted the principle that Indian people are entitled to the return of their ancestors' remains and of the items buried with them. Finally, Congress has mandated that cultural objects stolen from tribes must be returned when asked for, and has recognized that Indian people are not simply the objects of anthropological study, but a people with

their own culture and customs that must be accorded the respect that they deserve.

In the months to come, Indian tribes and their legal counsel should carefully study the provisions of the new law in order to learn the important new rights and opportunities it establishes for Native people. *(Article written by Henry Sockbeson, NARF staff attorney in Washington, D.C.) Those wishing to obtain copies of the NAGPRA should write to: House Document Room, House Annex #2, 2nd and D. Street S.W., Room B-18, Washington, D.C. 20515*

<sup>1</sup>Quoted by Douglas J. Preston, who gives an account of the Northern Cheyenne Chiefs visit to Washington in "Skeletons in our Museums' Closets," *Harper's*, Feb. 1989, at 68.

<sup>2</sup>Taken from notes dated January 18, 1890 at Ft. Randall, Dakota Territory and August 24, 1870 at Post Hospital Fort Sumner.

<sup>3</sup>We established that the TVA and the National Park Service had 13,500 remains. The Defense Department reported that the Air Force had over 140 remains and the Navy had 85 remains. The Fish and Wildlife Service had 637 Indian human remains.

<sup>4</sup>Quoted in Landers, "Who Owns the Past?" *Congressional Quarterly's Editorial Research Reports*, Jan, 1991, at 36.

### In Memorium

George Kalama, former NARF board vice-chairman and member, was killed in a fishing accident on December 20, 1990.

George, a member of the Nisqually Tribe of Western Washington, served on the NARF Board of Directors for six years providing excellent leadership and advice. He was also a former tribal chairman and a fisherman.

George will be remembered for his advocacy role in promoting Indian veterans rights. One of George's biggest achievements was his work in the development of a special program to treat American Indian veterans suffering from Post Traumatic Stress Disorder. He and other Indian veterans worked closely with health providers to design a culturally appropriate treatment approach for veterans.

## Case Updates

### **Village of Noatak v. Hoffman**

NARF attorney Lare Aschenbrenner argued the Alaska case, *Village of Noatak v. Hoffman*, before the U.S. Supreme Court on February 19, 1991. The issues in the case are: 1) whether Alaska Villages are recognized as Indian tribes; 2) whether the Eleventh Amendment bars suit against states by Indian tribes for past damages; and 3) whether the Village of Noatak's claim for damages presents a federal question. An earlier decision by the 9th Circuit Court of Appeals held that Alaska Native Villages are recognized as tribes by the United States and that Indian tribes can bring suits against states in federal court for past damages notwithstanding the Eleventh Amendment. NARF represents the Village of Noatak in the case.

### **Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma**

The U.S. Supreme Court ruled February 26, 1991, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, that even if a State that has not asserted jurisdiction over Indian lands under Public Law 280, it may tax sales of cigarettes by Indian tribes to non-tribal members, but may not tax such sales to members.

The Court also held: 1) that Indian tribes generally are immune from suit unless Congress provides otherwise; and 2) that land held in trust for Indian tribes, even if it is not formally designated as an Indian reservation, is subject to the normal doctrines and rules of federal Indian law such as tribal sovereignty and sovereign immunity. NARF filed an *amicus curiae* (a friend of the court) brief in the U.S. Supreme Court on behalf of several tribes and Indian organizations.

### **United States v. Oregon**

In *United States v. Oregon*, the United States sued the State of Oregon in federal district court alleging that the State lacks jurisdiction under the federal McCarran Amendment to quantify federal reserved water rights in the Klamath Basin in southern Oregon including those that the federal government holds for the Klamath Tribe. The Klamath Tribe, represented by NARF, intervened in the lawsuit as a plaintiff to join the federal government against the state and raise arguments of its own to protect its treaty rights. Oral argument was held February 19, 1991, in Portland, Oregon.

### **Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Commission**

In January, 1991, the Cheyenne-Arapaho District Court ruled that the Cheyenne-Arapaho Tribes of Oklahoma, represented by NARF, may tax oil and gas production on lands held in trust by the federal government for members of the Tribes. The oil companies have appealed to the tribal Supreme Court.

# NARF RESOURCES AND PUBLICATIONS

## THE NATIONAL INDIAN LAW LIBRARY

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to Federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials, such as law review materials, court opinions, and legal treatises, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

## AVAILABLE FROM NILL

### The NILL Catalogue

One of NILL's major contributions to the field of Indian law is the creation of the National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The NILL Catalog lists all of NILL's holdings and includes a subject index, an author-title table, a plaintiff-defendant table and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law. (1,000 + pgs. Price: \$75) (1985 Supplement \$10; 1989 Supplement \$30).

## Bibliography on Indian Economic Development

Designed to provide aid on the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations. This bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. 2nd edition (60 pgs. Price: \$30). (NILL No. 005166)

## Indian Claims Commission Decisions

This 47-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available. The index contains subject, tribal and docket number listing. (47 volumes. Price \$1,175). (Index priced separately at \$25). (Available from the National Indian Law Library).

*Prices subject to change*

## INDIAN RIGHTS MANUAL

**A Manual for Protecting Indian Natural Resources.** Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands, and archaeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of law advocates in resource protection. (151 pgs. Price \$25).

**A Manual on Tribal Regulatory Systems.** Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which

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comport with federal and tribal law, this manual provides an introduction to the law of civil regulation and a checklist of general considerations in developing and implementing tribal regulatory schemes. It highlights those laws, legal principles, and unsettled issues which should be considered by tribes and their attorneys in developing civil ordinances, irrespective of the particular subject matter to be regulated. (110 pgs. Price \$25).

**A Self Help Manual for Indian Economic Development.** This manual is designed to help Indian tribes and organizations on approaches to economic development which can ensure participation, control, ownership, and benefits to Indians. Emphasizing the difference between tribal economic development and private business development, this manual discusses the task of developing reservation economies from the Indian perspective. It focuses on some of the major issues that need to be resolved in economic development and identifies options available to tribes. The manual begins with a general economic development perspective for Indian reservations: how to identify opportunities, and how to organize the internal tribal structure to best plan and pursue economic development of the reservation. Other chapters deal with more specific issues that relate to the development of businesses undertaken by tribal government, tribal members, and by these groups with outsiders. (Approx. 300 pgs. Price \$35).

**Handbook of Federal Indian Education Laws.** This handbook discusses provisions of major federal Indian education programs in terms of the legislative history, historic problems in implementation, and current issues in this radically changing field. (130 pgs. Price \$20).

**1986 Update to Federal Indian Education Law Manual (\$30) Price for manual and update (\$45).**

**A Manual On the Indian Child Welfare Act and Law Affecting Indian Juveniles.** This fifth Indian Law Support Center Manual is now available. This manual focuses on a section-by-section legal analysis of the Act, its applicability, policies, findings, interpretations, and definitions. With additional sections on post-trial matters and the legislative history, this manual comprises the most comprehensive examination of the Indian Child Welfare Act to date. (373 pgs. Price \$35).

## PUBLICATIONS

**ANNUAL REPORT.** This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request.

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**Alaska Office:** Native American Rights Fund, 310 K Street, Suite 708, Anchorage, Alaska 99501 (907-276-0680).



# Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office: 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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