



Legal Review

NATIVE AMERICAN RIGHTS FUND

NAGPRA, CARLISLE, AND INDIGENOUS ACTIVISM

In 1990, the U.S. Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). The law was created to facilitate the return of Native American human remains and cultural items held by federal agencies and federally funded museums. NAGPRA also represented a shift “in basic social attitudes towards Native peoples” as, for too long, laws had protected non-Native cemeteries and graves from vandalism and desecration but had failed to protect those of Native people.¹ The need for NAGPRA’s passage came from historical disrespect for Native American human remains and cultural items “in the name of profit, entertainment, science, or development.”² At the time NAGPRA was passed, the federal government estimated that the transfer of Native American human remains would take about ten years to complete. Thirty-four years later, federal agencies and museums still hold more than 100,000 human remains, and Tribal Nations continue to actively pursue the return of their relatives and the cultural items that belong to them.

Tribal efforts to bring home ancestors have occurred for decades. Well before NAGPRA was enacted, Tribal Nations worked to repatriate the cultural items that once belonged to them and the Native American human remains of their ancestors. Tribal Nations across the United States advocated for decades to get NAGPRA passed and since its passage NAGPRA has long been viewed as human rights legislation.

Today, Tribal Nations enforce their NAGPRA rights in a variety of ways and repatriation continues to be an important exercise of Tribal sovereignty. Under NAGPRA, repatriation must occur in the manner that the Tribe identifies, including with the use of specific ceremonies and culturally significant practices. This long-overdue respect for Tribal sovereignty, cultures, and wishes is an essential part of the healing process. Unfortunately, NAGPRA’s legal and moral requirements continue to be ignored or actively denied. One of the most heartbreaking examples of this negligence can be found in the painful process of trying to bring home the remains of children that were taken from their families by the U.S. government during the federal Indian boarding school era and never returned.

Repatriating Children that Never Came Home

Each Tribal Nation must determine what actions they need to heal from the impact of the federal Indian boarding school system. For many, healing involves locating and repatriating the remains of their children who never returned home from federal Indian boarding schools. Each Native community has unique history and traditions, and each must take its own road to recovery. Understandably, for communities who had children taken from them during the federal Indian boarding school era, those remains can be particularly meaningful and painful to mourn and bring home. In recent years, NARF has worked with several Tribal Nations seeking the return of their children’s remains from the Carlisle Indian Industrial School. These repatriation efforts can be especially traumatic and challenging given the context of the federal Indian boarding schools and the cultural genocide that those schools embodied.

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A group of students learning English at Carlisle Boarding School.

Federal Indian boarding schools, some of which operated as recently as 1969, were aggressive in their mission to sever familial, cultural, and traditional ties between Native youth and their Tribal communities. This cultural genocide has inflicted incalculable intergenerational trauma on Native American people. It continues to pose immense challenges to the welfare of Tribal Nations' communities, cultures, governments, and economies.

Carlisle Indian Industrial School, in Pennsylvania, is one of the most infamous schools. It is known as the school that spurred the establishment of the federal Indian boarding school system. Founded by United States Army General Richard Henry Pratt in 1879, Carlisle sought to “kill the Indian and save the man” by forcibly assimilating Native American children into non-Native culture through coercion, force, and abuse. During this time, Tribal Nations often had little to no legal recourse to prevent the U.S. government from taking their children. More than 100 years later, NAGPRA offers an opportunity to bring some of those children home.

Samuel and Edward

Currently, NARF represents the Winnebago Tribe of Nebraska in their efforts to bring home the remains of two of their children: Samuel Gilbert and Edward Hensley. In September 1895, Capt. Beck, the United States Army's Indian Agent of the Omaha and Winnebago Indian Agency, sent young

Tribal members Samuel Gilbert and Edward Hensley from their homes in Winnebago, Nebraska, to the Carlisle Indian Industrial School in Pennsylvania. Samuel and Edward would never return to Winnebago. Both boys would die because of their time at the school. Instead of returning the boys to their homes for proper burials pursuant to Winnebago customs and traditions, school officials buried the boys. They did so, without notice to the Winnebago Tribe or the boys' families, at the Carlisle Indian burial ground—a burial ground

that already held the remains of many other Carlisle Indian students.

Years later, soon after Carlisle closed, the Army expanded the abandoned Carlisle site into an army post. During that transition, in 1927, the Army dug up the remains of nearly 180 Indian students, including Samuel and Edward, and buried them in a new location. Once again, this was done without notice to the Indian students' families or Tribes. The Army showed such disregard for the Indian remains that today some of the Indian students are missing and some have been so disturbed and mishandled that sets of remains can only be identified as “unknown.”

Nearly 100 years later, the Winnebago Tribe of Nebraska seeks to bring the boys' remains home pursuant to NAGPRA, which Congress designed specifically to allow Tribes to pursue and control the repatriation of their ancestors' remains. By bringing its boys home pursuant to NAGPRA, Winnebago seeks to honor its community's needs, correct historical injustices, and hold accountable those responsible for these wrongs. The Army, however, wants the Tribe to follow an army process for returning remains—a process that provides no rights to the Tribe. Throughout the boarding school era and its aftermath, the Army has prioritized its ease and bureaucratic processes over the needs of the families and Tribal Nations that it has harmed.

Winnebago has filed suit in the U.S. District Court for the Eastern District of Virginia (case 1:24-cv-00078). Winnebago is represented by its general counsel at Big Fire Law & Policy Group LLP and by legal counsel at the Native American Rights Fund and Cultural Heritage Partners, PLLC.

The loss of Tribal children still reverberates in the Winnebago community. To this day, Tribal elders instruct youth with guidance from the boarding school era. Issac Smith, a Winnebago Tribal Council member, describes how Winnebago elders instruct Tribal youth to never whistle at night. According to Winnebago history, these instructions helped ensure that U.S. Army soldiers would not hear Winnebago children’s whistles, find them, and take them from the Tribe. This cautionary advice, like the painful impact of federal Indian boarding schools, is still part of the Winnebago cultural fabric.

The Reason for NAGPRA

The sanctity of the dead and the right of families and communities to bury their dead is universal. Unfortunately, for Native Americans, those rights often have been ignored. Carlisle officials and the United States Army continue to deprive the Winnebago Tribe of that right.

It was exactly this disregard for Native American rights that inspired NAGPRA’s passage. Today, federal agencies and museums that continue to hold Native American human remains must reckon with their role in the misappropriation of those remains. Through NAGPRA, the federal law that the Army seeks to circumvent in Winnebago’s case, institutions must account for improperly held and acquired Native American remains.

Tragically, Tribal Nations will continue to have to address the death of Indian children at federal Indian boarding schools, as the Department of Interior identified at least 53 additional burial sites associated



Winnebago leadership and legal counsel, along with representatives of United South and Eastern Tribes and Catawba Nation, at the U.S. District Court of Virginia on July 12, 2024.

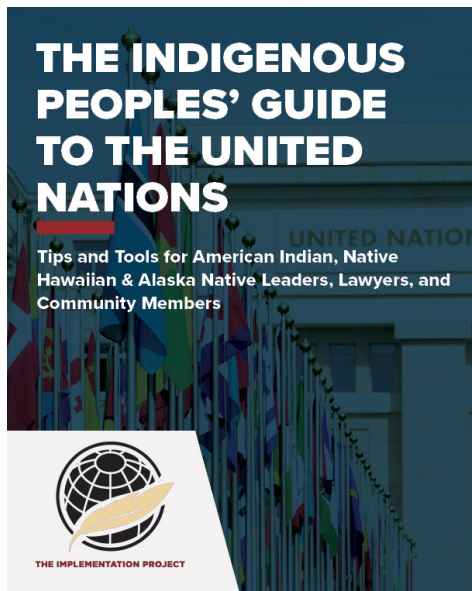
with federal Indian boarding schools in the *Federal Indian Boarding School Initiative Investigative Report*.³ It is essential that NAGPRA is rightfully applied for these repatriation efforts. The federal government cannot continue to ignore the rights of Tribal Nations and Native American families.

Victoria Kitcheyan, Chairwoman of Winnebago, explained that the Winnebago Tribe’s efforts to enforce its NAGPRA rights is rooted in Tribal history and activism. Winnebago Tribal council member, Louis LaRose was a longtime NAGPRA champion who passed away in November 2023. The lawsuit, the Tribe maintains, is a continuation of LaRose’s legacy. Chairwoman Kitcheyan voiced the Tribal Nation’s commitment, “The traditional name for the Winnebago people is Ho-Chunk, which translates to ‘the big voice.’ As we have always done, we will use our voice to hold our federal partners accountable for undermining NAGPRA and diluting the protections it guarantees to all Tribal Nations. Many leaders before us fought for that law and we will carry the battle forward.” 🗳️

Endnotes

- 1 Jack R. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35 (1992).
- 2 Id.
- 3 https://www.bia.gov/sites/default/files/dup/inline-files/bis_investigative_report_may_2022_508.pdf

CASE UPDATES



NOW AVAILABLE: *THE INDIGENOUS PEOPLES' GUIDE TO THE UNITED NATIONS*

As issues like climate change, repatriation, traditional knowledge protection, and cross-border access impact Indigenous communities across borders, Native Americans increasingly face rights violations that cannot be fully addressed through domestic advocacy alone. To empower Indigenous communities to engage on a global stage, The Implementation Project (a NARF and Colorado Law collaboration) released *The Indigenous Peoples' Guide to the United Nations*. The Guide demystifies the structure of the UN and highlights mechanisms, agencies, and initiatives—such as the UN Permanent Forum on Indigenous Issues, the World Intellectual Property Organization, and the UN Framework Convention on Climate Change—that are essential for advancing Indigenous rights. Read it here: bit.ly/UN-Guide 🏛️

NEW VIDEO SERIES: *SACRED PLACES AND PUBLIC HEALTH*

At a unique gathering in Albuquerque in late 2023, activists, Indigenous cultural practitioners, and public health leaders came together to explore the intersection of public health and access to sacred places for Native communities. For many Native communities, sacred places are essential to spiritual, cultural, and physical well-being. However, they are frequently inaccessible due to legal, logistical, or political barriers, leaving Indigenous people disconnected from the healing and balance these lands provide. Hosted by NARF and the Johns Hopkins Center for Indigenous Health, the event fostered a powerful dialogue on how public health initiatives can support Native practitioners in protecting sacred lands and addressing the health disparities linked to restricted access. Now, NARF has released a video series based on that gathering that explores the importance of sacred places to Native health and culture.

Viewers can learn from the experiences of those who work tirelessly at the intersection of land justice, public health, and cultural preservation. **How to watch:** visit youtube.com/NativeAmericanRightsFund. 🏛️

National Indian Law Library

BY THE NUMBERS

The National Indian Law Library (NILL) maintains a unique and valuable collection of Indian law resources and assists people with their research needs. This article looks at NILL's impressive body of work *by the numbers*.

Research: NILL assists both NARF staff and the general public with federal and Tribal Indian law research needs. In 2024, NILL's small but mighty team of three librarians **answered more than 1,020 inquiries**. Anyone with a relevant research question is invited to reach out to NILL via the Ask Us form found at narf.org/nill.

Curation: The catalog contains records for NILL's physical materials as well as articles, eBooks, and other items available online. **More than 450 items have been added** to the catalog so far in 2024, including more than 170 books and 260 articles. Law review and bar journal articles account for 57% of materials viewed and downloaded by library patrons visiting online over the past year.

Tribal Supreme Court Project

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians and NARF. The Project's goals are to promote greater coordination and improve strategies on litigation that may affect the rights of all Tribal Nations. We encourage Tribes to contact the Project, especially when considering a petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track at sct.narf.org.

October 7 was the first day of the Court's October Term 2024. As of this Update, the Court has not accepted any Indian law cases for review. Among pending petitions, the Project currently is tracking *Apache Stronghold v. United States* (24-291) (Religious Freedom).

APACHE STRONGHOLD V. UNITED STATES (24-291)

Oak Flat is a significant and unique sacred place for Western Apache people and is located on federal land within Western Apache ancestral territory and the State of Arizona. In 2015, legislation authorized the United States to transfer Oak Flat to Resolution Copper Mining, LLC. The proposed copper mine will completely and permanently destroy Oak Flat.

The nonprofit, Apache Stronghold, sued the U.S. and Resolution Copper challenging the land transfer and destruction of Oak Flat under the Religious Freedom Restoration Act of 1993, which requires strict scrutiny of government action that would substantially burden religious exercise, and the Constitution Free Exercise Clause, which requires heightened scrutiny when the government substantially burdens religious practice. The district court denied Apache Stronghold's requested preliminary injunction. In an en banc review by an 11-judge Ninth Circuit panel, Apache Stronghold's claims again were rejected, with seven opinions issued in 246 pages. After Apache Stronghold's petition for en banc review by the full Ninth Circuit was denied, Apache Stronghold filed its petition for a Writ of Certiorari. 🏛️

If you'd like to learn more or donate to the Tribal Supreme Court Project, visit: sct.narf.org.

Usage: Recent updates to NILL's checkout system has made it better able to track patron use statistics. This year, **more than 2,900 physical and online items have been checked out.**

Tribal Law: The Tribal Law Gateway provides access to Tribal codes from 273 Tribal Nations and the constitutions (or other governing documents) of 384 Tribal Nations. The Tribal Law Gateway **now hosts 41 Tribal codes in full** and has keyword searching across the collection.

News: The Indian Law Bulletins are emailed to subscribers on a weekly basis. Interested readers can sign up for the bulletin for free at narf.org/nill.

More than 8,000 subscribers receive the Indian Law Bulletin, which includes updates to Supreme Court cases; federal, state and Tribal court opinions; regulatory information; legislation updates; newly published law review and bar journal articles; and relevant news headlines.

See all of this and more at the NILL website narf.org/nill, which includes the library catalog, Tribal Law Gateway, and Indian Law Bulletins. 🏛️





CALL TO ACTION

It has been made abundantly clear that non-Indian philanthropy cannot sustain NARF's work. To provide legal advocacy in a wide variety of areas such as religious freedom, the Tribal Supreme Court Project, Tribal recognition, human rights, trust responsibility, voting rights, Tribal water rights, Indian Child Welfare Act, and Tribal sovereignty issues, NARF looks to Tribal Nations to provide the crucial funding to continue our legal advocacy on behalf of Indian Country. It is an honor to list those Tribes and Native organizations who have chosen to share their good fortunes with the Native American Rights Fund and the thousands of Indian clients we have served.

We encourage other Tribes and organizations to become contributors and partners with NARF in fighting for justice for our people and in keeping the vision of our ancestors alive. We thank the following Tribes and Native organizations for their generous support of NARF in the 2024 fiscal year (October 1, 2023 to September 30, 2024):

To join these Tribes and organizations and support the fight for Native rights and Tribal sovereignty, contact Don Ragona at ragona@narf.org

AMERIND

Chickasaw Nation
Chicken Ranch Rancheria of Me-wuk Indians
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Cowlitz Indian Tribe
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Muckleshoot Indian Tribe
Poarch Band of Creek Indians
Sac and Fox Nation of Oklahoma
San Manuel Band of Mission Indians
Santa Ynez Band of Chumash Indians
Seminole Tribe of Florida
Shakopee Mdewakanton Sioux Community
Tanana Chiefs Conference
Tulalip Tribes of Washington
United Tribes of Bristol Bay
Wilton Rancheria

The Native American Rights Fund

The Native American Rights Fund (NARF) is a Native-led, nonprofit legal organization defending and promoting the legal rights of Native American people on issues essential to our Tribal sovereignty, natural resource protections, and human rights.

Since 1970, we have provided legal advice and representation to Native American Tribal Nations, individuals, and organizations on high impact issues. Our early work was instrumental in establishing the field of Indian law. NARF—when very few would—steadfastly stood for religious freedoms and sacred places, subsistence hunting and fishing rights, as well as basic human and civil rights. We continue to take on complex, time-consuming cases that others avoid, such as government accountability, climate change, voting rights, and the education of our children. We have assisted more than 300 Tribal Nations with critical issues that go to the heart of who we are as sovereign nations.

NARF's first Board of Directors developed five priorities to guide the organization. Those priorities continue to lead NARF today:

- Preserve Tribal existence
- Protect Tribal natural resources
- Promote Native American human rights
- Hold governments accountable to Native Americans
- Develop Indian law and educate the public about Indian rights, laws, and issues

Under the priority to preserve Tribal existence, NARF constructs the foundations to empower Tribes to live according to their traditions, enforce their treaty rights, ensure their independence on reservations, and protect their sovereignty.

An adequate land base and control over natural resources are central to economic self-sufficiency and self-determination. They are vital to the very existence of Tribes. Thus, much of NARF's work aims to protect Tribal natural resources.

In order to promote human rights, NARF strives to enforce and strengthen laws that protect the rights of Native Americans to exercise their civil rights, practice their traditional religion, use their languages, and enjoy their culture.

Contained within the unique trust relationship between the United States and Tribal Nations is the inherent duty for all levels of government to recognize and responsibly enforce the laws and regulations applicable to Native people. NARF will hold governments accountable to Native Americans.

For the continued protection of Indian rights, we must develop Indian law and educate the public about Indian rights, laws, and issues. This priority includes establishing favorable court precedents, distributing information and law materials, fostering relevant legal education, and forming alliances with Indian Law practitioners and other organizations.

Requests for legal assistance should be addressed to NARF's main office at 250 Arapahoe Ave, Boulder, CO, 80302. NARF's clients are expected to pay what they can toward the costs of legal representation.

NARF Legal Review is published biannually by the Native American Rights Fund. There is no charge for subscriptions, however, contributions are appreciated.

www.narf.org

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