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Native American Rights Fund

Review

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Federal Indian Burial Policy — JUL 7 1987 ***Historical Anachronism*** ***or Contemporary Reality?***

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Introduction

Current estimates place the number of Native American bodies stored in federal institutions, such as the Smithsonian Institution, public and private universities and museums and private collections in America at from 300,000 to 600,000. At least one-half million bodies have also made their way into collections in foreign countries. Indian tribes and national Indian organizations are beginning a systematic national drive to get these human remains back into Indian hands for appropriate disposition. Simply put, notwithstanding the claims of scientific and educational interests, on moral, religious and legal grounds these remains belong back in the ground or other suitable final resting place.

One might think that this impressive collection of Indian remains is nothing but a historical anachronism, and that our society had become sufficiently enlightened so as not to be so utterly, blatantly racist and disrespectful. If only that were the case! Contemporary federal law and policy, however, defines Indian gravesites and human remains as "archeological resources" — relics of antiquity — and elevates scientific values over religious and cultural values. As a result, the storage of Indian skeletal materials and associated grave goods continues largely unabated.

This scenario contrasts sharply with the treatment of the human remains of other groups. Non-Indian cemeteries are routinely moved to make way for highway and dam construction projects, housing developments, and other improvements in our society. Even "sensational" archeological discoveries as reported in a May 3, 1987 story in the *Denver Post* ultimately receive different treatment:

Renaissance Redcoat

Archaeologists and historians have joined to identify a skeleton found in Philadelphia as that of a British infantryman who apparently died 210 years ago fighting in the American Revolution.

The University of Pennsylvania Museum of Archaeology and Anthropology plans to put casts and holograms of the bones and associated artifacts on exhibit next month under the title "Last Muster for a British Soldier." The remains of the man were reinterred in a formal funeral ceremony attended by British and American veterans.

Construction workers unearthed the skeleton in 1985 while excavating ground in the city's Mount Airy section. Museum archeologists used bone fragments to determine the approximate age and health of the man at the time he was killed.

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That Indian remains received different treatment begs the question: Why? Why have the bodies of the cavalymen discovered at the site of Custer's Last Stand, Little Big Horn, been reburied when the Sioux warriors killed there have not? Surely we can to some degree tolerate the fascination of the archeological community to "study" Indian bones. But for how long? Do their scientific needs justify curation in perpetuity? Just how much insult to the American Indian is our society willing to tolerate for the sake of a handful of scientists? Do these scientists really produce any information of value to Indians? To the broader society?

This article attempts to begin to address these questions by tracing the historical foundations of present day federal law and policy on this subject, and argues that law and policy must soon change to reflect and protect the fundamental beliefs, attitudes and rights of tribal descendants to the remains of their dead ancestors.

The Genesis of Federal "Ownership" and Control of Indian Burials

The federal government first got into the business of cultural resource management near the turn of the century, with the enactment of the 1906 Antiquities Act. Spurred by the national archeological societies of the day, Congress sought to stem the tide of the wholesale destruction of cultural sites in the Southwest. A large foreign market in cultural materials had developed, unrestrained by local, state or federal law enforcement. The Antiquities Act, thus, made it a federal crime to "appropriate, excavate, injure, or destroy any...object of antiquity, situated on lands owned or controlled by the Government of the United States" without the permission of the government.

Congress, however, gave no consideration in the 1906 Act to the protection of sites, including burials, for their inherent religious and cultural value. Indeed, the Act served as a means by which the national archeological community, found in the more prominent educational institutions of the day, gained unfettered access to and control over Indian cultural resources located on public and Indian lands. The community of archaeologists saw destruction by foreign commercialization as a threat only to their narrow scientific and educational interests, not as a threat to Indian culture and religion, *per se*. And the notion that Indian remains located on public lands "belong to" or are the property of the federal government — embodied in these first federal laws on the subject — originated not from any established body of common law (as is discussed below) but merely from the effective lobby of a self-serving professional community of interests.

In this vein the Act permits the "examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity" only by institutions "deemed properly qualified to conduct such examination, excavation or gathering." That the interests of scientific and educational institutions are primarily served by the Act is clear:

Provided, that the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges...with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

There is no record of concern for the traditional Indian viewpoint in the proceedings of Congress on the 1906 Act. Indeed, passages from the hearings before the Senate Subcommittee of the Committee on Public Lands, however, reflect the government's more pervasive ethnocentric philosophy and attitude toward traditional Indian culture at the turn of the century. In testimony before the Subcommittee Office of Indian Affairs' Commissioner William A. Jones, concerning the cliff dwellings on the Southern Ute Reservation in southwestern Colorado, noted:

The Southern Ute Reservation is a treaty reservation, and it will be necessary to negotiate with the Indians to cede or sell that portion of the reservation which contains these prehistoric relics. You authorized us, I think, two years ago to negotiate with the Southern Ute Indians for that purpose. I have been trying to do so. We have not succeeded so far, but we think that this summer we will succeed. They have an extravagant idea of the value of that portion of the reservation, but I think with a little patience we can get them to cede from the reservation such portions as contain the relics.

The specific nature of the Ute's objection to ceding that portion of their reservation is unclear from the hearing record; what is apparent is the Commissioner's (and by implication the Office of Indian Affairs') willingness to clear the way for scientific exploration and excavation of the area, irrespective of the nature of the Indian objection. The response to any Indian objection was simply to take the land away from the objecting tribe.

Monsignor O'Connell, Rector of the Catholic University of America, set the tone for the entire congressional proceedings surrounding the 1906 Act: "...these articles of archeology, etc. are not simply the property of the United States Govern-

ment, but in a certain sense the property of the scientific world."

The presumption of federal ownership of cultural resources, including Indian burials, continued with the Reservoir Salvage Act of 1960, amending the Historic Sites, Buildings and Antiquities Act of 1935. The federal government's preference for the scientific and educational value of these resources to the exclusion of their inherent cultural and religious value is evident from the Interior Department's endorsement of the Salvage Act.

This bill has as its object the preservation of historical and archeological data which might otherwise be lost as a result of flooding caused by the construction of a dam by any agency of the United States or by any private person or corporation holding a license issued by any such agency.

* * *

With the increased industrialization and greater Federal activity in construction of large-scale multipurpose water control projects, the problem of salvaging and preserving archeological and historical antiquities of national significance in advance of destruction becomes ever more critical. The bill emphasizes the point that the necessary archeological and historical salvage should be performed in advance of such construction activities, and it reflects a growing public awareness of their increasing loss of this national heritage through such Federal and private activities.

As in the 1906 Antiquities Act the 1960 Reservoir Salvage Act in effect opened the door to widespread "looting" and unrestrained expropriation of sites by the professional archeological community, and made qualified public and private museums and other institutions the repository for "relics and [human] specimens" removed from sites. Notably, the 1960 Act marked the advent of federal financial subsidization of archeological investigations and excavations on a broad scale, hastening the "salvage archeology" era. Thousands of Indian "specimens" wound up and today remain stored in institutions across America as a result of the work of salvage archaeologists.

The National Historic Preservation Act (NHPA) of 1966, amended in part in 1980, also plays a part in Indian cultural resource management. But like the Antiquities Act and the Salvage Act, it results in little real substantive change in terms of protecting burial sites and associated sacred materials. Section 106 of NHPA requires federal agency heads, prior to licensing any federal undertaking, to "take into account

the effect of the undertaking on any [area]...that is included in or eligible for inclusion" in the National Register of Historic Places. That process entails seeking the comments of the Advisory Council on Historic Preservation, an advisory office established by the NHPA. But Section 106 is procedural in nature; agency land managers, after securing the Advisory Council's comments, can choose to ignore the comments and license or proceed with the federal undertaking. At best the process may result in site avoidance when not too costly from a development standpoint; oftentimes the result is "mitigation" which may mean little more than additional curation and storage of Indian materials.

The Archeological Resources Protection Act of 1979

The presumption of Federal "ownership" and control of Indian burials continues today in the Archeological Resources Protection Act (ARPA) of 1979. Motivated largely by the inability (if not unwillingness) of federal land management agencies to enforce the provisions of the 1906 Antiquities Act, ARPA more precisely defines "archeological resources" and substantially broadens and stiffens the range of civil and criminal sanctions which the federal government can impose on unqualified, unpermitted "looters."

ARPA, however, includes Indian graves and human skeletal materials discovered on public and Indian lands as "archeological resources" which are the property of the United States. Moreover, it perpetuates the process of preserving such materials in a "suitable university, museum, or other scientific or educational institution."

To Congress' credit Indian tribes or individual Indians must consent to the issuance of ARPA permits for the excavation or removal of archeological resources on Indian lands owned or controlled by said tribe or individuals. And ARPA requires tribes to be notified before religious or cultural sites can be harmed or destroyed by activities on public lands. But there are no assurances that the "notice" provision to tribes will effectively alter the land manager's decision, to reflect Indian concerns respecting the harm or destruction of a site. In the best of cases managers consult with tribes early on in the land management planning process to avoid culturally and religiously sensitive areas. In the more usual case the manager may take the tribe's views into account, as required by the NHPA discussed above, yet reject them for administrative, economic or political reasons. Notice to and consultation with tribal spiritual people must be more than another

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"cost of doing business" before these provisions of ARPA will have any significant impact.

Various federal departments and agencies have adopted regulations, policies and guidelines implementing ARPA. One example is a guideline written in 1982 by the National Park Service consulting archaeologist, purportedly for the entire Department of the Interior and its various bureaus (Bureau of Land Management, Bureau of Indian Affairs, Office of Surface Mining, Bureau of Reclamation, etc.). Entitled "Guidelines for the Disposition of Archeological and Historical Human Remains," the document facially recognizes that the "proper treatment [of Indian remains] often involves especially sensitive issues in which scientific, cultural and religious values must be considered and reconciled." To accomplish that end the guidelines — much in the nature of ARPA — encourage early consultation with affected tribes, or, in the case of non-federally recognized tribes, "ethnic groups."

But what real difference has ARPA "notice" or the guidelines' "consultation" requirements really meant to Indian people? The answer is simple and unequivocal: very little. For instance, most bureaus and offices of the Interior Department interpret the guidelines as placing the scientific and education value of cultural sites over religious and cultural values. And the common interpretation of ARPA is that it does not allow reburial of Indian remains; that as property of the United States disturbed remains must be curated and stored in qualified institutions. As a cruel joke the guidelines direct "any bureau or office of the Department charged with the care of custody of human remains [to] maintain the collection in keeping with the dignity and respect to be accorded all human remains." But the human remains of what other ethnic group in this country are shown the same treatment?

Passed in 1978, the American Indian Religious Freedom Act (AIRFA) would seem to compel a different result. AIRFA expressly protects and preserves American Indians' right of access to sacred sites, *including burial sites*. AIRFA was enacted in recognition of the lack of "clear, comprehensive and consistent Federal policy" premised on a variety of federal laws and the "inflexible enforcement" of that policy resulting in the abridgment of Indian religious freedom. From the foregoing discussion it is plain to see how the spectrum of federal archeological and cultural resource laws have frustrated Indian religious beliefs and attitudes concerning the burial sites of their ancestors. Yet to date no changes have been made in these laws to reflect AIRFA's articulation of the scope of Indian religious rights under the First Amendment to the United States Constitution.

In sum, contemporary federal law and policy concerning Indian gravesites and skeletal remains is little more than a throwback to the ethnocentric laws and policies of the late 19th and early 20th century. And as long as Indian burial sites, and the human remains and grave "goods" found therein, are considered to be the property of the United States and treated as other "relics" or "objects of antiquity," Indian beliefs and attitudes will be largely ignored and frustrated.

Defining The Nature Of Indian Rights To And Control Of Indian Burials

Few people, other than some physical anthropologists and archaeologists (though by no means a clear majority of their profession), would dispute the notion that Indians and tribes have a profoundly superior moral claim to the Indian remains and grave goods, based on traditional religious and cultural beliefs and values. Deeply ingrained religious attitudes toward the dead are found in all cultures worldwide; Native Americans are no exception. Certainly there will be and are exceptions, but in the main most contemporary tribal groups have strong objections to the federal government's treatment of their ancestors' remains. Many traditional Indian people believe that the continuing desecration threatens the spiritual balance and harmony of the entire world, not just one tribal community. And many personally feel the spiritual disquiet of their ancestors, whose bodies are stored in plastic bags and airtight boxes in the Smithsonian Institution and other private and public institutions.

Indeed, one would think that on the strength of the moral claim alone Indians would be able to secure the return of their ancestors' bones. And in fact there is legislation pending in the United States Senate which, despite its shortcomings, would begin the systematic process of identifying nationwide the location and tribal affiliation of Indian remains and sacred artifacts and their eventual return to tribes for appropriate disposition. NARF believes the proposed law — known as the Native American Cultural Preservation Act (S. 187) — is inadequate because it fails to recognize paramount tribal rights to these materials and thus perpetuates the myth of federal ownership, and because it does not set maximum time limits within which remains and sacred artifacts stolen from graves must be returned to the appropriate tribe.

Ours is a nation of laws, which laws sometimes have very little real connection to morality or justice. Accordingly, tribal advocates feel compelled to construct a legal theory of Indian ownership superior to that of the United States. Without question a legal claim to ownership will have to be

established if tribes are forced into court to secure the return of their ancestors' bones.

The question of what legal rights tribes and individual Indians have to the ownership and control of Indian burials on federal lands has not been directly addressed by courts. Absent a clear articulation, one must analogize to decisions rendered in similar areas of the law. Below is a cursory examination of these decisions.

The Common Law Analogy

American property law generally vests ownership of objects embedded in the earth in the landowner, under the common law maxim: "Cujus est solum, ejus est usque ad coelum et ad inferos," or "to whomsoever the soil belongs, he owns also the sky and to the depths." This maxim seemingly vests title to Indian burials in the landowner, whether private or government.

Different, special common law rules apply to gravesites, however. Because no one "owns" or holds a property interest in a dead body — "title" to a deceased human being — the common law doctrine of abandonment does not normally apply to burial grounds. When its identity as a burial ground is lost, an obligation continues not to desecrate the graves or dishonor the dead. And descendants are invested with a legal right to prevent and protect a burial site from desecration. Wrongful exhumation is considered an actionable wrong and reburial, if not done in a decent and dignified manner, renders one liable to tort for damages sustained.

A decision consistent with these common law principles was reached in the context of Indian burials on private lands, in a 1986 case from the Louisiana Court of Appeals. In *Charrier v. Bell*, or the "Tunica Treasure" case, the court confirmed a superior right in the Tunica Biloxi Tribe of Louisiana, represented by the Native American Rights Fund, to skeletal remains and associated grave artifacts removed from private property. Between 1968 and 1971, Leonard Charrier, a former prison guard and self-proclaimed "amateur archaeologist," discovered and systematically removed the materials from approximately 150 burial sites at Trudeau Plantation. Charrier alleged to have the permission of the property owner, in reality only the property manager, to excavate the sites and remove the materials. In 1974 Charrier sued the nonresident owners of Trudeau Plantation to quiet title to the materials after unsuccessfully attempting to sell the collection to the Peabody Museum at Harvard University. The Tunica-Biloxi Tribe of Louisiana intervened in the litigation in 1981, after obtaining federal recognition.

The district court, after a trial on the merits, held that the Tribe is the lawful owner of the remains and artifacts. The Court of Appeals affirmed the district court decision, ruling in effect that the common law doctrine of abandonment did not apply to burial materials:

The intent in interring objects with the deceased is that they will remain there perpetually, and not that they are available for someone to recover and possess as owner.

However, the fact that the descendants of fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the bodies of the deceased, does not result in a conclusion that the goods were abandoned. While the relinquishment of immediate possession may have been proved, an objective viewing of the relinquishment does not result in a finding of abandonment. Objects may be buried with a decedent for any number of reasons. The relinquishment of possession normally serves some spiritual, moral, or religious purpose of the descendant/owner, but is not intended as a means of relinquishing ownership to a stranger. Plaintiff's argument carried to its logical conclusion would render a grave subject to despoliation either immediately after internment or definitely after removal of the descendants of the deceased from the neighborhood of the cemetery.

In reaching the decision, the court reasoned that at least some members of the current day Tunica-Biloxi Tribe are descendant from the Indians buried at Trudeau Plantation, and thus have standing to assert legal claim to the materials.

The important, but unanalyzed, aspect of this case concerns the superiority of the tribal interest. Fee patent title to Trudeau Plantation was first acquired by grant from the British Crown in 1768, and subsequently conveyed over the years to a number of successive private owners. For the Tunica-Biloxi Tribe in 1987 to still hold a superior interest in the materials, their descendants must have retained — and never abandoned or relinquished — rights to the graves at the time of British occupation and exercise of sovereignty over the area through the 1763 Treaty of Paris. In effect, the British Crown could convey no greater title to a private owner by grant than that which it had. For the Tunicas to have a surviving interest that interest must have existed prior to and at the time of grant in 1768. Whether a different result would be reached if burial materials are

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considered personalty is an open, unresolved matter in the law. And whether the *Charrier* decision can successfully be applied to defeat the United States' claim to ownership of Indian burial site materials is unknown at this point in time.

Lessons From The United States' Extinguishment of Aboriginal Indian Title

In the famous 1823 Supreme Court decision in *Johnson v. M'Intosh*, the Court held that upon "discovery" the European sovereigns held "ultimate dominion" in land "subject only to the Indian right of occupancy," also called "aboriginal Indian title." Tribes held aboriginal title to lands inhabited since time immemorial. Once the United States was organized and the Constitution adopted, tribal rights to Indian lands became the exclusive province of federal law. This "use and occupancy" right can only be terminated or conveyed by or with the consent of the United States. Until diminished by legitimate congressional act, the Indians' right of occupancy is "as sacred as the fee simple of the whites"; and "as sacred and as securely safeguarded as is fee simple absolute title."

While there were other purposes the overriding goal of the United States during treaty making was to obtain Indian lands to foster westward expansion. In exchange for the extinguishment of aboriginal Indian title the United States promised to tribes the exclusive, recognized title to their reservation lands, exclusive use and occupation of those lands, and other rights (e.g. off-reservation rights to hunt and fish) which varied from treaty to treaty, tribe to tribe. After the treaty era ended in 1871 the same federal objectives were achieved by way of legislative agreements and executive orders, either expressly or impliedly ratified by Congress. In this way tribes ceded literally tens of millions of acres of aboriginal territory — and the right of use and occupancy — to the United States.

Did Indian tribes, by way of treaties, agreements and executive orders, cede and relinquish their rights, however, defined, to Indian burials and artifacts to the United States? Did tribes have either the authority or the legal ability to convey to the United States rights to burial sites or collections of remains in burial pits or mounds? The *Charrier* decision makes it clear that a tribe has standing to protect the gravesites of ancestral members from desecration, and to demand and secure the return of remains improvidently removed from burials. *Charrier* and the common law discussed above do not provide complete, satisfactory answers to these questions.

Canons of construction unique to the interpretation of Indian treaties provide helpful insight. These

canons require a construction of treaties so as to resolve ambiguities in favor of Indian tribes, and an interpretation of treaties as the Indians would have understood them. And treaties have been interpreted as a grant of rights *from* Indian tribes to the United States; *not* as a grant *to* tribes. Rights not expressly granted are reserved.

In the context of Indian burial sites and grave materials, then, it is hard to conceive of tribes ceding any rights to the United States. In the hour of his death in 1871, Tu-eka-kas, the father of Chief Joseph of the Nez Percés, reminded his son never to sell the bones of his father. Chief Joseph describes the death.

My father sent for me. I saw he was dying. I took his hand in mine. He said: "My son, my body is returning to my mother earth, and my spirit is going very soon to see the Great Spirit Chief. When I am gone, think of your country. You are the chief of these people. They look to you to guide them. Always remember that your father never sold his country. You must stop your ears whenever you are asked to sign a treaty selling your home. A few years more, and white men will be all around you. They have their eyes on this land. My son, never forget my dying words. This country holds your father's body. Never sell the bones of your father and your mothers." I pressed my father's hand and told him I would protect his grave with my life. My father smiled and passed away to the spirit-land.

I buried him in that beautiful valley of winding waters. I love that land more than all the rest of the world. A man who would not love his father's grave is worse than a wild animal.

The author is unaware of any discussion of the extinguishment and relinquishment of property rights in burial sites to the United States in treaty negotiations; the matter was simply not discussed. In contrast to the 1985 Supreme Court decision in *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, silence in the treaties or other agreements as to Indian burial rights is not, and should not be, viewed as inconsistent with the purposes for the cession. Then again it is doubtful that Indians in the 19th Century were aware of the avarice the archaeological community would soon engender for Indian burial remains.

The same questions as above can be raised in the context of the Indian Claims Commission proceedings. Established in 1946, the ICC was given jurisdiction to hear five major categories of claims by tribes, bands, or other identifiable groups of American Indians against the United States. Con-

cerning Indian treaties, agreements and executive orders the Commission had authority to hear:

claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, ... or claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant.

Again, the ICC proceedings contain no evidence of extinguishment of or compensation for the extinguishment of rights to Indian burial sites. And the proceedings shed no light on the issue of the authority of tribes to extinguish such rights.

Arguably, the United States took ceded Indian land subject to an implied or constructive trust to treat Indian burials in accordance with traditional notions of respect and decency. A constructive trust is an equitable, remedial device imposed by courts to prevent fraud, mistake, unjust enrichment; or some other form of unconscionable conduct. Indian people would characterize the federal government's expropriation of their ancestors' bodies for the sake of science as a mistake, an unconscionable mistake.

Conclusion

This article briefly traces the history of federal Indian burial policy. Contemporary federal policy in this area has shown remarkably little change from the ethnocentric, genocidal policies of the federal government of a century ago; remarkable when juxtaposed with the evolution of the broader federal Indian policy of self-government and self-determination. It is time for a change in federal policy concerning the treatment of Indian burial sites and cultural resources; AIRFA compels a change in federal law and policy. Tribes and spiritual leaders are demanding the return of their dead ancestors' remains. Indian bones must be removed from the basements, storerooms and display cases of federal museums and other public institutions and returned to tribes.

Postscript: We are beginning to see some changes in federal policy reflective of Indian concerns. The Eastern and Southern Regional Offices of the U.S. Forest Service, for instance, have developed a draft policy on the "Treatment of Human Remains" which contrary to Interior Department policy expressly includes provisions for reburial and presumes that reburial will take place. The policy, however, still precedes from the assumption that the U.S. "owns" Indian burials and allows for scientific analysis where appropriate — a decision to be made by the agency, not the affected tribe or tribes.

And in the April 1987 edition of the *Smithsonian* magazine Secretary of the Smithsonian Institution Robert McC. Adams' comment letter wrote that "we have an obligation to return the Indian skeletal remains in our collections to tribal descendants." One should be careful not to read too much into the Secretary's promises, however. Adams extends the obligation only to instances where descendants are *actually* known; the Institution has not agreed to return remains in instances where appropriate tribal affiliation can be established. The *Charrier* decision sends a clear, contrary message to the Smithsonian.

(Article written by Steve Moore, NARF staff attorney and director of the Indian Law Support Center.)



Western History Collections, University of Oklahoma Library

Case Updates

Texas Tribes' Restoration Bill Passes House

The Alabama-Coushatta Tribe and Ysleta del Sur Pueblo Restoration Act, passed the House of Representatives on April 21, 1987. Senate action on the bill is expected late this summer. NARF represents the two Tribes.

Request to Accept Retrocession Filed

On March 26, 1987, NARF asked the Assistant Secretary of Interior to reconsider and reverse its decision rejecting Nevada's offer of the retrocession of civil and criminal jurisdiction over Ely Colony. Ely Colony is located in the east central part of Nevada and is comprised of approximately 200 Shoshone-Paiute tribal members. In August 1986, the Department of Interior declined to accept retrocession based primarily on the federal government's concerns about increased costs to the government.

Federal Court Remands Action Challenging Department of Interior's Decision Extending Oil and Gas Leases

On November 13, 1986, in *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, the federal district court of Oklahoma remanded a challenged Department of Interior's decision back to the Secretary of Interior to determine whether the Secretary properly performed his duties and whether the oil and gas leases in question negated the Tribes' right to consent. In 1981, the Bureau of Indian Affairs approved the extension of certain oil and gas leases located on trust land without tribal consent. Following the exhaustion of administrative appeals, the Cheyenne-Arapaho Tribes in 1984 filed this action requesting the court to declare that the oil and gas leases between the Tribes and an oil company automatically expired in 1981.

The Tribes raise two major issues in this case. First, was tribal consent required prior to extending the leases, and second, did the Secretary of Interior fail to perform his trust duty in extending the leases by his failing to investigate the current market value of the leases. NARF represents the Tribes.

Court Dismisses South Dakota Forced Fee Patent Cases

The Court of Appeals for the Eighth Circuit affirmed the dismissal of fourteen South Dakota cases, consolidated on appeal, which claimed the United States illegally issued fee patents to Indian allottees under the "forced fee patent" policy of the early 1900's. In the early 1900's, commissions established by the Secretary of Interior issued fee patents to Indian allottees they found competent under the Burke Act without their application or consent. As part of the policy, the competency commissions investigated only allottees of one half or more Indian blood. Under this policy, allottees of less than one-half Indian blood were presumed competent and received fee patents without investigation.

The Indian claimants are all descendants of Sioux Indians who were issued land allotments and then received fee simple patents without application under the blood quantum policy. All the allottees later transferred or lost title to their property through sale or foreclosure. The cases are 2415 claims which seek return of land and trespass damages. The lower district courts dismissed their cases based on sovereign immunity, statute of limitation, and the Secretary acted within his authority in issuing forced fee patents.

On appeal, the Eighth Circuit held that a six-year statute of limitations governing suits against the United States had run and barred the law suit. The court determined that the cause of action accrued in 1948 when the statute of limitation was enacted. In reaching its decision the court found that the United States was an indispensable party to the action. Therefore, the case could not proceed without the United States. NARF handles the case of *Potter v. South Dakota* and also did the briefing on behalf of the individuals who were represented by private counsel. A motion for reconsideration has been filed by NARF in the Eighth Circuit.

Eighth Circuit Denies Rehearing In Lakebed Case

On November 8, 1986, the Eighth Circuit refused to reconsider its prior decision which held the State of South Dakota rather than the Yankton Sioux Tribe owns the bed of Lake Andes located within the boundaries of the Yankton Sioux Tribe's Reservation. NARF has filed a petition of certiorari (review) to the U.S. Supreme Court.

Consent Decree Entered In Prisoners' Rights Action

An Idaho state court approved a consent decree entered into by Indian inmates and the State of Idaho correctional institution. The Indian plaintiffs had brought suit claiming the correctional institution was violating their freedom of religion under the First and Fourteenth Amendments to the Constitution.

In the decree the correctional institution agreed to: 1) permit a medicine man or spiritual leader to advise Indian inmates and perform other religious functions; 2) educate prison staff about the religious practices of American Indians; 3) permit outside input on the sincerity of a person's religious belief if in question; 4) allow inmates to maintain a sweat lodge, supply necessary firewood, and allow weekly access to a sweat lodge; 5) allow inmates the use of a medicine pipe; 6) permit the wearing of traditional hairstyles, headbands, medicine bags, and tobacco pouches. NARF assisted Idaho Legal Services in *Brown v. Arvae*.

Federal Court Quiets Title To Two Lots In Shoshone-Bannock Tribes' Land Action

The United States government brought suit to quiet title to twelve lots in Pocatello, Idaho. The Shoshone-Bannock Tribe intervened into the suit and filed a separate complaint against the twelve landowners. On November 4, 1986, the district court of Idaho held that two defendants held title to their lots under a 1965 patent issued to them by the government. The complaint was dismissed against these two defendants, but the case will continue against the remaining defendants. NARF represents the Shoshone-Bannock Tribes.

Interior Grants Federal Recognition to Gayhead Wampanoag Tribe

In April, the Bureau of Indian Affairs approved the Gayhead Wampanoag Tribe's petition for federal recognition. The recent decision reverses the BIA's preliminary adverse finding that the tribe did not have a contemporary Indian community, and there was not a continuity of leadership. NARF represents the Tribe.

NARF Resources & 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, 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-copy 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).

Bibliography on Indian Economic Development

Designed to provide aid for 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: \$30.00). (NILL No. 005166)

Indian Claims Commission Decisions

This 43-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available, with an update through volume 43 in progress. The index contains subject, tribal, and docket number listings. (43 volumes. Price: \$820). (Index price: \$25.00). (Available from the Indian Law Support Center).

Prices Subject to Change

NARF Resources & Publications

continued...

Indian Rights Manual

(Available from the Indian Law Support Center)

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 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, the 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 Laws Manual. (\$30.00) Price for manual and update (\$45.00)

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).

Prices Subject to Change

Films and Reports

"Indian Rights, Indian Law." This is a film documentary, produced by the Ford Foundation, focusing on NARF, its staff, and certain NARF casework. The hour-long film is rented from: Karol Media, 22 Riverview Drive, Wayne, NJ 07470 (201-628-9111).

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.

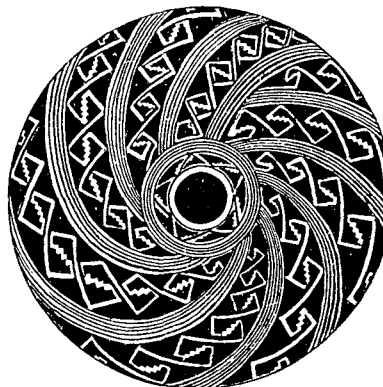
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MAIN OFFICE: Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302 (303-447-8760).

D.C. Office: Native American Rights Fund, 1712 N. Street, N.W., Washington, D.C. 20036 (202-785-4166).

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



American Indians, Time, and the Law Native Societies in a Modern Constitutional Democracy by Charles F. Wilkinson

"Lucid, well-organized, and ably written, this is an original and significant contribution to an understanding of Indian affairs. It is must reading for anyone interested in that field."

— Alvin M. Josephy, Jr., author of numerous books on Native Americans and the American West, and a member of NARF's National Support Committee

American Indians, Time, and the Law, provides a contemporary analysis of the Supreme Court's rulings in Indian law during the last quarter century. The book is dedicated to the Native American Rights Fund and is written by Charles F. Wilkinson, former NARF staff attorney and currently professor of law at the University of Oregon.

In his book, Wilkinson researches Indian law and policy through a unique historical, political, and anthropological investigation. He concludes that the Supreme Court *has* recognized Indian tribes as permanent governments and, on the whole has tended to honor the old promises made in treaties with Indian tribes. He argues that federal Indian law and policy has a tremendous bearing on the growing international movement for aboriginal rights. "For all of its flaws, the policy of the United States toward its native people is one of the most progressive of any nation....The doctrines developed here can be instructive — and in some cases can be rallying cries — elsewhere."

American Indians, Time, and the Law is published by Yale University Press. The Native American Rights Fund receives 40% of the proceeds of sales purchased directly from us. To receive this



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significant contribution to the field of Indian law, please use the order card below, enclose \$18.50 (includes postage and handling), and return in the envelope provided in this newsletter.

The American Indians, Time, and the Law has already received extraordinary praise

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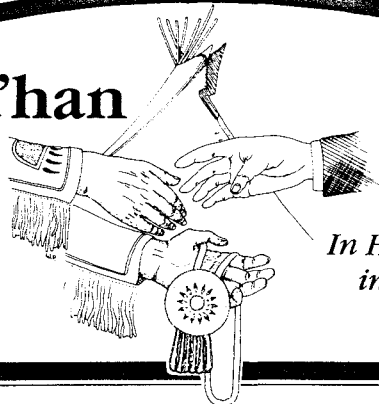
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Otu'han



*In Honor or
in Memory of
a Loved One*

...als of Lewis and Clark
...he Sioux had a custom
...the names of friends
...wished to honor. This
...ed to as Otu'han (o-tu-
...a word literally trans-
...away." Items of value
...quilts and household
...red over a long period
...ven away during pow-
...erations in honor of
...aries, marriages, birth-
...special occasions. The
...customary in memory
...The custom of giving
...nory of someone is still
...among Indian people

...of Otu'han the **Native
Rights Fund** has received
...om friends and sup-
...port of:

...by Paul H. Andriance
...rg by Erin Butler Araki
...ki by Gary Archambault
...Chris by Dennis Armos
...ce by William &

...Dorothy Baken
...by Robert Blinn
...A Marlene Bluestein &

...s by Elinor Briefs
...an by Carolyn Chrisman
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...Charles R. Colmant
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...by Edith Ruth Davis
...inger by Kay Dellinger
...by Harvey A. Dennenberg
...by Lucille A. Echohawk
...by Gordon Elrick
...by Joan Higgins
...Shana Holland
...W. Ickles by

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Iring (Wally) Woliver by Sylvia and
Gene Ohrenstein
Daughter "Suki" Ohrenstein by Sylvia and
Gene Ohrenstein
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Eleanor B. and Charles M. Gahm by
Florence Wall
Norman Penty by Nanlouise Wolfe
Louis G. Zirkle by Merle W. Zirkle

NARF has also received numerous
gifts in honor of individuals on special
occasions, but because of the increas-
ing number we are unable to list them.
Thank you for being a part of our
efforts to help America's Indians

The Native American Rights Fund
extends its sympathy to the fam-
ily and friends of Robert Leland.
Mr. Leland, who was a donor to
NARF, died October 24, 1986.
Among other interests, the re-
cent Robert Leland was person-
ally involved in activities on
behalf of the Pyramid Lake
Paiute Tribe of Nevada, for
whom NARF has provided con-
siderable counsel.

Corporate Ta

Corporate takeovers, divestitures
and other major financial changes im-
pact more than just the company's
shareholders, employees, customers
and competitors. They also affect or-
ganizations like NARF. Specifically,
changes in the corporate world mean
changes in corporate philanthropy

For instance, NARF had been a long-
time recipient of corporate support
from Gulf Oil Company. When Chevron
USA, Inc. took over the corporation
several years ago, we lost our contacts
and an annual source of support.

Chevron USA Contributes To NARF

We are pleased to announce that the
Native American Rights Fund has just
received a first-time grant in the
amount of \$1,500 from Chevron USA,
Inc. The grant is to help us with a com-
puter equipment purchase for our
National Indian Law Library. With a
tremendously increased demand for
our library resources since the early
1980's, Chevron's support will help us
to be much more efficient and thereby
better able to keep up with the thou-
sands of requests for our help. Thank
you to Chevron USA, Inc. for their vote
of confidence in our effort to help
Native Americans

ARCO Experiencing Hard Times

The takeover of Gulf Oil Company
by Chevron is not the only instance
in which we have been affected by
changes in the corporate climate. Our
support from the Atlantic Richfield
Corporation (ARCO) — a long-time and
well-known contributor to Indian is-
sues — has decreased substantially
the last two years. The reduction is
due in large part to tremendous de-
clines in oil industry profits. Hopefully
ARCO's financial situation will im-
prove in the future so that we can
possibly anticipate renewed and in-
creased support from the company

keovers and NARF

AT&T Resumes Support

Storage Technology Corporation's financial situation has precluded our receiving support from that financially shaken institution, as has been the case with Frontier Airlines. The divestiture of AT&T eliminated support from them for several years, but, as we reported in our last *NARF Legal Review* (Winter, 1987), the newly formed AT&T Foundation recently granted \$5,000 toward our Library project. The Rocky Mountain regional offices for the Company promoted the grant request to the national foundation.

CBS Changes Threaten A Partnership

It is still unclear how the recent shake-up of management at CBS will affect its corporate philanthropy policy. That corporate foundation has been one of NARF's most substantial corporate contributors in the last several years. NARF would like to acknowledge and extend a very sincere thank you to immediate past president of the CBS Foundation, Jack Kiermaier. Mr. Kiermaier was an ally to groups like NARF and his departure from CBS leaves a tremendous gap, not only at that institution but to charities like NARF, as well as the broader philanthropic arena. We would like to extend our best wishes to him in his new capacity as president to the Foreign Policy Association (New York City).

IBM Contributes Nationally And Locally

International Business Machines (IBM) has been a contributor to NARF for years. Among the nonprofit sector nationwide, IBM is widely recognized as one of, if not *the* largest corporate contributor to public charities. Many of its contributions are in-kind, specifically in the area of loaned executives. NARF applies for and receives annual support from IBM at national headquarters in Armonk, New York, as well as from the Boulder plant facility. Regrettably, IBM's current financial situation precludes our pursuing a loaned executive with that company at this time.

Fortunately, we just received a \$750 grant from IBM's facility in Boulder, CO, to purchase computer equipment, again for our National Indian Law Library. A very special thank you to IBM, both locally and nationally, for its continued participation with us over the years. Our gratitude is also extended to one of IBM's communications executives, Bill Prater, (Boulder, CO) for his volunteer time in 1986 to help improve our public information efforts. A great many of Mr. Prater's suggestions have been incorporated into the *NARF Legal Review*.

People like Bill Prater and companies like IBM make all the difference to us. Thank you.

Local Giving Is Up

On a more local level, US West (Denver) recently renewed its grant support to NARF, this time increasing its contribution from \$5,000 to \$7,500. The donation is for general support purposes. US West is the regional holding company for several telephone companies; its local corporate philanthropy department is headed by Jane

(continued on back panel)

In Memoriam

NARF was saddened to learn of the recent death of Mardee McKinlay Birchfield. Ms. Birchfield was vice president of community affairs for KUSA (Channel 9), Denver, which is operated by the Gannett Company. As such, she was largely responsible for granting us the funding from Gannett for our special 15th anniversary edition of the *NARF Legal Review*.

We will miss Mardee McKinlay Birchfield tremendously. She was a true advocate for the needs of literally thousands of the underserved and underrepresented. Our deepest sympathy to her family, friends and fellow staff members for her untimely and premature death.

NARF

Native American Rights Fund

Dollars & Sense

A Publication Especially Prepared For NARF Donors/Spring 1987

NARF's 1987 Telemarketing Campaign Links Alaska to the Southwest

In late June, the needs of our brothers and sisters in Alaska will be linked to America's Southwest. Because of a very generous offer by NARF's National Support Committee member, Amado Peña, donors who contribute \$1,000 or more in response to our special telephone campaign to raise money for our Alaska efforts will receive a Peña art piece valued in excess of \$400. Peña, who is Yaqui and Chicano, is internationally known for his work depicting the Southwest. The gift to our donors is possible because of Peña's generosity and enthusiasm in supporting NARF's efforts; he's providing the artwork from his private collection at no cost to NARF.

At this writing, one of NARF's Alaska attorneys, Robert Anderson, has just completed yet another week in our nation's capital to forge together amendments to the 1971 Alaska Native Claims Settlement Act (ANCSA) that will meet the needs of Alaska Natives in 1991. In that year, protective language in ANCSA will expire, resulting in potentially genocidal results unless we can pass amendments now to protect the land base and uphold tribal sovereignty.

We believe NARF's efforts in Alaska are making all the difference in the Alaska Native communities' ability to determine their own future. However, the work in our 49th state is horrendously costly. Competing with the Alaska Natives are state and private constituencies who can launch massive and expensive campaigns to promote their own special interests.

We will be mailing you further information about the issues in Alaska, explaining why we need your support and how your money will be used

Please consider a gift or pledge in as generous an amount as possible.

Together — with the talent, expertise and commitment of the Native American Rights Fund attorney staff, with you — the thousands of donors who care and support us so generously — and with people like Amado Peña, who are willing to publicly commit so as to make our efforts that much more

successful, we are confident and excited about the successes we can bring about in Alaska.

NARF Dollars & Sense is published by the Native American Rights Fund, 1506 Broadway, Boulder, CO 80302 Marilyn E. Pourier, Editor

About Amado . . .

Amado Peña has been a member of NARF's National Support Committee since January of 1986. For years he has contributed various art pieces for NARF art shows. The Peña image 'El Nacimiento' was the cover of NARF's 1985 annual report and drew nationwide praise. In 1986 his work 'La Elegante' was used for a special NARF certificate of appreciation for major donors.

Peña's work has been the subject of well over 100 one-man exhibits across the country, as well as several one-man retrospective shows. Among the major public collections including work by Peña are: The White House, the Smithsonian Institute, California State University at Long Beach, The El Paso Museum of Art, The University of Texas Huntington Art Gallery, Nuevo Santander Museum, the Whitney Museum, and Tracor Corporation. The complex nature of the art and its appeal may be best summarized by a quote from *Southwest Art Magazine*: "His unique style and symbolism are a synthesis of the anthropomorphism of Pre-Columbian art, the stylization of nature in American Indian art, the native expressionism of Mexican folk art, and the sophistication of contemporary American art."

On behalf of all of us at the Native American Rights Fund, a special note of thanks to a unique individual — Amado Peña — who helps the lives of others through his talent, time and generosity.



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 the 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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