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# Nebraska's Landmark Repatriation Law: A Study of Cross-Cultural Conflict and Resolution

ROBERT M. PEREGOY

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## INTRODUCTION

This article explores the cross-cultural repatriation conflict between Indian tribes and the museum and archaeological communities in Nebraska during the 1980s and early 1990s. It seeks to provide an understanding of the issues (and nonissues) surrounding the enactment of the nation's first general statute requiring public museums to repatriate Indian skeletal remains and burial offerings to Indian tribes for reburial. The focus is a case study of the bitter, widely publicized dispute between the Nebraska State Historical Society and the Pawnee Tribe of Oklahoma, an indigenous Nebraska tribe. The first part of the article is an overview of the competing interests of Indian tribes and the museum and archaeological communities, as manifested in the cross-cultural conflict. The second part delineates the legal foundation of tribal repatriation efforts and Nebraska's landmark repatriation legislation. The third part presents an overview of the processes and politics that led to the enactment of the human rights law designed to resolve the cross-cultural conflict. The fourth part summarizes the provisions of the watershed legislation. The last part focuses on the implementation of the repatriation provisions of the statute

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in the context of the Pawnee Tribe of Oklahoma and the Nebraska State Historical Society.

### THE BATTLE LINES OF THE CLASSIC CROSS-CULTURAL CONFLICT

When our people die and go on to the spirit world, sacred rituals and ceremonies are performed. We believe that if the body is disturbed, the spirit becomes restless and cannot be at peace. Why do you impose your values on us when we do not impose our values on you? All we want is reburial of the remains of our ancestors and to let them finally rest in peace, and for all people in Nebraska to refrain from, forever, any excavation of any Native American graves or burial sites.<sup>1</sup>

With this simple, yet eloquent plea in March 1988, chairman Lawrence Goodfox, Jr. of the Pawnee Tribe of Oklahoma issued the first of several requests to the Nebraska State Historical Society (NSHS) for the repatriation of the remains and burial offerings of untold hundreds of deceased Pawnee individuals long held by the NSHS.<sup>2</sup> Led by executive director James Hanson, the NSHS, a powerful state agency, steadfastly refused to respond to the tribe's repeated requests to rebury deceased Pawnee ancestors and their burial offerings in accordance with tribal religious beliefs and mortuary practices. As a result, a protracted, nationally visible battle ensued between the Pawnee Tribe and the NSHS.

As succinctly captured by Chairman Goodfox in his opening plea to the NSHS, the bitter controversy amounted to a classic cross-cultural conflict. This conflict pitted the religious freedom and equal protection rights of Indian peoples against the avowed interests of racial biology in curating and studying dead Indian bodies in the name of science. It also directly implicated the interests and practices of museums and historical societies that retain and exhibit sacrosanct Native American burial offerings for public viewing.

Briefly stated, Pawnee burial ceremonies constitute religious practices that are part of both the historical and contemporary greater tribal belief system.<sup>3</sup> These time-honored beliefs hold that, if remains or burial offerings are disturbed or separated, the spirits of the deceased will wander restlessly and never be at peace. Pawnee tradition further teaches that adverse spiritual and physical consequences, even death, may be visited upon the living

relatives of the deceased or anyone involved with the disturbance of dead Pawnee bodies or associated burial offerings. Thus, notwithstanding the motive for disinterring Pawnee burials, such sacrilegious activity causes emotional distress and spiritual sickness among the living. This was precisely what happened in 1988 when the Pawnee tribal government and people first learned that the NSHS had plundered hundreds of Pawnee graves in Nebraska during the first half of this century.<sup>4</sup>

Throughout this cross-cultural conflict, the NSHS refused to recognize or honor the religious-based mortuary traditions, practices, and rights of the Pawnee people. Consistently focusing on the interests of science and history, the NSHS executive director opposed reburial on the basis of the perceived value of Pawnee remains and burial offerings to "discovering how people lived" in Nebraska's past.<sup>5</sup> Framing the issue as a "science versus religion" dispute, Hanson disparagingly equated dead Pawnee bodies with books and argued that "a bone is like a book . . . and I don't believe in burning books."<sup>6</sup> The state official further insinuated that the Pawnee people had ceased to practice their traditional mortuary ceremonies, requiring that the dead remain undisturbed in their final places of rest.<sup>7</sup> At one point, Hanson publicly challenged the Pawnee to "prove their religion is being affected by our possession of these things."<sup>8</sup> Other NSHS officials, in a futile attempt to retain certain peace medals buried with deceased Pawnee, alleged that such burial offerings "are not religious objects like crucifixes, rosaries and bibles."<sup>9</sup>

The battle lines of this classic cross-cultural conflict were thus drawn. The insensitivity of NSHS officials and the misinformation they disseminated made it clear that remedial relief would not be forthcoming until cross-cultural education and sensitization occurred. This need was particularly compelling considering that NSHS policymakers were all non-Indian and that the overwhelming majority had ignored or misrepresented the religious values and traditions of the Pawnee and other tribes throughout the controversy.

In light of the relentless resistance of the NSHS to reburial, the Pawnee Tribe realized that a satisfactory remedy at the administrative level of state government was simply not available. Accordingly, the tribe joined forces with Nebraska tribes to seek legislation that would force the recalcitrant agency to repatriate the Indian dead and their burial offerings. This coalition ultimately led to the 1989 enactment of the nation's first general repatriation statute, the Unmarked Human Burial Sites and Skeletal Remains

Protection Act, commonly known as LB 340.<sup>10</sup>

The landmark law was the first in the country to require public museums to return all tribally identifiable skeletal remains and burial offerings to Indian tribes that requested them for reburial. The Nebraska legislation has been widely recognized as a model that has led to the enactment of similar laws in Arizona, Hawaii, and other states, and to the enactment of two federal repatriation statutes,<sup>11</sup> the National Museum of the American Indian Act<sup>12</sup> and the Native American Graves Protection and Repatriation Act.<sup>13</sup>

Nebraska's law was the result of a prolonged struggle by indigenous and present-day Nebraska tribes to secure equal protection and treatment of the Indian dead. The repatriation battle between the NSHS and the Pawnee Tribe ultimately was fought in all three branches of state government as well as in the federal bureaucracy. The legislative battle and debates on LB 340 constituted, by all accounts, one of the most controversial, hard-fought, and emotional issues to come before the Nebraska legislature in years. Reburial opponents, led by the NSHS, waged a carefully orchestrated grass-roots campaign of misinformation, sensationalism, half-truths, and outright lies in an attempt to derail the historic human rights legislation. Under color and authority of state law, the NSHS raised every conceivable obstacle to prevent reburial of the Pawnee dead in accordance with tribal religious beliefs and practices. At one point, the Nebraska State Historical Society even instigated the active involvement of the United States government in an attempt to defeat the Pawnee Tribe's quest to rebury its dead ancestors.

Yet the Indian tribes and peoples prevailed. In the final analysis, the courageous vision of enlightened Nebraska lawmakers firmly committed to the principles of fairness, equality, and human dignity won the day for a traditionally oppressed minority group, many of whom could not even vote for the lawmakers who carried the banner of justice on their behalf.<sup>14</sup> The strong support for Indian tribes and peoples manifested by Nebraskans in this historic action is sound testimony to their commitment to the American system of justice.

Although the tribes prevailed at the legislative level, the bitter dispute between the NSHS and the Pawnee Tribe continued to rage throughout the implementation phase of the law. These post-LB 340 disputes resulted from the NSHS's open defiance of the mandates of the legislature and the tribe's reburial claims and rights. The disputes found their way to the state attorney general,

the state ombudsman, and the state court. The Pawnee Tribe prevailed in each instance.

### THE LEGAL FOUNDATION OF TRIBAL REPATRIATION EFFORTS AND NEBRASKA'S REBURIAL STATUTE

While the nation's legal system and social policy have largely failed to protect the sepulcher of the American Indian dead, applicable law amply supports the repatriation of dead Indian bodies and funerary objects held by institutions such as the NSHS. Indeed, the sources of law underlying the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act include the common law, precursor state statutes, constitutional law, and federal Indian law.

#### **Pre-LB 340 Nebraska Statutory Law and Common Law Rights to Rebury Pawnee Dead**

During the initial attempt to prevent the repatriation and reburial of Pawnee dead bodies,<sup>15</sup> the NSHS claimed that it legally owned or had title to all human skeletal remains in its possession.<sup>16</sup> However, under American common law, there is no property interest or ownership right to a dead body.<sup>17</sup> The remains of any race are not chattels that may be bought, sold, or traded in the marketplace. Ownership of the burial land does not affect this rule. Landowners have only technical possession of graves and simply hold them in trust for the relatives or descendants of the deceased.<sup>18</sup> Thus, because landowners cannot convey any title, the NSHS or any other institution may not own or have title to Indian remains, even if obtained with the permission of landowners.

Once duly interred, a dead body is in the custody of the law and may be removed only pursuant to proper legal authority.<sup>19</sup> The common law has a strong presumption against the removal of a dead body, even for reinterment to another place.<sup>20</sup> This presumption is logically stronger where no reinterment is contemplated, as when the NSHS removed hundreds of dead Pawnee bodies from tribal cemeteries.<sup>21</sup>

State statutes also may regulate the exhumation or removal of the dead.<sup>22</sup> For a court to construe a statute permitting disinter-

ment of a dead body, "it must be clear in its intent."<sup>23</sup> In the absence of such specific statutory or constitutional provisions, common law remains in effect.<sup>24</sup>

Nebraska statutory law makes it a misdemeanor to dig up, disinter, remove, or carry away "any dead human body or the remains thereof" from "its place of deposit or burial."<sup>25</sup> This criminal statute grants three narrow exemptions in (1) lawfully authorized dissection of bodies; (2) change of sepulcher by cemetery officials;<sup>26</sup> and (3) change of sepulcher by relatives or intimate friends.<sup>27</sup>

Nebraska, like most other states, has specific statutory procedures for the disinterment of human bodies.<sup>28</sup> State law requires that only the next of kin<sup>29</sup> or a county attorney<sup>30</sup> may apply for and obtain a disinterment permit from the Bureau of Vital Statistics. A licensed funeral director<sup>31</sup> must directly supervise the disinterment. A party attempting to disinter more than one human body must submit "an order from a court of competent jurisdiction" to the Bureau of Vital Statistics with the permit application.<sup>32</sup> The required court order must specify "the place for reinterment, and the reason for disinterment."<sup>33</sup> The statute thus contemplates a requirement that the party exhuming human remains shall reinter them. This statutory scheme enacted in 1921 provides no exemption for NSHS disinterment or retention of Pawnee remains removed from Pawnee burials. Thus, the NSHS would have had to comply with these statutory requirements for the state agency to colorably claim a superior right to tribal skeletal remains acquired after 1921.<sup>34</sup>

The NSHS must also meet the applicable common law requirements for a nontribal entity to have a right of disposition superior to an Indian tribe. Under common law, NSHS's or any other party's disturbance and removal of skeletal remains is "subject to the control and direction of a court of equity."<sup>35</sup> In Nebraska, the courts have held that the consent of judicial authority is essential to allow disinterment for even the next of kin.<sup>36</sup> Significantly, common law considers an allegation that a given tribal human remain may be of historic or scientific interest insufficient grounds to allow disinterment without court or other approval.<sup>37</sup>

Nebraska statutory law also specifies the persons who have the right to control the disposition of a deceased's remains.<sup>38</sup> Under the law of descent and distribution, where there is no surviving competent spouse, adult child, parent, or sibling, an adult next of kin is vested with this right.<sup>39</sup> Where a tribal government represents all living members and therefore all descendant tribal members, common law presumes that the tribe is the nearest "next of

kin."<sup>40</sup> The tribe need not prove specific blood ties between the unknown decedents and specific living kin to obtain its rights to control the remains.<sup>41</sup> Additionally, under Nebraska statutory law, skeletal remains do not escheat to the state unless there are no next of kin takers.<sup>42</sup> Therefore, in situations such as the Pawnee case, a tribal right to control disposition of Indian remains takes statutory preference over that of a state agency or institution, if exercised on behalf of its entire membership.

Without this type of statutory scheme, the common law applies notice to and consent of the nearest next of kin as critical factors in determining whether removal of the skeletal remains was proper. Courts typically allow disinterment with the consent of a relative only when meeting controlling authority's narrowly prescribed circumstances and only where reinterment is contemplated.<sup>43</sup> Next of kin may maintain an action for a deprivation of the right of sepulcher or for mutilation of the body.<sup>44</sup> Courts universally hold liability for damages to arise for disinterments done<sup>45</sup> without the knowledge of the nearest next of kin.<sup>46</sup> The judiciary considers notice to parties who have a right to object (1) to ensure that final sepulcher is not disturbed against their will<sup>47</sup>; (2) to provide an opportunity to assure themselves that the exhumation is done with dignity; and (3) to document the reburial and its location.<sup>48</sup> This duty of notice pertains even if the next of kin do not own the burial land.<sup>49</sup>

Any agency seeking to withhold Indian remains from reburial holds the burden of proof to show proper legal authority to disinter the dead and to control the disposition of the dead.<sup>50</sup> In the Pawnee repatriation dispute, the NSHS failed to produce a single regulatory permit or court order authorizing it to disinter any deceased Pawnee.<sup>51</sup> Moreover, the NSHS was unable to produce any colorable evidence that it had sought or obtained the Pawnee tribal government's consent to disinter any of the Pawnee graves.<sup>52</sup> Finally, no Nebraska statute expressly authorizes the NSHS to disinter dead bodies as a matter of course or right.<sup>53</sup> The NSHS therefore failed to show any legal right or authority to disinter, procure, possess, or withhold the Pawnee dead from reburial. Because the NSHS's disinterment and removal of Pawnee dead bodies from Pawnee cemeteries was not authorized by law, it constituted unlawful and *ultra vires* conduct. Thus, under applicable statutory and common law, the right to control the disposition and reburial of Pawnee dead bodies vested in the Pawnee Tribe, not the NSHS.<sup>54</sup>



### Common Law Rights of Possession to Pawnee Funerary Objects

American common law has long held that disinterred funerary objects are the property of the person or persons who furnished the grave or their known descendants.<sup>55</sup> This rule applies even if the specific identities of the deceased individuals are unknown<sup>56</sup> and even if the rightful owner does not own the land where the graves are located.<sup>57</sup> More specifically, landowners where graves are located have only technical possession of the burial objects, holding them in trust for the donors or their descendants.<sup>58</sup> Thus, a landowner or anyone who disinters burial goods with a landowner's permission does not have and therefore cannot convey title to burial goods in instances where, as in the case of the NSHS, the landowners or gravediggers are strangers to the decedent or his or her descendants. The length of time a body has been buried is irrelevant.<sup>59</sup>

A court applied these common law rules in a dispute over the ownership of Indian burial offerings in *Charrier v. Bell*, 496 So. 2d 601 (La. App.), *cert. denied*, 498 So. 2d 753 (La. 1986). The facts of *Charrier* are substantially analogous to the Pawnee situation in Nebraska. *Charrier* was an action to quiet title to two-and-one-half tons of Tunica Indian burial goods unearthed by an amateur archaeologist. The burial goods came from 150 Indian graves about 250 years old, located on private land that bore no resemblance to a cemetery when the goods were unearthed. The court held that the Tunica Tribe was the lawful owner of the grave goods, even though the specific identities of the deceased individuals were unknown. The court stated,

They were burial goods then and they remain burial goods today, whether they are referred to as artifacts, funerary offerings or the "Tunica Treasure." . . . [We] cannot agree that ownership of such objects may be acquired by reducing them to possession and over the objections of the descendants of the persons with whom the objects were buried. Reason dictates that these objects, when and if removed, rightfully belong to the descendants if they be known and for such disposition as the descendants may deem proper. We hold accordingly. *Charrier v. Bell*, No. 5,552, slip op. at 11-13 (20th Jud. Dist., La. Mar. 18, 1985), *aff'd*, 496 So. 2d 601 (La. App. Cir. 1 1986), *cert. denied*, 498 So. 2d 753 (1986).

Significantly, the court ruled in the tribe's favor despite the claimed historic or scientific value of the grave goods. The court noted,

In some quarters, Charrier's discovery is viewed as an archaeological find of considerable significance. To others it is viewed as the systematic despoliation of . . . [the Tunica's] ancestral burial grounds. While we can fully appreciate the former view, it cannot override the equally considerable merit we find in the latter view. *Id.* at 14.

Finding that the deceased Tunica Indians were interred "with their earthly possessions for use in the spiritual hereafter," the *Charrier* court further ruled that the common law doctrine of abandonment does not apply to burial offerings. The court outlined its reasoning as follows:

The fact that the . . . 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 circumstances and intent 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 it is not intended as a means of relinquishing ownership to a stranger. [Charrier's] argument carried to its logical conclusion would render a grave subject to despoliation either immediately after interment or indefinitely after removal of the descendants of the deceased from the neighborhood of the cemetery. *Charrier v. Bell*, *supra*, 496 So. 2d at 604-05 (1986).

No Nebraska statute altered these long-standing rules of common law prior to general codification in the state's 1989 landmark reburial law. Similarly, it is unlikely that other states have statutorily or otherwise altered these rules. Thus, the common law provides ample support for Native Americans and their tribes seeking to repatriate Indian grave offerings for reburial or other appropriate disposition. Further, this long-standing body of American law serves as a solid legal basis for the enactment of legislation mandating the relinquishment of improperly obtained Indian burial offerings.

### **Constitutional and Federal Law Claims Available to Repatriate Pawnee Dead and Burial Offerings**

Where disputes over the repatriation of Indian remains and funerary objects involve state officials acting under color and authority of state law, constitutional and federal statutory causes of action are available to tribes and their members. Because questions of race, religion, and property are directly implicated by the inherent nature of these disputes, there are cognizable constitutional claims under the First and Fourteenth amendments to the United States Constitution.

The Fourteenth Amendment forbids invidious discrimination based on race.<sup>60</sup> The Supreme Court has strongly intimated that racially motivated state action resulting in denial of sepulcher to the Indian dead raises serious questions "concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment."<sup>61</sup> The facts in the Pawnee repatriation controversy establish that the NSHS, acting under color and authority of state law, conducted a systematic effort to unearth hundreds of Pawnee dead bodies and engaged in a carefully orchestrated campaign to prohibit their reburial. The NSHS has not subjected any other race or Indian tribe to such mistreatment. Thus, the Pawnee Tribe and its members have a colorable equal protection claim to challenge this state action by the NSHS.

The Fourteenth Amendment also prohibits a state from taking property in violation of due process of law. Because the property right in disinterred grave goods vests in the descendants of the decedent, a state may have obtained this property in violation of due process of law and without just compensation.<sup>62</sup>

Further, state action that interferes with religious mortuary practices may violate the First Amendment Free Exercise Clause.<sup>63</sup> The NSHS's disinterment and withholding of Pawnee dead from reburial unequivocally infringes on fundamental Pawnee religious beliefs and mortuary traditions.<sup>64</sup> Accordingly, the Pawnee people have a colorable constitutional claim for state interference with their religious rights and practices. Under this same rationale, Nebraska attorney general Robert Spire concluded in 1988 that a court would rule in favor of the Pawnee Tribe and its members and order the repatriation and reburial of all Pawnee dead bodies and burial offerings held by the NSHS.<sup>65</sup>

Although untested in a repatriation context, these constitutional safeguards remain available in most repatriation situations,

notwithstanding the Supreme Court's recent decision in *Employment Division v. Smith*, 494 U.S. \_\_\_, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). While that decision narrowed the protective scope of the Free Exercise Clause of the First Amendment, the Pawnee repatriation issue, and perhaps others, can be distinguished from the facts and holding of *Employment Division v. Smith*.<sup>66</sup> In any event, the Supreme Court has indicated that the legislature is the proper forum for balancing society's competing interests implicating the First Amendment's Free Exercise Clause.<sup>67</sup> Therefore, legislation such as the Nebraska repatriation statute would likely survive a court challenge.<sup>68</sup>

### **Federal Indian Law Recognizes the Pawnee Tribe's Inherent Sovereign Right and Authority to Repatriate Pawnee Dead and Burial Offerings Disinterred on Historic Pawnee Lands**

Beyond state, common, and constitutional law, the Pawnee Tribe's repatriation claim and the Nebraska statute are strongly grounded in established principles of federal law governing Indian treaties and tribal sovereignty. These federal and tribal political rights provide an additional legal basis for the Pawnee and other tribes to repatriate their deceased relatives and burial offerings held by nontribal entities.

Indian treaty construction is governed by the principle that "the treaty is not a grant of rights to the Indians but a grant of rights from them—a reservation of those [rights] not granted."<sup>69</sup> Under this Supreme Court rule, any right not ceded by a tribe to the United States in a treaty is implied to be reserved by the tribe.<sup>70</sup> In addition to land, the term *reservation* of rights includes other valuable rights not relinquished when Indians conveyed their aboriginal title to the United States.<sup>71</sup> Another principle governing treaty construction states that a treaty must be interpreted as the Pawnee would have understood it,<sup>72</sup> given the practices and customs of the tribe at the time the treaty was negotiated.<sup>73</sup>

The Pawnee Tribe and the federal government entered into several treaties beginning in 1833. Pursuant to these treaties, the tribe ceded certain lands in Nebraska to the United States.<sup>74</sup> Consistent with these rules of treaty construction, the Pawnee Tribe's land cession cannot fairly be construed to encompass a relinquishment of tribal authority and control over Pawnee burials in Nebraska. Given the fundamental importance of the tribe's

religious-based mortuary traditions, customs, and practices of sepulcher,<sup>75</sup> the only logical and fair inference is that the Pawnee Tribe reserved this right and authority.

While treaties may be interpreted by federal agents' representations,<sup>76</sup> the canons of Indian treaty construction bar imputing an illegal intent to the United States as trustee for Indian tribes.<sup>77</sup> Thus, the federal government could not have intended to obtain Pawnee lands to disinter dead Pawnee bodies or to condone such, because grave robbing was a well-established common law crime by the time the Pawnee treaties were negotiated.

The Supremacy Clause of the United States Constitution is applicable to international and Indian treaties alike.<sup>78</sup> It prohibits a state from enacting or enforcing any state statute or regulation that conflicts with treaties between Indian tribes and the United States.<sup>79</sup> The Supremacy Clause further precludes a state from applying its law to Indians located outside the geographical boundaries of an Indian reservation when its application interferes with a tribe's reserved treaty rights.<sup>80</sup> Thus, even though the Pawnee Tribe retains no reservation lands in Nebraska, regulatory or policy actions by the NSHS, an agency of Nebraska, prohibiting the repatriation of the Pawnee dead are null and void under superseding federal treaty law.

In addition to reserved treaty rights, Indian tribes, as sovereign governments, retain the right to govern the internal affairs of their members.<sup>81</sup> The power to govern the domestic relationship between the living and the dead comprises a fundamental attribute of the Pawnee tribal government.<sup>82</sup> State or federal governments may not encumber this sovereign right unless expressly allowed by Congress.<sup>83</sup>

Beginning in 1988, the Pawnee Tribe initiated official action to repatriate all dead Pawnee Indians and their burial offerings held by the state of Nebraska under the auspices of the NSHS.<sup>84</sup> Since that time, under color and authority of state law, the NSHS has acted systematically to prevent the Pawnee Tribe from reburial of all of its dead held by the state agency. Congress has never authorized this interference, and therefore it probably would not withstand judicial scrutiny.<sup>85</sup>

The forgoing rules of law formed the legal basis of the Pawnee Tribe's repatriation claims against the NSHS. These legal principles are also available to other tribes seeking repatriation of their dead and burial offerings. Nebraska's landmark repatriation statute enacted in 1989 codified the majority of the rules. They can

further serve to form the legal foundation of repatriation legislation in other states.

### THE PROCESSES AND POLITICAL RESOLUTION OF THE CROSS-CULTURAL CONFLICT

Nebraska's 1989 reburial statute is the product of protracted tribal negotiations and lobbying in both the administrative and legislative arenas of Nebraska state government. An examination of the issues, processes, and hurdles that the tribes confronted and overcame in seeking legislation to remedy the disparate treatment accorded the Indian dead in Nebraska facilitates an understanding and appreciation of the precedent-setting law.

#### **Nebraska Reburial Movement: 1971–87**

Tribal efforts to have legislation passed to protect the native dead in Nebraska date at least to 1971. In November of that year, the Nebraska Indian Commission, a state agency, called for the enactment of legislation to stop the uncontrolled digging and desecration of Indian graves in the state.<sup>86</sup> However, the commission's 1971 plea went unanswered.

Between 1981 and 1986, the Omaha and Winnebago tribes worked to preserve, protect, and salvage unmarked burial sites in Nebraska from archaeological excavations, grave robbing, and construction projects. Their efforts met with little success.<sup>87</sup> Undaunted, the tribes and the state Indian commission pushed ahead and drafted a proposal for consideration by the state legislature during the 1987 session.<sup>88</sup>

In January 1987, Senator James Pappas introduced LB 612, which initially proposed the adoption of the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act.<sup>89</sup> The bill was designed to protect unmarked burial sites from unauthorized disturbance and to require the repatriation of human skeletal remains and burial offerings held by public institutions and other entities in the state.<sup>90</sup> The bill received extensive media attention, spawned primarily by the Nebraska State Historical Society, which bitterly opposed the bill on the basis that it allegedly would "cripple" forensic research and the "science of archaeology" and would force the NSHS to lose "more than 10,000 irreplaceable

artifacts.”<sup>91</sup> The society’s core concern with the bill, according to executive director James Hanson, rested with the fact that the legislation required the NSHS to return coveted peace medals that it had removed from Pawnee burials.<sup>92</sup>

The society waged a successful media campaign against LB 612 and called on its members, numbering in excess of four thousand persons throughout the state, to lobby their senators.<sup>93</sup> Perhaps the most effective tool employed by the NSHS was a “legislative alert” sent to its membership. Using unfounded scare tactics, NSHS director Hanson warned, “If LB 612 becomes law, you could go to jail for a year and be fined up to \$1,000 for giving an arrowhead, a piece of pottery, or a chip of flint to a child, a friend, or even a Nebraska museum!”<sup>94</sup> Labeling the bill a “raid” on the NSHS’s “collection” of human skeletal remains and burial offerings,<sup>95</sup> Hanson called on the politically powerful NSHS membership to oppose the bill.<sup>96</sup> The record reflects that Hanson’s legislative alert generated numerous letters to state senators in opposition to LB 612.<sup>97</sup> The legislature took no action on LB 612, which accordingly died at the end of the 1988 legislative session.<sup>98</sup>

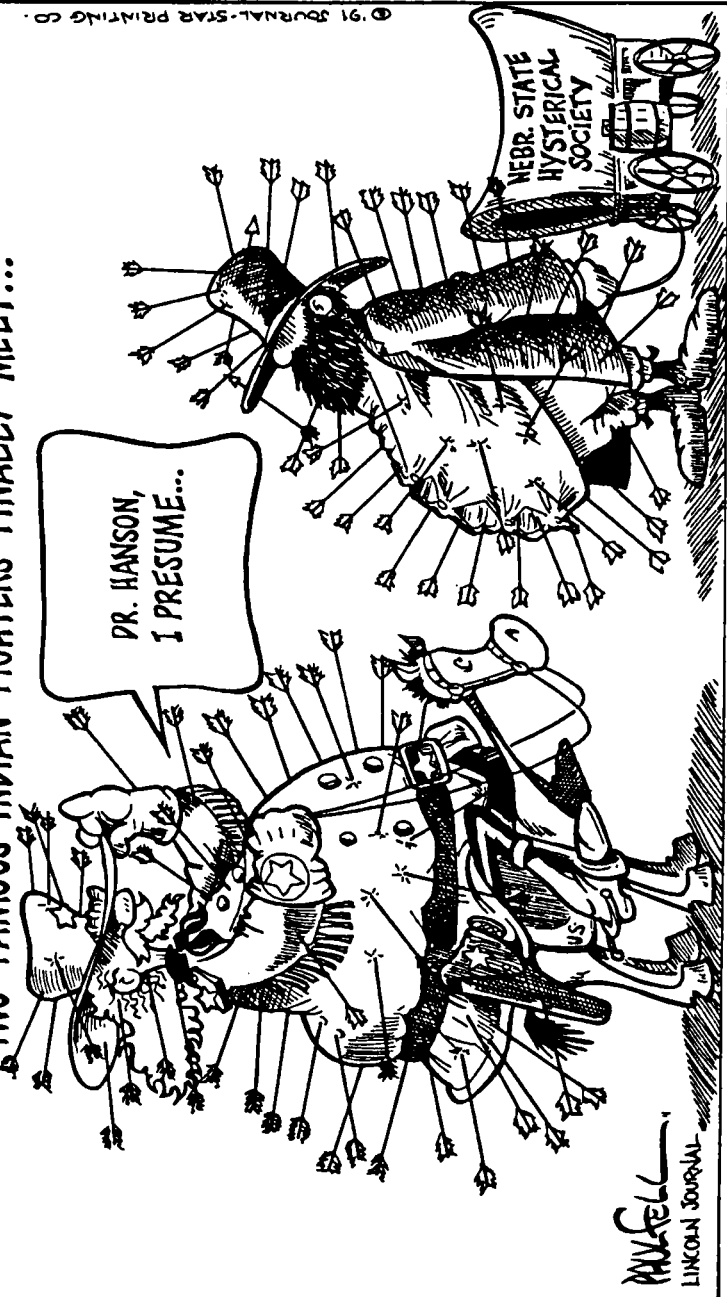
In the final analysis, the grass-roots political organization and power of the NSHS killed LB 612.<sup>99</sup> The Nebraska tribes simply were not financially capable or adequately staffed to effectively join the battle waged by a powerful state agency with extensive media and political contacts, a staff of over one hundred people, and an annual budget approaching nearly \$4 million. The NSHS had enormous, unparalleled resources at its immediate disposal to be devoted at will to the campaign to defeat the tribal reburial movement and thereby to frustrate the legitimate human and religious rights and interests that the Indian tribes of Nebraska sought to vindicate.

### **Pre-LB 340 Politics: 1988 Negotiations with the NSHS to Establish a Repatriation Policy at the Administrative Level of State Government and to Draft Unmarked Grave Protection Legislation**

In early 1988, the Pawnee Tribe of Oklahoma learned from representatives of the Nebraska tribes that the Nebraska State Historical Society had custody of an unspecified number of Pawnee dead bodies and burial offerings.<sup>100</sup> Desiring to accomplish a dignified reburial of their ancestors, the Pawnee Tribe, represented by the

TWO FAMOUS INDIAN FIGHTERS FINALLY MEET...

DR. HANSON,  
I PRESUME...



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Native American Rights Fund (NARF), joined ranks with the Nebraska tribes to try to establish a statewide repatriation policy. The entry of the Pawnee Tribe of Oklahoma and NARF into the Nebraska repatriation movement proved to be a strategically pivotal move, shifting the balance of power from the museum and archaeological communities to the tribes. This ultimately led to the enactment of Nebraska's landmark burial legislation. However, the process culminating in the new law was long and costly and often was characterized by bad faith, deception, and unlawful conduct by the NSHS.

The goal of the new tribal coalition was to bring all interested parties together and begin the negotiation process anew. The LB 612 experience demonstrated at least one major issue on which the tribes and museum community apparently could agree: the need to protect unmarked burials throughout the state from unauthorized disturbance.<sup>101</sup> Concomitantly, the interested parties remained unable to agree on the real issue in the controversy—the repatriation and reburial of dead bodies and burial offerings held by museums in the state.

The tribes devised a two-pronged approach to the burial issue: First, as to protecting unmarked burials, tribal advocates recommended the establishment of a writing committee consisting of representatives of the tribes and museum and archaeological communities to draft legislation for introduction in the 1989 legislature. Second, as to repatriating Indian skeletal remains and burial offerings, the tribes, led by the Pawnee, focused on negotiating with the NSHS for the establishment of an effective repatriation policy at the administrative level of state government.<sup>102</sup>

### *NSHS's attempts to undermine the legislation drafting process*

In March 1988, the writing committee, consisting of representatives of the NSHS, the University of Nebraska, the Nebraska Indian Commission, and the Native American Rights Fund on behalf of the Pawnee Tribe, began work.<sup>103</sup> After a seven-month process and three drafts, the committee developed what tribal representatives believed was a consensus legislative proposal designed to protect unmarked graves throughout the state.

However, on 9 September 1988, the president of the NSHS

executive board informed tribal representatives that the NSHS staff had drafted a separate bill. The NSHS, a state government agency that had declared itself committed to work openly with tribal representatives to develop the consensus bill, had drafted its own self-serving bill in the back room.<sup>104</sup> The tribes were shocked and outraged by this secret, deceptive conduct.

Finding that the secret bill failed to protect Indian rights and interests, the tribes requested the opportunity to provide input into the NSHS legislation.<sup>105</sup> The NSHS denied this request. Then, as a stopgap measure, the tribes asked the NSHS executive board to refrain from introducing the secret NSHS bill and to continue working with Indian representatives on the consensus bill. At its 17 December 1988 meeting, the NSHS board granted the tribes' request, declaring its desire "to develop a legislative bill acceptable to all."<sup>106</sup>

Disregarding the NSHS executive board's clear directive, the NSHS staff refused to work with the writing committee on the consensus bill. Instead, NSHS director Hanson proceeded unilaterally, convincing two senators to introduce the secret bill during the first session of the ninety-first legislature. After a committee hearing in March 1989, the legislature resoundingly killed LB 691 because of the secret drafting process and because the bill competed with the more comprehensive, protective consensus bill, LB 340. The legislature noted that, with the exception of the repatriation provisions, all interested parties represented on the writing committee had developed LB 340.<sup>107</sup>

In retrospect, the failure of LB 691 and the concomitant enactment of LB 340 exemplified the commitment of the Government, Military, and Veterans' Affairs Committee and the Ninety-First Nebraska Legislature to fairness and due process. In this instance, Nebraska lawmakers held the NSHS, a state government agency, accountable to itself and to the Indian tribes it had treated in an underhanded manner.

### *Tribal attempts to seek repatriation at the administrative level of state government*

To establish an effective repatriation policy leading to the reburial of its ancestors and burial offerings held by Nebraska museums, the Pawnee Tribe first negotiated with the Nebraska State Historical Society for several reasons. First, the state agency possessed the

skeletal remains and burial offerings of untold hundreds of deceased Pawnee, erroneously claiming it owned them.<sup>108</sup> Equally important, the NSHS took the lead role in opposing repatriation and reburial and was a proven powerful political force. Finally, the Pawnee Tribe considered negotiation necessary to exhaust its administrative remedies and thereby protect its option to appeal to other forums of government for relief. Accordingly, the Pawnee Tribe had two primary objectives in negotiating with the NSHS: (1) the establishment of a model repatriation policy at the administrative level of state government, and (2) pursuant to such policy, the timely return and reburial of all reasonably identifiable Pawnee dead bodies and burial offerings held by the NSHS.

As part of their repatriation request, the Pawnee and other tribes proposed that the NSHS adopt a repatriation policy requiring the return of all tribally identifiable skeletal remains and burial offerings to requesting tribes for reburial.<sup>109</sup> To support its proposed repatriation policy, the Pawnee Tribe provided NSHS policymakers with extensive information on the historical and contemporary religious-based mortuary traditions and practices of the Pawnee and other Indian peoples.<sup>110</sup> Also, in response to the president of the NSHS executive board, the tribe furnished a comprehensive legal memorandum supporting, if not mandating, repatriation in light of governing law.<sup>111</sup>

Hanson responded by proposing a competing policy that strictly limited repatriation to any remains disinterred in the future.<sup>112</sup> Thus, the NSHS staff proposal circumvented the basic question of the repatriation of remains and burial goods already disinterred and held by the state agency.

It soon became apparent that the NSHS executive board had no intention of conducting a fair hearing process and that it was predisposed to reject both the Pawnee repatriation claim and the proposed policy. The tribes' primary concern centered on the fact that the policymaking body intended to limit its solicitation of external comments to one or two carefully selected representatives of the scientific community who opposed reburial. Specifically, the board indicated it would not make a policy decision until it had the benefit of the testimony of a Smithsonian Institution scientist conducting studies on the precise Pawnee skeletal remains at issue.<sup>113</sup> Moreover, the Smithsonian scientist was officially on record as opposed to the reburial mandates of LB 612.<sup>114</sup> Thus, the primary "expert" that the NSHS intended to and did call had a classic conflict of interest and simply corroborated Hanson's

antireburial position. The tribe's efforts to facilitate a fair hearing proved futile, because the NSHS executive board ultimately rejected the Pawnee Tribe's proposed policy and repatriation request.

Beyond this administrative gamesmanship, the NSHS further hampered the tribe's request with unlawful conduct. Specifically, NSHS director Hanson denied Pawnee tribal researchers access to NSHS burial records documenting the Pawnee disinterments. Pursuant to the state's public records law, the tribe successfully petitioned the state attorney general.<sup>115</sup> On 6 October 1988, the attorney general ordered the NSHS to disclose the withheld records. He concluded, *inter alia*, that the NSHS was a state agency or other public body subject to the public records law and that the information sought constituted public records that were not exempt from the disclosure requirements of the statute.<sup>116</sup> Two days later, the NSHS executive board unanimously voted to comply with the order of the attorney general.<sup>117</sup>

Even with this clear directive, Hanson continued to refuse to disclose a significant portion of the disputed records.<sup>118</sup> His actions necessitated a second directive from the attorney general.<sup>119</sup> Finally, Hanson granted access to NSHS burial records. However, the six-month delay severely stymied the tribe's research project and repatriation negotiations.

Resolution of the burial records dispute did not thwart the relentless campaign of NSHS officials to prevent reburial of the Pawnee dead. Hanson, a nonlawyer, resorted to nonexistent or inapplicable federal law in an attempt to justify his position. Specifically, he erroneously advised the policymaking body that a federal regulation conferred ownership of the Pawnee collection in the United States government<sup>120</sup> and that the NSHS therefore could not lawfully return the Pawnee skeletal remains or burial offerings to the tribe.<sup>121</sup> Although the alleged federal regulation never existed,<sup>122</sup> Hanson's legal cite played a key role in the board's decision to take no action on the tribe's repatriation request at the October 1988 meeting.<sup>123</sup>

Later conceding that the federal regulation did not exist, the NSHS director then turned to inapplicable federal authority to defend his position.<sup>124</sup> Specifically, he claimed that reburial of the Pawnee collection would violate the 1906 federal Antiquities Act and other unspecified federal law allegedly prohibiting reburial, because funds provided by the defunct Works Progress Administration (WPA) were utilized to disinter Pawnee burials.<sup>125</sup> Further,

Hanson enlisted the assistance of the National Park Service (NPS), a powerful federal agency.<sup>126</sup>

The federal government's entrance into the dispute further complicated the already protracted conflict. In November 1988, the Midwest Archaeological Center of the National Park Service threatened confiscation of the Pawnee collection of skeletal remains and burial offerings if the NSHS board took action in favor of reburial.<sup>127</sup> The NPS based its threat on the 1906 federal Antiquities Act.<sup>128</sup> However, after the Pawnee Tribe established that the Antiquities Act was inapplicable,<sup>129</sup> the NPS withdrew its confiscation threat.<sup>130</sup>

Notwithstanding this withdrawal, the NPS central office in Washington, D. C. continued to allege that the federal government "may" have an unspecified "interest" in the NSHS collection because of NSHS's use of federal WPA funds.<sup>131</sup> The NPS advised the NSHS not to take any action on the Pawnee repatriation request until the NPS could determine the exact nature of the alleged interest.<sup>132</sup> However, the NPS again failed to provide any authority to support its claim. In contrast, the Pawnee Tribe provided both the NPS and the NSHS with controlling legal authority establishing that the federal government had no legal interest in or control over the Pawnee collection because of WPA funds, or otherwise.<sup>133</sup>

The collusive action of the federal and state governments to concoct a federal ownership claim or interest in the Pawnee collection further delayed state agency action on the tribe's repatriation claim.<sup>134</sup> On 14 December 1988, Nebraska's attorney general issued a legal opinion concluding that a court would rule in favor of the Pawnee Tribe and order the return of all Pawnee skeletal remains and burial offerings for reburial.<sup>135</sup> Even with the great weight of legal authority supporting repatriation and the absence of any colorable federal ownership claim or interest, the NSHS executive board voted overwhelmingly to reject the Pawnee Tribe's repatriation request.<sup>136</sup>

The decision of the state agency was a great disappointment to the Pawnee Tribe and its many supporters.<sup>137</sup> On 20 December 1988, the United States Department of the Interior officially waived any interest the federal government may have had in the Pawnee collection.<sup>138</sup> On this basis, the Pawnee Tribe formally appealed to the NSHS to reconsider its adverse decision.<sup>139</sup> Without presenting the request to the board or responding directly, Frederick Wefso, then the NSHS executive board's recently elected president, an-

nounced publicly that the NSHS would take no further administrative action on the matter.<sup>140</sup>

Thus, the Pawnee Tribe realized that any further effort to negotiate with the NSHS would prove futile and that all administrative remedies had been exhausted. The tribe then turned to the legislative branch of Nebraska state government to force the recalcitrant state agency to repatriate deceased Pawnee ancestors and their burial offerings for a dignified reburial.

### 1989 Enactment of the Nebraska Reburial Law

The convention of the Ninety-First Nebraska Legislature in 1989 was marked by a definite shift in the balance of political power from reburial opponents to the tribes. This transition was the product of two years of intense media coverage, public education, tribal lobbying,<sup>141</sup> and growing public disgust with the NSHS treatment of the Pawnee Tribe. Nevertheless, the repatriation question remained at the forefront of controversy.

Senator Ernie Chambers, the only Black member of the Nebraska legislature and a longtime advocate of the rights of the oppressed, introduced the reburial bill, LB 340, in January 1989.<sup>142</sup> After a public hearing by the Government, Military, and Veterans' Affairs Committee, a majority of the committee members favored the *reburial of skeletal remains and burial offerings to be disinterred in the future, as well as the reburial of human skeletal remains previously disinterred and held by public museums.*<sup>143</sup> However, the senators were divided on the provision of the bill requiring these entities to return for reburial *all previously disinterred funerary objects identifiable to a specific tribe or tribes, notwithstanding whether such objects could be linked with a specific set of tribal skeletal remains.* To move the bill out of committee, the tribes agreed to an amendment limiting the definition of *burial goods* to grave offerings that "can be traced with a reasonable degree of certainty to the specific human skeletal remains" with which they were buried.<sup>144</sup>

After the committee approved the bill, the NSHS executive director vowed publicly to support LB 340. His commitment was intended to defuse the controversy and thereby minimize the intense pressure exerted on senators by lobbyists and the public.<sup>145</sup> The NSHS executive board then voted to support LB 340, contingent upon an amendment allowing the NSHS to retain burial offerings "important to telling the state's history."<sup>146</sup> Not unex-

pectedly, Hanson reneged on his promise to support LB 340, causing senators Baack and Chambers to charge publicly that he had acted in bad faith.<sup>147</sup> Senator Baack subsequently proclaimed on the floor of the legislature that the NSHS director's actions "give more meaning than before to the old saying 'White Man speaks with a forked tongue.'"<sup>148</sup>

This development served to erode the NSHS's credibility even further in the eyes of the legislature and the public. In mid-February 1989, the *Omaha World-Herald*, the only Nebraska newspaper with a statewide circulation, published the results of its scientifically based public opinion poll. This poll revealed that nearly seven of ten (69 percent) Nebraskans surveyed supported the reburial of Indian skeletal remains and burial goods held by the NSHS.<sup>149</sup>

In response to public opinion and rising legislative support, NSHS officials and other reburial opponents accelerated their campaign in an attempt to derail the repatriation legislation. Their tactics degenerated from the absurd to the outrageous. Hanson publicly claimed that if the NSHS repatriated Pawnee dead bodies, Nebraska would risk the loss of "hundreds of millions" of federal dollars allocated to highway construction projects, the Farmers Home Administration, the Soil Conservation Service, and the NSHS's historic preservation programs.<sup>150</sup> Hanson further announced that the Pawnee Tribe would place its deceased ancestors and burial offerings in an Oklahoma museum, rather than reburying them. Attempting to rally the support of the University of Nebraska's "Big Red" football fans, the NSHS director further suggested that "[f]rankly, I think we get beat bad enough in football by Oklahoma that we shouldn't have to turn our museum over to Oklahoma."<sup>151</sup>

Most egregious was the attack of reburial opponents on Pawnee religious beliefs and practices. Frederick Wefso, NSHS executive board president, and F. A. Calabrese, head of the Midwest Archaeological Center of the National Park Service (NPS), publicly leveled charges that the Pawnee Tribe sought repatriation to sell its ancestors' remains and their burial offerings on the antiquities market.<sup>152</sup> Hanson and his staff further made erroneous charges, discussed above, impugning the sincerity of Pawnee religious beliefs.

These unfounded attacks on the Pawnee people were designed to generate an amendment to LB 340 allowing the NSHS to retain "precious" Pawnee burial goods alleged to be "priceless" or

"worth millions."<sup>153</sup> At the core were three peace medals,<sup>154</sup> which officials claimed were worth up to \$1 million each.<sup>155</sup> Hanson admitted, on the basis of "good [NSHS] recordkeeping,"<sup>156</sup> that LB 340 would require the agency to relinquish the three medals.<sup>157</sup>

Against this backdrop, the Nebraska legislature began floor debate on LB 340 in early March 1989. Senator Chambers eloquently and persuasively characterized the bill as long overdue religious freedom and human rights legislation. He stated,

What we are talking about with this bill is nothing less than human dignity, and what we are asking for is common decency: the same concern accorded to those that we identify as Native Americans accorded routinely to every other group on this planet and certainly in this country. It should not be necessary for a group who were wronged in the first instance to be required to bring out their religion and have it pass muster before those who may have wronged them in the first instance. They should not be required to prove every tenet of their creed, or their doctrine, or their dogma as no other member of any religion is required to do before he or she is allowed to say that I revere and respect my dead and I want the same respect from you. We must be able to conceive of the idea that to Native American people there can be as much concern on their part for their ancestors who are departed as we have for ours. We must be able to conceive that to the same way a blessed rosary has a special significance when buried with a departed Catholic that the burial goods placed with our Native American brothers and sisters would have the same consecrated significance for them . . . . Everybody on this floor understands very well what it is I am talking about and were it not for a group that has traditionally been despised, abused, spat upon, who are few in numbers, impoverished . . . if we were not talking about such a group as that, this bill would not even be necessary. We didn't need a bill like this to protect the ancestors of white people or any other group, and I think the very fact that we have to do it in this fashion is a shame upon all of us, but we can rectify a long existing wrong as much lies within our power . . . .<sup>158</sup>

LB 340 ultimately passed the three required rounds of floor debate and action. Proponents defeated all hostile amendments, including several designed to strike burial goods from the scope of the legislation. Ultimately heeding the advice of Senator Baack that the "right thing to do" in this "moral and religious" issue was to rebury "these captives that we have kept in the historical society



and finally let the spirits go,"<sup>159</sup> the unicameral adopted the historic measure on 19 May 1989.<sup>160</sup> Governor Kay Orr signed the precedent-setting human rights legislation into law on 23 May 1989. Thus, Nebraska's Unmarked Human Burial Sites and Skeletal Remains Protection Act became the first general repatriation statute in the nation.<sup>161</sup>

### THE PROVISIONS OF NEBRASKA'S PRECEDENT-SETTING REBURIAL ACT <sup>162</sup>

The primary purpose of Nebraska's Unmarked Human Burial Sites and Skeletal Remains Protection Act is to "assure that all human burials are accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations . . ." <sup>163</sup> To carry out this intent, the statute regulates two areas: (1) the reburial of tribally identifiable dead bodies and associated grave offerings held by public entities in the state;<sup>164</sup> and (2) the protection of unmarked burials throughout Nebraska.<sup>165</sup> In effect, the Nebraska Reburial Act codifies longstanding, relevant rules of common law, constitutional law, and federal Indian law.

#### Repatriation

The repatriation provisions of LB 340 require state-sponsored or state-recognized public bodies in possession or control of "reasonably identifiable" disinterred human skeletal remains and associated "burial goods" of American Indian origin to return such to a relative or Indian tribe or tribes for reburial within one year of the receipt of a request.<sup>166</sup> The one-year period affords institutions holding such the opportunity to initiate, conduct, or complete study in the interest of science or history.<sup>167</sup> The act thus strikes a reasonable balance between the competing interests of the mortuary beliefs of the Indian tribes and the concerns of the scientific community.<sup>168</sup>

The two key terms in the legislation are *reasonably identifiable* and *burial goods*. The reburial statute defines *reasonably identifiable* as "identifiable, by a preponderance of the evidence, as to familial or tribal origin based on any available archaeological, historical, ethnological, or other direct or circumstantial evidence or expert opinion."<sup>169</sup> Under this definition, the act requires the return and

reburial of *all* human skeletal remains and associated burial offerings that can be reasonably linked to a modern Indian tribe or tribes based on a preponderance of evidence.<sup>170</sup> The antiquity or age of the skeletal remains is not a relevant consideration, as long as they are “reasonably identifiable” to a specific tribe or tribes. The definition of *reasonably identifiable* also provides for the submission of tribal ethnohistorical accounts, including oral histories, in determining tribal affiliation of dead Indian bodies and burial offerings held by state entities.<sup>171</sup>

The repatriation statute defines *burial goods* as “any item or items reasonably believed to have been intentionally placed with an individual at the time of burial which can be traced with a reasonable degree of certainty to the specific skeletal remains with which it or they were buried.”<sup>172</sup> The legislature’s intent was to limit the application of “burial goods” to those funerary objects that can be reasonably linked to a specific set of human skeletal remains.<sup>173</sup> The reburial statute does not require that funerary objects be linked to actual, available human skeletal remains in order to fall within the statutory definition.<sup>174</sup> Colorable documentation or other reasonable means establishing that the funerary object is somehow associated with a specific set of human skeletal remains is sufficient.<sup>175</sup> Upon such a showing, the funerary object constitutes a “burial good” within the meaning of the statute and is therefore subject to reburial.<sup>176</sup> In the absence of such a showing, a funerary object is not a “burial good” under the act, even when reasonably identified with a specific Indian tribe.<sup>177</sup>

The act requires public bodies subject to a repatriation claim to provide the requesting relative or Indian tribe with an itemized inventory of all human skeletal remains and burial goods subject to repatriation ninety days prior to the date of such return.<sup>178</sup> The act further requires the transferring entity and the party receiving the remains and burial offerings to sign, at the time of actual repatriation, a transfer document specifically identifying each transferred human skeletal remain and burial good by inventory number and description.<sup>179</sup> Thus, the statute contemplates that tribes shall have access to burial records created and maintained by affected public entities. This access allows tribal representatives to advance their repatriation claims and sign the statutorily mandated transfer documents with full knowledge and information.<sup>180</sup> The legislature intended tribes to have access to such agency records, in part because the agencies are the sole source of records documenting the specifics of the disinterments.<sup>181</sup>

### **Protection of Unmarked Burial Sites in Nebraska**

The Unmarked Human Burial Sites and Skeletal Remains Protection Act provides extensive protections for unmarked burials and cemeteries throughout the state.<sup>182</sup> The act requires any person who encounters or discovers human skeletal remains or burial offerings associated with an unmarked grave to immediately cease any activity causing further disturbance of the burial.<sup>183</sup> Such person is then required to report the presence and location to local law enforcement officials,<sup>184</sup> who in turn are required to notify the landowner, the county attorney, and the Nebraska State Historical Society.<sup>185</sup> If the county attorney determines criminal activity is implicated, the official is authorized to retain custody of the remains until the matter is resolved.<sup>186</sup> In any event, the act requires reburial in conformity with its provisions.<sup>187</sup>

The statute authorizes the NSHS to assist in the examination of human skeletal remains and burial offerings disinterred from unmarked cemeteries to attempt to determine their identity or origin.<sup>188</sup> If the human remains or burial offerings are determined to be of non-American Indian origin, the NSHS is required to notify the county attorney. This official then is required to cause the reinterment of the remains in compliance with existing state statutes.<sup>189</sup>

If the NSHS determines that the discovered remains or burial offerings are of American Indian origin, the society is required to promptly notify the Nebraska Indian Commission and any known relatives.<sup>190</sup> If no relatives are known, the NSHS is required to notify Indian tribes that it identifies as linked or related to the human remains.<sup>191</sup> In all cases, the statute requires the NSHS to comply with the decision of the relative or Indian tribe regarding reburial or other disposition.<sup>192</sup>

The act further prohibits public agencies from displaying human skeletal remains that are reasonably identifiable as to next of kin or tribal origin.<sup>193</sup> It does authorize the curation of human skeletal remains and burial offerings of unknown familial or tribal origin but only where such are "clearly found to be of extremely important, irreplaceable, and intrinsic scientific value."<sup>194</sup> Notwithstanding this limited authorization, the act contemplates that all human remains and burial offerings will be reinterred.<sup>195</sup>

## Dispute Resolution and Enforcement

The statute provides an administrative procedure for the resolution of disputes arising under the act.<sup>196</sup> This provision requires an aggrieved party seeking relief to submit documentation to the adverse party, describing the nature of the grievance. The parties then are required to meet within sixty days to determine if they can resolve the dispute. If they cannot, the act further requires the two adverse parties to designate a third party to assist in resolution of the dispute. Such designation must occur within fifteen days after the initial meeting of the adverse parties. If the disputants cannot agree on a third party within the prescribed period, the state public counsel/ombudsman is automatically designated to serve in that capacity.<sup>197</sup>

Following the designation of a third party, the aggrieved party is authorized to submit a petition and supporting documentation to the third party, describing the nature of the grievance. The act requires the aggrieved party simultaneously to serve the adverse party, which then has thirty days to respond by submitting documentation to the other two parties. Thereafter, the third party is required to review the petition, the response, all supporting documentation, and other relevant information. Following such review and within ninety days of the filing of the petition, the three parties are required to resolve the dispute by majority vote.<sup>198</sup>

This dispute resolution procedure is the exclusive remedy available to an aggrieved party under the act. The statute prohibits lawsuits prior to exhaustion of the mandated administrative remedy. Thereafter, either the aggrieved or the adverse party may apply for judicial relief.<sup>199</sup>

The repatriation statute further authorizes "any person, Indian tribe, or tribal member" to bring a civil cause of action "against any person alleged to have intentionally violated" the Unmarked Human Burial Sites and Skeletal Remains Protection Act.<sup>200</sup> The statute of limitations on these causes of action is two years from the discovery of the alleged violation.<sup>201</sup> If the plaintiff prevails, courts may award actual damages for each violation.<sup>202</sup> A court may also award injunctive and equitable relief to a prevailing plaintiff, including forfeiture and reinterment of any human skeletal remains or burial offerings held in violation of the act.<sup>203</sup> The statute further provides for the forfeiture of equipment used in violation of the act.<sup>204</sup> Courts may also award reasonable attorney fees to the prevailing party in civil actions.<sup>205</sup>

By adding burial offerings to the prohibition, the act amended an earlier statute prohibiting the disinterment or removal of skeletal remains.<sup>206</sup> Under the act, it is now a crime to aid, incite, assist, encourage, or procure the disinterment or removal of burial goods from the place of burial.<sup>207</sup> Trafficking, throwing away, or abandoning human remains and burial offerings known or reasonably known to have been disinterred is likewise prohibited.<sup>208</sup> Violation of these statutory prohibitions constitutes a Class I misdemeanor.<sup>209</sup>

### IMPLEMENTATION OF NEBRASKA'S UNMARKED HUMAN BURIAL SITES AND SKELETAL REMAINS PROTECTION ACT

The NSHS bitterly resisted implementation of Nebraska's landmark human rights legislation. Its resistance stands in contrast to the University of Nebraska's cooperative and dignified repatriation of human skeletal remains and funerary objects of the Omaha Tribe. The NSHS's continued defiance of the law illustrates the importance of including adequate procedural safeguards and remedies governing the implementation of repatriation legislation.

#### **NSHS's Continuing Campaign to Resist Reburial**

The NSHS continued its campaign to frustrate Pawnee repatriation efforts. In June 1989, NSHS director Hanson refused to grant tribal researchers access to NSHS burial records for the third time in less than a year. This was despite two standing orders of the Nebraska attorney general directing the NSHS to disclose its records. Because the NSHS is the sole source of such information, this unlawful denial further frustrated the tribe's attempt to compile an independent tribal inventory of Pawnee remains and burial offerings subject to repatriation under the act.<sup>210</sup>

The Pawnee Tribe again appealed to the state attorney general to order the NSHS to disclose its burial records.<sup>211</sup> In response, the attorney general admonished NSHS director Hanson to "quit horsing around" and ordered the state agency to comply with both the open records law and the repatriation statute.<sup>212</sup> Both the attorney general and the Pawnee Tribe vowed to sue the NSHS if

it did not disclose the requested information.<sup>213</sup> Thereafter, the NSHS capitulated and granted the tribe access to burial records. This was the NSHS executive board's second policy decision in less than a year to comply with the public records law.<sup>214</sup>

Notwithstanding, the NSHS continued to defy both the public records and repatriation statutes. In the fall of 1989, Hanson publicly criticized the legislature for enacting LB 340, labeling the new law "censorship" and characterizing the legislative action as "dictatorial."<sup>215</sup> Additionally, an NSHS employee represented that their statutorily mandated inventory would include only "historic" Pawnee skeletal remains dating from 1750 A. D., rather than all the "reasonably identifiable" Pawnee remains required by the new law.<sup>216</sup> The Pawnee Tribe wrote a series of letters to the NSHS to determine if this was the official position of the NSHS and to ascertain how the agency interpreted the tribe's repatriation claim and the scope of the reburial law.<sup>217</sup> However, Hanson steadfastly refused to respond to these inquiries.

Finally, in January 1990, the Pawnee Tribe requested the withheld information under the state's open records law.<sup>218</sup> In response, Hanson, without authorization from the executive board, filed suit against the Pawnee Tribe in state court.<sup>219</sup> In its suit, the NSHS claimed that it was not a state agency but rather a private, nonprofit corporation and therefore was not subject to the state's open records law. In the alternative, the NSHS contended that the documents the tribe sought were not public records or were exempt from the disclosure requirements of the law. The NSHS also alleged that the Pawnee Tribe was not a "person" within the meaning of the open records law and therefore was not entitled to examine the records.<sup>220</sup> The NSHS further claimed that the repatriation statute, not the open records law, governed the records dispute and that the repatriation statute did not require disclosure of the information. The tribe counterclaimed, alleging that the opposite of the NSHS claims was true and that the NSHS was violating the open records law. Shortly thereafter, the attorney general of Nebraska intervened in the lawsuit on the side of the Pawnee Tribe.

After extensive discovery and a five-day trial, the court ruled in favor of the Pawnee Tribe and the state of Nebraska on all issues.<sup>221</sup> In short, the court estopped the NSHS from denying it is a state agency, ruled it had violated the open records law, and ordered it to produce all of the disputed documents in its possession.<sup>222</sup>

The NSHS executive board ultimately voted to appeal all issues

in the case, including a subsequent court order awarding the Pawnee Tribe over \$61,000 in attorney fees and costs as the prevailing party under Nebraska's public records law.<sup>223</sup> The society's decision to appeal caused a public outcry and was labeled a "BIG mistake" in an editorial in the *Lincoln Journal-Star*.<sup>224</sup> The editorial posited that a reversal, although described as "unlikely," of the district court's ruling that the NSHS is a state agency and not a private corporation could result in the legislature's terminating its annual appropriation to the NSHS in excess of \$3 million—an action that would destroy the state's historical society.<sup>225</sup> In effect, the editorial characterized the NSHS judicial appeal as a "no win" situation.<sup>226</sup> Appellate briefing is scheduled for early 1992, with a decision anticipated in late 1992 or early 1993.

Also in January 1990, two state senators opposed to LB 340 sponsored a bill designed to remove burial goods from the reach of the repatriation statute.<sup>227</sup> The senators introduced this bill at the approximate time the NSHS filed its open records lawsuit against the Pawnee Tribe. Attempting to retain the coveted Pawnee peace medals held by the NSHS, society member Ron Hunter lobbied vigorously in support of the proposed legislation.<sup>228</sup> However, the landmark law that had been enacted the previous year was not undone.<sup>229</sup> In response to the sentiments of enlightened senators, a sympathetic public, and well-organized tribal opposition, Nebraska lawmakers killed the bill in committee after its hearing in February 1990.<sup>230</sup> However, this action did not stop the NSHS's relentless campaign to prevent the reinterment of Pawnee burial goods coveted by the agency.

### **NSHS Attempts to Resist Pawnee Repatriation Claims Filed under the Statute: The Pawnee Tribe's Invocation of Statutory Grievance Procedures**

The NSHS continued to resist Pawnee repatriation efforts during its inventory of Pawnee skeletal remains and burial goods. In June 1990, the NSHS produced the inventory mandated pursuant to the repatriation law.<sup>231</sup> However, the document was limited to "historic Pawnee" and "Lower Loup" cultures. Based on tribal research completed by archive expert Dr. Anne Diffendal, a comparison of the NSHS inventory with the tribe's research of NSHS records revealed that the state's inventory omitted the skeletal remains and burial offerings of hundreds of "prehistoric" indi-

viduals documented by the Pawnee Tribe to be "reasonably identifiable" as Pawnee relatives or ancestors.<sup>232</sup> Thus, the inventory discrepancies confirmed that the NSHS did not intend to comply with the requirements of the reburial law. They also substantiated Pawnee tribal conclusions that the NSHS filed the open records lawsuit to prevent the tribe from examining records that might have revealed that the NSHS was defying the reburial law.

In accordance with the act, the Pawnee Tribe submitted a grievance and supporting documentation to the NSHS in an attempt secure a two-party resolution of the dispute.<sup>233</sup> The tribe's grievance included three parts:

First, it challenged the NSHS's refusal to return specific burial offerings admitted to be interred with and traceable to specific Pawnee skeletal remains. The NSHS claimed that, although it once had possession of the skeletal remains of these fourteen individuals, they had since been discarded or were now inexplicably missing. The NSHS based its refusal on an erroneous interpretation of the reburial statute: The society alleged that the statute required the physical presence of a bone fragment in order for the funerary object to be considered a "burial good" subject to return under the law.<sup>234</sup>

Among these specific burial goods was the George III peace medal, which the NSHS had fought to retain as "important to Nebraska's past." Prior to LB 340, Hanson represented publicly that the legislation would force the NSHS to return the George III medal to the Pawnee Tribe.<sup>235</sup> The prospect of relinquishing the peace medals was a primary basis of Hanson's vociferous, widely publicized opposition to the repatriation legislation.<sup>236</sup> Further, the initial inventory produced by the NSHS in June 1990 established that the NSHS was then in possession of numerous human bone fragments associated with the George III medal. However, the NSHS later suspiciously amended this portion of its inventory, alleging that these bone fragments were somehow missing.<sup>237</sup> Thus, the NSHS's reasons for refusing to return the medal it coveted became highly questionable.

Because of these suspicious circumstances, the Pawnee Tribe requested the opportunity to examine the George III peace medal. Not surprisingly, the NSHS refused.<sup>238</sup> However, after three state senators informed Hanson that they would accompany tribal representatives and a numismatic expert to the NSHS museum to inspect and authenticate the medal, the agency ultimately capitulated.



lated.<sup>239</sup> During this inspection and authentication, the NSHS inadvertently disclosed that it recently had purchased a second George III medal<sup>240</sup> for under \$4,000—a far cry from its previous representations that peace medals were worth \$1 million each.<sup>241</sup>

The second prong of the tribe's grievance focused on the NSHS's refusal to repatriate the skeletal remains and associated burial offerings of more than one hundred individuals disinterred from burial sites associated with the prehistoric Loup River/Itskari phase of Nebraska history. The NSHS refused even though John Ludwickson, an NSHS archaeologist, had concluded in 1978 that these deceased individuals were the lineal ancestors of the present-day Pawnee.<sup>242</sup> The NSHS based its refusal on an erroneous interpretation of the scope of the reburial law. Ignoring the plain language of the statute, the NSHS alleged that the legislature did not intend LB 340 to require the repatriation of "materials older than 1700 A. D.," i. e., those identified as "prehistoric."<sup>243</sup>

The third prong of the Pawnee Tribe's grievance challenged the refusal of the NSHS to repatriate the skeletal remains and burial offerings of an unspecified number of individuals disinterred from burials associated with the Central Plains Tradition of Nebraska history.<sup>244</sup> The Pawnee Tribe asserted this repatriation claim jointly with the Arikara and Wichita tribes, because the three tribes descended from Northern Caddoan groups occupying Central Plains Tradition sites in Nebraska.<sup>245</sup> The NSHS rejected this claim, alleging that the repatriation statute does not provide for multiple tribal claims. Further, the NSHS's opposition was a reversal of its interpretation of Central Plains archaeology, which it had embraced prior to the repatriation controversy. That interpretation, evidenced by published and unpublished statements of NSHS archaeologists as recently as 1985, recognized the existence of the requisite relationship between the Pawnee and groups of the Central Plains Tradition.<sup>246</sup> Significantly, but not surprisingly, NSHS staff archaeologists were not able to cite or produce any evidence that would serve as a basis for the society's eleventh-hour change in position.<sup>247</sup>

According to archaeologist Larry Zimmerman, professor of anthropology and chairperson of the Department of Social Behavior of the University of South Dakota, the Nebraska State Historical Society's new archaeological view demanded a level of proof and data that, by definition, is virtually impossible to attain in the field of archaeology.<sup>248</sup> In effect, the NSHS rejected the repatriation act's standard of "reasonably identifiable by a preponderance of the

available evidence" and replaced it with a standard of certainty.<sup>249</sup> Not only was the NSHS's self-serving standard contrary to controlling law, it constituted an aberration in the world of archaeology.<sup>250</sup>

In compliance with the Nebraska repatriation law, the Pawnee Tribe presented its grievance to NSHS officials on 21 September 1990 in an effort to settle the dispute informally. However, the meeting did not resolve the fundamental disagreements forming the tribe's grievances. At the meeting, the parties submitted the names of respective nominees for the third party required by the act. Because the NSHS and the tribe could not agree on the third party,<sup>251</sup> the act automatically designated the public counsel/ombudsman of the state of Nebraska to serve.<sup>252</sup>

Following the administrative grievance procedure, the Pawnee Tribe filed a formal grievance and supporting documentation with the public counsel on 11 December 1990.<sup>253</sup> The NSHS responded with its position and documentation in January 1991.<sup>254</sup> Thereafter, the Pawnee Tribe submitted its rebuttal.<sup>255</sup>

In March 1991, the public counsel ruled for the Pawnee Tribe.<sup>256</sup> The public counsel ruled that the law does not require the physical presence of a bone linked with a funerary object in order for a burial offering to constitute a "burial good" within the meaning of the act.<sup>257</sup> Rather, documentary evidence that "reasonably traces" a burial offering to a specific set of human remains is sufficient under the law.<sup>258</sup> Thus, even though some remains were somehow missing, the public counsel ordered the NSHS to return to the Pawnee Tribe for reburial *all* burial goods in the NSHS's possession that are reasonably identifiable as Pawnee.<sup>259</sup>

The public counsel also ruled that the Pawnee Tribe had established, by a preponderance of the evidence, that all of the human skeletal remains and burial goods from the prehistoric Itskari phase were reasonably identifiable as ancestors to the Pawnee.<sup>260</sup> The public counsel rejected the NSHS's most recent opinion that the skeletal remains from the Itskari phase were not identifiable as Pawnee; the counsel found that the NSHS had submitted no documentation to support its claim.<sup>261</sup> Accordingly, the public counsel ordered the NSHS to repatriate all such Pawnee skeletal remains and burial offerings held by the state agency.<sup>262</sup>

The third issue required the public counsel to decide whether all of the skeletal remains and burial goods of the Central Plains Tradition peoples were reasonably identifiable as Pawnee, Arikara, or Wichita in origin.<sup>263</sup> Although the public counsel found that the

evidence suggested that *some* of the peoples of the Central Plains Tradition may be ancestral to the Pawnee and Arikara tribes, he concluded that the evidence would not support a finding that *all* such peoples were collectively identifiable as the ancestors of one or more of the three petitioning tribes.<sup>264</sup> Accordingly, the public counsel invited submission of a revised joint tribal petition addressing constituent parts of the Central Plains Tradition that might be reasonably identifiable as ancestral to the petitioning tribes.<sup>265</sup> Most significant was his ruling that multiple tribal claims are authorized under the act.<sup>266</sup>

### **Repatriations Effectuated Pursuant to Nebraska's Law**

In September 1990, the NSHS returned the skeletal remains and burial goods of nearly four hundred Pawnee individuals whom the agency had listed on its inventory as Pawnee.<sup>267</sup> During the transfer, the tribe and the NSHS conducted a meticulous verification process to ensure that all skeletal remains and burial goods listed on the NSHS inventory were returned.<sup>268</sup> This process culminated with the signing of hundreds of transfer documents by tribal and NSHS officials. Thereafter, the Pawnee delegation transported the caskets holding the remains of their ancestors in a dignified funeral procession, led by officers of the Lincoln Police Department and the Nebraska State Patrol, to Genoa, Nebraska. The tribe reburied the individuals in accordance with Pawnee tribal mortuary traditions.<sup>269</sup>

This repatriation constituted the first return and reburial in the United States of dead Indian bodies and burial goods under a general repatriation statute. Further, in late September 1991, in accordance with the Nebraska public counsel award, the NSHS repatriated over one hundred deceased Pawnee Indians and their burial goods from the Loup River/Itskari phase of Nebraska history. These individuals were reinterred in a mass grave in southwestern Nebraska.<sup>270</sup>

On 28 October 1991, the public counsel of Nebraska held an evidentiary hearing pursuant to a formal grievance filed by the tribe regarding the lawful ownership and disposition of the George III medal. On 5 November 1991, prior to a ruling, the NSHS capitulated and returned the medal to the Pawnee Tribe.<sup>271</sup> The tribe plans to reinter this burial good at an undisclosed site.

In November 1991, in response to the prospect of another

statutory grievance to be filed by the Pawnee Tribe, the NSHS executive board voted to repatriate all Indian skeletal remains and associated burial goods left in the society's collection, with board president Dennis Mihelich announcing publicly that "we are out of the bones business."<sup>272</sup> These human remains and burial goods are from prehistoric people, including ancestors of the Pawnee who inhabited Nebraska from approximately 1000 A. D. to 1500 A. D. They include the Nebraska Phase, Upper Republican, St. Helena, and Central Plains cultures.<sup>273</sup> When this repatriation is completed, over one thousand Pawnee ancestors and tens of thousands of their burial offerings disinterred by the NSHS will have been reburied by the tribe according to religious-based tribal mortuary traditions and practices.

In addition to these Pawnee repatriations, the University of Nebraska returned the skeletal remains and burial offerings of nearly one hundred Omaha tribal ancestors.<sup>274</sup> The Omaha Tribe reburied the individuals in Nebraska on 3 October 1991.<sup>275</sup>

The Omaha repatriation situation has been characterized by genuine, good faith cooperation and negotiations between the two parties and accordingly has precluded invocation of the grievance procedures under Nebraska's repatriation law. The University of Nebraska's willing cooperation with the Omaha Tribe stands in stark contrast to the obstinate and often unlawful conduct of the Nebraska State Historical Society. Indeed, the University of Nebraska's dignified, forthright, and lawful treatment of the Omaha Tribe exemplifies the conduct all public officials should emulate when responding to repatriation claims of Indian tribes and their members.<sup>276</sup>

## CONCLUSION

Nebraska's landmark repatriation legislation represents the triumph of human rights, religious freedom, and common decency. By enacting the historic measure, Nebraska lawmakers sent a loud and clear message that the state will no longer tolerate the disparate, sacrilegious treatment of the Indian dead, whether in the name of science, history, or otherwise. Senator Baack, now the speaker of the Nebraska Unicameral Legislature, succinctly personified the underlying sentiments that ultimately generated the precedent-setting legislation. Senator Baack stated,

The way I look at it, we will be burying a part of our history, but we probably didn't have the right to dig up part of the Native American history to start with. I became convinced that the artifacts are such a part of their religious beliefs that we have no right to keep them. Their religious beliefs are also part of our history. By putting them back, we are honoring part of our history, rather than reburying it.<sup>277</sup>

Equally important, the Nebraska legislation clearly establishes that state lawmakers will not condone the mistreatment of Native Americans by a state agency when tribal governments seek to rebury their dead in accordance with Indian religious traditions and practices. Without question, the Nebraska State Historical Society's arrogant and insensitive conduct toward the Pawnee Tribe shocked the conscience of legislators and the public alike. It thus served to underscore the dire need for state legislation to remedy the cross-cultural conflict. Similarly, the NSHS's abhorrent conduct shocked the national museum community and served to enlighten Congress about the compelling need for national grave protection and repatriation legislation to preclude the occurrence of another "worst case scenario" like that in Nebraska.<sup>278</sup>

### ACKNOWLEDGMENTS

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### NOTES

1. Statement of chairman Lawrence Goodfox, Jr. of the Pawnee Tribe of Oklahoma, Nebraska State Historical Society, Executive Board Meeting, Lincoln, Nebraska (25 March 1988) (available from NARF).
2. See article by Orlan Svingen in this volume, describing the expropriation of Pawnee graves by the Nebraska State Historical Society.
3. See article by Roger Echo-Hawk in this volume describing in detail historical and contemporary Pawnee mortuary traditions and practices.
4. See article by Orlan Svingen in this volume.

5. See Margaret Reist, "Tribal chairman requests return of skeletal remains," *Lincoln Journal*, 25 June 1988.

6. *Ibid.*

7. See, e. g., Minutes, Nebraska State Historical Society Executive Board Meeting, 17 December 1988 (available from the NSHS).

8. See David Schwartzlander, "Board approves plan for remains," *Lincoln Journal*, 18 December 1988.

9. See Statement of Citizens to Save Nebraska's History, February 1989 (available from NARF).

10. *Neb. Rev. Stat.* §§ 12-1201 through 12-1212 (Supp. 1990); § 28-1301 (Supp. 1990).

11. See, e. g., Bob Reeves, "State ancestral remains law said 'landmark' bill for nation," *Lincoln Journal-Star*, 9 March 1991.

12. 20 U. S. C. § 80q-9 (1989).

13. 25 U. S. C. § 3005 (1990).

14. The Pawnee people have largely resided in Oklahoma since the 1870s, when they were forced to leave Nebraska and establish a new homeland in Oklahoma. Accordingly, Oklahoma Pawnee are not eligible to vote in Nebraska elections. Moreover, there are very few Native Americans in most legislative districts in Nebraska.

15. The term *dead body* in a legal sense means human skeletal remains, including pieces or particles of bones that are "distinguishable from the soil in which they were placed, i. e., that have not decomposed." Thus, under the law, one bone or particle thereof constitutes a dead body. See *Sorrentino v. State*, 212 N. Y. S. 2d 160, 13 A. D. 2d 5, *aff'd*, 180 N. E. 2d 916, 11 N. Y. 2d 695, 225 N. Y. S. 2d 764 (1961); *Wilson v. Read*, 74 N. H. 322, 323-24, 68 A. 37 (1907); *Carter v. Zanesville*, 59 Ohio St. 170, 52 N. E. 2d 160 (1898); 25 A. C. J. S., *Dead Bodies* § 1 at 458 (1966).

16. See letter from James Hanson, NSHS executive director, to Walter Echo-Hawk, 26 August 1988 (available from NARF and the NSHS). The NSHS claimed that it held title to a certain number of Pawnee dead bodies and burial offerings on the basis of a bill of sale from A. T. Hill to the NSHS, dated 17 April 1942 (available from the NSHS). The state agency also claimed it obtained permission from landowners to disinter and remove Pawnee burials in its possession.

17. See 22A Am. Jur. 2d, *Dead Bodies* § 2 (1988); 25A C. J. S. *Dead Bodies* § 2 (1966); Jackson, *The Law of Cadavers and of Burials and Burial Places*, 129-34 (2d ed., 1950); accord, Op. Cal. Att'y Gen. (21 May 1990); 88 Op. Ks. Att'y Gen. 73 (1988).

18. See, e. g., *Traveler's Insurance Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936); *Busler v. State*, 184 S.W.2d 24, 27 (Tenn. 1944).

19. 22A Am. Jur. 2d, *supra*, note 17, §§ 18-21, 23, 25; 25A C. J. S., *supra*, note 37, § 4; see also *Stastny v. Tachovsky*, 178 Neb. 109, 132 N.W.2d 317 (1964). (Although not favored, a state district court has authority to order exhumation where good and substantial reason is shown.)

20. 25A C. J. S., *supra* note 15, § 9 at 523 n.75.

21. See, e. g., *State v. Johnson*, 50 P. 907 (1897) (unexplained possession of a dead body illegally removed is *prima facie* evidence of wrongful possession); *State v. Schaffer*, 95 Iowa 379, 64 N.W. 276 (1895). (Burden is on defendant to show he had lawful authority to disinter a dead body.)

22. *King v. City of Shelby*, 40 Ohio App. 195, 178 N. E. 22 (1931).

23. Jackson, *The Law of Cadavers*, *supra* note 17, at 108.

24. See, e. g., *Matter of Morehead*, 10 Kan. App. 2d 625 706 P.2d 480 (1985); *Bd.*

*of County Commissioners v. Central Air Conditioning*, 235 Kan. 977, 683 P. 2d 1282 (1984); *Gonzales v. Atchison*, 189 Kan. 689, 371 P. 2d 193 (1962).

25. Neb. Rev. Stat. § 28-1301(1) (a)-(c) (1989).
26. Neb. Rev. Stat. § 71-605 (1989).
27. Neb. Rev. Stat. § 71-605, 28-1301(2) (1989).
28. Neb. Rev. Stat. § 71-605(5), (6) (1921) (reissue 1989).
29. Neb. Rev. Stat. § 71-605(5) (1989); see also Neb. Rev. Stat. § 71-1339 (1990).
30. Neb. Rev. Stat. § 71-605(5) (1989).
31. *Id.*
32. Neb. Rev. Stat. § 71-605(6) (1989).
33. *Id.*
34. See, Neb. Rev. Stat. § 71-1339(5) (1990). The vast majority of the Pawnee dead bodies disinterred and held by the NSHS were disinterred from Pawnee cemeteries after 1921. See letter from James Hanson to Walter Echo-Hawk, 26 August 1988 (available from NSHS and NARF).
35. 25A C. J. S., *supra* note 15, at 496. See also Jackson, *supra* note 17, at 101-122.
36. *McEntee v. Banacum*, 66 Neb. 651, 92 N. W. 633 (1902).
37. In fact, the earliest common law prosecutions against body snatchers explicitly rejected the "Dr. Frankenstein defense" that a "specimen" for dissection and anatomical studies motivated and justified the disinterment. See 21 ALR 2d, *Corpse and Removal*, § 3 *The English Background*, at 479 (1952).
38. Neb. Rev. Stat. § 71-1339 (1990).
39. Neb. Rev. Stat. § 71-1339(5) (1990); Neb. Rev. Stat. § 30-2303 (5) (1989). *Black's Law Dictionary* (5th ed., 1979) defines *next of kin* as follows: "In the law of descent and distribution, this term properly denotes the person's nearest of kindred to the deceased, that is, those who are most nearly related to him by blood; but it is sometimes construed to mean only those who are entitled to take under some statute of distribution, and sometimes to include other persons" (citation omitted).
40. *Charrier v. Bell*, 496 So.2d 601, 604 (La. App.) *cert. denied*, 498 So. 2d 753 (La., 1986). See also Op. Neb. Att'y Gen. (14 December 1988) (concluding that a court would recognize the Pawnee Tribe's right to represent families of deceased Pawnee ancestors not individually identified).
41. *Id.*
42. See Neb. Rev. Stat. §§ 30-2303, 30-2305 (1989).
43. *Traveler's Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936). (Relative who is beneficiary of life insurance policy of deceased may consent to delay of interment or disinterment for purpose of autopsy for promotion of truth and justice.)
44. *Id.* A wide variety of other common law causes of action are available to Indian tribes seeking the repatriation of their dead held by institutions such as the NSHS. Withholding a dead body from those with a right to burial gives rise to a cause of action in tort. See 25A C. J. S., *supra*, note 15, § 8(3) at 512. It is no defense that the withholding entity is a public, charitable institution or that disinterment without notice to relatives was done "in good faith." See *Howard v. Children's Hospital*, 37 Ohio App. 144, 174 N. E. 166 (1930); see also 25A C. J. S., *supra*, note 15, § 9 at 521. The next of kin may maintain damages actions based upon trespass and wrongful disinterment, even though the next of kin have no legal interest in the land containing the human remains. *Id.*, § 8(5) at 516.

Common law causes of action for breach of trust duties against institutions withholding the Indian dead from reburial also are available to tribes. These trust duties can be created in three different ways. First, one in possession of a dead body cannot "own" the body but merely holds the same "in trust" for those who have the right to possession for purposes of burial. Hence, the common law imposes a trust upon those in possession of dead bodies. That it may be a state who is the party in possession makes no difference, because the "public has a vital interest in the proper disposition of the bodies of its deceased members." § 5 at 507. *Id.* Commentators describe this trust as being "in the nature of a sacred trust for the benefit of all." *Id.*, § 3 at 491. Second, owners of lands containing graves may have technical possession of the burials, but they merely hold this possession under the common law as trustees for the rightful owners. If the landowner breached that trust duty by allowing the human remains or burial offerings of a tribe to be expropriated, and an institution reaped the benefit from such breach of trust, then equity deems that institution to be a "quasi trustee" accountable to the rightful owners. See Jackson, *supra*, note 17 at 142, 157. Third, in instances where institutions such as the NSHS wrongfully obtained or are in wrongful possession of dead Indian bodies or funerary objects in breach of a legal duty owed to the tribe or in violation of equity, then equity will create a "resulting trust" or a "constructive trust" in favor of the tribe. Failure to return such remains or burial offerings to the beneficiaries of the trust upon request may constitute an actionable breach of trust or repudiation of the trust.

45. *Ferguson v. Utilities Elkhorn Coal Co.*, 313 S. W. 2d 395 (Ky. 1958); *Louisville Cemetery Ass'n v. Downs*, 241 Ky. 773, 45 S. W. 2d 5 (1931).

46. See, e. g., *Block v. Har Nebo Cemetery Co.*, 14 Pa. D & C 237 (1930); *McDonald v. Butler*, 10 Ga. App. 845, 74 S.E. 573 (1912); *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 33 S. E. 853 (1899).

47. *Gardener v. Swan Point Cemetery*, 20 R. I. 646, 40 A. 871 (1898).

48. *Louisville Cemetery Ass'n v. Downs*, 241 Ky. 773, 45 S. W. 2d 5 (1931).

49. *Hamilton v. Individual Mausoleum Co.*, 149 Kan. 216, 86 P.2d 501 (1939); *North East Coal Co. v. Pickelsimer*, 253 Ky. 11, 68 S. W. 2d 760 (1934); *North East Coal Co. v. Delong*, 254 Ky. 22, 70 S. W. 2d 972 (1934); *Louisville Cemetery Ass'n v. Downs*, 241 Ky. 773, 45 S. W. 2d 5 (1931).

50. See Neb. Rev. Stat. § 71-1339 (5) (1990). This showing is required even if the withholding agency did not itself disinter the remains, because a state institution, as a donee or purchaser, can acquire no better right than the donor or seller could convey. See, e. g., Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N. Y. U. Rev. L. & Soc. Change 437, 441 n. 18 (1986) and accompanying text. Moreover, the law requires institutions in Nebraska, such as the NSHS, in possession of "any dead human body or the remains thereof" to make such a showing of proof to overcome N. R. S. § 28-1302 (1) (c) (1989), which makes such possession illegal in all but the most limited, enumerated circumstances. See also *State v. Schaffer*, 95 Iowa 379, 64 N. W. 2d 276 (1895). (Burden is on defendant to show he had lawful authority to disinter a dead body.)

51. The NSHS cited only one "source" to support its long-standing exhumation of Pawnee dead bodies—an erroneous, antiquated, one-half page, unsigned opinion of the Nebraska attorney general—issued in 1958—some twenty to thirty-five years after the NSHS had disinterred the vast majority of Pawnee bodies. See *Historical Newsletter*, Nebraska State Historical Society, February 1989. The 1958 opinion stated that "[t]he law appears to be well established that



the term 'dead human body' does not include remains that have long since decomposed, such as would be the case with the remains of Indians who inhabited Nebraska before the advent of the white settlers here." Op. Neb. Att'y Gen. (1958). The opinion concluded that it therefore was lawful for the NSHS to exhume "the skeletal remains of ancient Indians" without obtaining permission from any public official. Id. However, "well established law" holds that "dead human body" includes any "visible and identifiable portion of a human body," including "bones or pieces and particles of bones" that exist in a condition where they are distinguishable from the soil in which they were placed, i. e., which are not "decomposed." See letter from Robert Peregoy to Frederick Wefso, 18 November 1988, pp. 4-8 (available from NARF and the NSHS). The irony, if not the absurdity, of the 1958 opinion on which the NSHS relied rests with the fact that the state agency withheld the Pawnee skeletal remains from reburial in order to prevent decomposition in the first place. Further, the NSHS continued to base its refusal to repatriate the Pawnee dead bodies on this erroneous, *post hoc* opinion despite the fact that, in 1989, the Nebraska attorney general issued an opinion concluding that the Pawnee Tribe had a superior legal right to repatriation and reburial of dead Pawnee ancestors held by the NSHS. See Op. Neb. Att'y Gen. (14 December 1988) (Spire to White Shirt).

52. See article by Orlan Svingen in this volume.

53. For example, nothing, in the plain language of Neb. Rev. Stat. § 82-101 (1987), originally enacted in 1883, can be construed to grant the Nebraska State Historical Society authority to exhume dead bodies in any manner, especially when done in violation of common law or of Neb. Rev. Stat. §§ 71-605(5)-(6) (1989), 71-1339 (1990), and 28-1301 (1989). The 1883 statute that made the NSHS a state agency provides that the NSHS museum is to be used for "the preservation, care and exhibition of documents, books, newspapers, weapons, tools, pictures, relics, scientific specimens, farm and factory products, and all other collections pertaining to the history of the world, particular to that of Nebraska and the West." The terms *preservation, care, and exhibition* do not include exhumation or disinterment. Nor do any of the objects specified expressly include dead bodies or portions thereof, or grave goods that may have been removed by illegal or dubious means. Nor does Neb. Rev. Stat. § 39-1363 (1987), enacted in 1959, confer any express right on the NSHS to exhume or retain dead human bodies. It merely authorizes state agencies to enter into agreements with the Nebraska Department of Roads to remove and preserve "historical, archaeological, and paleontological remains" disturbed during highway construction projects after 1959. Because the statute does not expressly authorize the removal of dead bodies, it cannot be facially construed as authorizing the removal or preservation thereof. The American common law, which strongly disfavors such activity, was well established in the United States when these statutes were enacted. Any significant departures from the moral sensibilities protected by the common law would have to have been expressly stated by the legislature before any such intent could be imputed to that body. Importantly, the society may own or dispose of property only "with the consent of the Legislature." Neb. Rev. Stat. § 82-101 (1987). The Nebraska legislature subsequently vested the right of disposition of human remains to other persons with an enumerated statutory preference. Neb. Rev. Stat. § 71-1339 (1990). Hence, even assuming *arguendo* that intent can somehow be imputed to the legislature to consent to the acquisition and possession of dead bodies by the NSHS in 1883, such consent was revoked in 1954 with the enactment of Neb. Rev. Stat. § 71-1339 (1990).

54. Aside from these considerations, where a state agency seeks permanently to retain the bodies of dead persons from burial, problems of lawful storage immediately arise under other provisions of Nebraska statutory law. Neb. Rev. Stat. § 12-606 (1987) appears to prohibit the retention of dead bodies in public structures except "within the confines of an established cemetery." See also Neb. Rev. Stat. §§ 12-607-12-618 (1987). (Other statutory requirements must be met before above-the-ground structures may be used to contain the body of any dead person.)

55. *Charrier v. Bell*, No. 5,552, slip op. (20th Jud. Dist., La. 18 March 1985), *aff'd* 496 So. 2d 601, 605-604 (La. App. Civ. 1 1986), *cert. denied*, 498 So. 2d 753 (1986); *Busler v. State*, 184 S. W. 2d 24 (Tenn. 1944) (even if a coffin may have become part of the realty, it becomes the personal property of heirs of deceased when removed and may be the subject matter of larceny); *Ware v. State*, 121 S. E. 251 (Ga. App. 1924); *Maddox v. State*, 121 S. E. 251 (Ga. App. 1924); *State v. Doepke*, 68 Mo. 208 (1878) (coffin and burial offerings are property of the person who buried the deceased); *Tennant v. Boudreau*, 6 Rob. 488 (La. 1844) (jewels removed from tomb by thief convicted of larceny belong to heir of deceased for whatever disposition desired); *Wonson v. Sayward*, 13 Pick. 402 (Mass. 1832).

56. See *Charrier v. Bell*, *supra*, 496 So.2d at 604 (La. App. Civ. 1 1986).

57. *Busler v. State*, 184 S. W. 2d 24 (Tenn. 1944).

58. *Id.*

59. *Charrier v. Bell*, no. 5,552 slip op. at 11-13 (20th Jud. Dist. La. Mar. 18, 1985), *aff'd* 496 So. 2d 601 (La. App. Civ. 1 1986), *cert. denied*, 498 So. 2d 753 (1986).

60. See *Rice v. Sioux City Cemetery*, 349 U. S. 70, 80 (1955) (Black, J., dissenting); see also *Washington v. Davis*, 426 U. S. 229 (1976); *Regents v. Baake*, 438 U. S. 265 (1978). Further, the Ninth Amendment may also be pertinent, since the disputes affect deeply ingrained and universally held values and rights regarding the sanctity of the dead. The Ninth Amendment to the United States Constitution provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

61. See *Rice*, *supra*, 349 U. S. at 80 (Black, J., dissenting) (deceased Winnebago Indian denied sepulcher in all-white cemetery pursuant to racially restrictive covenant; equal protection issue not decided as a result of intervening state law banning such restrictive covenant).

62. See *Charrier v. Bell*, 496 S. 2d 601, 605 (La. App. Civ. 1 1986), *cert. denied*, 498 So. 2d 753 (La. 1986) and discussion, *supra*.

63. See, e. g., *Fuller v. Marx*, 724 F. 2d 717 (8th Cir. 1984); Walter Echo-Hawk, "Tribal Efforts to Protect Against Mistreatment of the Dead: The Quest for Equal Protection of the Laws," *Native American Rights Fund Legal Review* 3 (1988): 14.

64. See article by Roger Echo-Hawk in this volume.

65. Op. Neb. Att'y Gen. at 8-9 (14 December 1988) (Spire to White Shirt).

66. In *Employment Division v. Smith*, the Supreme Court ruled that the compelling state interest test is no longer applicable where a general, religion-neutral law burdens the free exercise of religion of a particular group. *Id.* at 890-92. However, the Pawnee repatriation matter did not involve a facially neutral rule of general applicability. Rather, the administrative policy or regulation promulgated by the NSHS, an agency of state government, was expressly limited to prohibiting the repatriation and reburial of hundreds of Pawnee dead and their burial offerings. See Minutes, Nebraska State Historical Society Executive Board, 17 December 1988, 2. Thus, the Pawnee fact situation falls outside the scope of the holdings of *Employment Division v. Smith* and its progeny. The

constitutional protections guaranteed to the Pawnee people by the Bill of Rights survive that line of decisions. See, e. g., *Hunafa v. Murphy*, 907 F. 2d 46, 48 (7th Cir. 1990) (practice of serving pork to inmates is equivalent to a general, secular regulation applicable to all inmates and does not violate First Amendment rights, even if offensive to Jews and Muslims); *Yang v. Sturmer*, 750 F. Supp. 558, 559 (D. R. I. 1990) (autopsy conducted by state's chief medical examiner pursuant to facially neutral autopsy statute of general applicability held under *Smith* not to violate First Amendment rights of decedent's family, even though the autopsy was offensive to their religious beliefs).

67. See *Employment Division v. Smith*, 494 U. S. \_\_\_, 108 L. Ed. 2d at 893 (1990); *Lyng v. N. W. Indian Cemetery Protection Assoc.*, 485 U. S. 439, 452 (1988).

68. In addition to these constitutional protections, federal statutory law may protect the interests and rights of Indian tribes in repatriation disputes. Title 6 of the Civil Rights Act, 42 U. S. C. § 2000d (1964), forbids racial discrimination or denial of benefits by any federally funded program. Further, 18 U. S. C. § 1163 (1956) prohibits theft, conversion, or possession of "any . . . property belonging to any Indian tribal organization." A federal cause of action to redress deprivation of federally protected rights under color of state law, custom, or usage is also available under 42 U. S. C. § 1983 (1979).

69. *United States v. Winans*, 198 U. S. 371, 381 (1905).

70. *Id.*

71. *United States v. Michigan*, 471 F. Supp. 192, 254 (W. D. Mich. 1979), stay denied, 505 F. Supp. 467, 623 F. 2d 448, 89 F. R. D. 307, 653 F. 2d 277, 520 F. Supp. 207 (W. D. Mich. 1981), *cert. denied*, 454 U. S. 1124 (1981).

72. See *Choctaw Nation v. Oklahoma*, 397 U. S. 620, 621 (1970).

73. *Kimball v. Callahan*, 493 F. 2d 564, 566 n. 7 (9th Cir. 1974).

74. See, e. g., *Treaty*, 9 October 1833, U. S.-Pawnee Tribe, 7 Stat. 488.

75. See article by Roger Echo-Hawk in this volume.

76. See *United States v. Oneida Nation of New York*, 576 F. 2d 870 (N. Y. Ct. Cl. 1978).

77. See F. Cohen, "Limitations on Federal Power," in *Handbook on Federal Indian Law* (Charlottesville, VA: Michie Bobbs-Merrill, 1982), 217-28.

78. *United States v. Michigan*, 471 F. Supp. 192, 265 (W. D. Mich.), *cert. denied*, 454 U. S. 1124 (1981).

79. *Id.*

80. *Id.*

81. See, e. g., *United States v. Quiver*, 241 U. S. 605, 606 (1916).

82. See, e. g., *id.*

83. *United States v. Quiver*, 241 U. S. at 605, 606 (1910).

84. See discussion, in section entitled "The Battle Lines of the Classic Cross-Cultural Conflict," in this article.

85. See *Mexican v. Circle Bear*, 370 N. W. 2d 737 (S. D. 1985). (Under principles of federal Indian law, state court granted comity to tribal court order disposing of the body of dead Indian, although relevant state and tribal law differed.)

86. *Lincoln Star*, 18 November 1971; see also *Chronology of Events Leading to the Introduction of LB 340*, March 1989 (hereinafter *LB 340 Chronology*) (available from NARF).

87. See *LB 340 Chronology*, 1.

88. *Id.* Tribal representatives primarily responsible for organizing and launching the Nebraska reburial movement and for drafting and advancing LB

612 included attorney James Botsford; Louis LaRose, chairman of the Winnebago Tribe of Nebraska; Dennis Hastings, historian of the Omaha Tribe; and Reba White Shirt, executive director of the Nebraska Indian Commission. These leaders were subsequently joined by Daniel Denney, chairman of the Santee Sioux Tribe of Nebraska.

89. LB 612, 90th Neb. Legis., 1st sess. (1987).

90. See Nebraska Legislative Council, *The Nebraska State Historical Society-Interim Study LR 409 Final Report*, 17–18 (1988) (hereafter *LR 409 Final Report on NSHS*).

91. Fred Thomas, "Hanson Blasts Bill on Indian Burial Sites," *Omaha-World Herald*, 10 February 1988.

92. *Id.*

93. Throughout this process, the society received favorable press coverage from the *Omaha-World Herald*, whose publisher was then a member of the executive board of the NSHS. In addition to favorable news articles, the *World-Herald* printed at least one editorial in opposition to LB 612, charging that it would be "crazy" to repatriate burial offerings. See "Graves Protection Proposal Raises Legitimate Concern," *Omaha-World Herald*, editorial, 9 March 1988. Reflecting NSHS treatment of the tribes, the editorial focused solely on the interests of science and history in retaining Pawnee burial offerings, while completely ignoring the cultural and religious interests of the tribes in reburying their dead. See also Fred Thomas, "Hanson Blasts Bill on Indian Burial Sites," *Omaha-World Herald*, 10 February 1988; Fred Thomas, "Society Head's Opposition to Bill Called Proper," *Omaha World-Herald*, 9 March 1988.

94. Letter from James A. Hanson, director, Nebraska State Historical Society, to society members, 2 February 1988 (available from the NSHS). Reba White Shirt, executive director of the Nebraska Indian Commission, labeled such tactics "alarmist and unfounded." Nebraska senator Ernie Chambers charged that "Mr. Hanson is being dishonest in much of his wild, misleading exhalations." See Thomas, "Society Head's Opposition to Bill Called Proper." NSHS executive board member Roger Welsch, then a professor at the University of Nebraska, charged that opponents to the bill were being "hysterical." See J. L. Schmidt, "Opponents of grave-protection bill labeled hysterical by its supporters," *Lincoln Journal*, 15 February 1988. These unfounded scare tactics ultimately caused many people to refer to the NSHS as the "Nebraska State Hysterical Society." See, e. g., Paul Fell, "Two Famous Indian Fighters Finally Meet," *Lincoln Journal*, 30 July 1991 (editorial cartoon).

95. See Schmidt, "Opponents of grave-protection bill labeled hysterical," *supra*.

96. Among the NSHS membership are doctors, lawyers, judges, professors, bankers, newspaper publishers, state senators, and members of Congress.

97. See, e. g., files of Senator Dennis Baack, chairman of the Government, Military and Veterans' Affairs Committee, Ninetieth Nebraska Legislature, (1987–8).

98. See LR 409 Final Report on NSHS, *supra*, note 90, 18.

99. Roger Welsh, a professor at the University of Nebraska and a former NSHS executive board member who supported the reburial initiatives of the tribes, stated, "[A]n enormous, expensive campaign has been launched against [LB 612], primarily by the 'diggers'—the very people who got us in this mess to begin with." See Schmidt, "Opponents of grave-protection bill labeled hysterical," *supra*, note 94

100. During the LB 612 controversy throughout 1987 and early 1988, the NSHS represented to Nebraska tribal representatives that the only identifiable tribal remains it held were Pawnee. The NSHS director accordingly chided the Nebraska tribes for having no interest or standing before the NSHS. Telephone interview with James Botsford, Esq., attorney representing the Winnebago Tribe of Nebraska (13 August 1991). In response, Nebraska tribal representatives contacted the Pawnee Tribe to inform its governing officials that the NSHS had custody of an untold number of deceased Pawnee individuals and their burial offerings. *Id.* At this juncture, the Pawnee Tribe entered the controversy and began to seek the return and reburial of Pawnee relatives or ancestors held by the NSHS.

101. The issue of unmarked burials protection was not in controversy, because the NSHS and other archaeologists had ceased proactive digging of Indian graves sometime in the late 1960s or early 1970s. Apparently, after that time the NSHS became involved with digging Indian graves only in conjunction with state highway construction projects where Indian burial grounds were inadvertently disturbed.

102. The Pawnee Tribe was the logical tribal party to lead the negotiations with the NSHS, because the NSHS claimed that the only identifiable dead bodies in its collection were Pawnee. Thus, a genuine, ripe controversy existed in the repatriation context between the Pawnee Tribe of Oklahoma and the NSHS.

103. See LB 340 Chronology, 1.

104. See, e. g., Al Laukaitis, "Decision delayed on Indian remains," *Lincoln Star-Journal*, 9 October 1988; see also Minutes, Nebraska State Historical Society Executive Board Meeting, 8 October 1988, 1–2 (available from the NSHS).

105. A brief comparative analysis of LB 691 and LB 340 reveals that LB 691, the NSHS staff bill, provided for little or no tribal role in the decision-making process regarding the disposition of human skeletal remains and burial offerings. See LB 691, §§ 2 and 3, 91st Neb. Leg., 1st sess. (1989). Instead, it conferred near absolute power on the NSHS to make such decisions, requiring the NSHS to "consult" with tribes only when such consultation was "possible." *Id.*, § 2. In stark contrast, LB 340 provided a significant role for tribes in determining the disposition of Indian remains and burial offerings. Further, LB 340 proposed more stringent protections of unmarked burials, including the confiscation of equipment used by persons convicted of robbing unmarked graves. Finally, LB 340 established a policy requiring equal treatment of the dead—a key provision absent from the unsuccessful LB 619. *Id.*, § 3.

106. Minutes, Nebraska State Historical Society Executive Board Meeting, 17 December 1988, 2 (available from the NSHS).

107. See, e. g., "Committee Kills Burial Site Measure," *Omaha World-Herald*, 17 March 1989.

108. At the outset of the Pawnee negotiations with the NSHS in March 1988, the tribe did not know how many Pawnee dead bodies or burial offerings the NSHS held. Apparently, neither did the NSHS. Executive director Hanson had initially claimed that the NSHS possessed the skeletal remains of approximately five hundred deceased Native American individuals, one hundred of whom were identifiable as Pawnee and the rest unidentifiable as to tribe. See Fred Thomas, "Indian Tribes Request Remains for Reburial," *Omaha World-Herald*, 26 March 1988; see also letter from James A. Hanson to Walter Echo-Hawk, 26 August 1988 (available from the NSHS). However, tribal research discovered that the NSHS retained in excess of five hundred Pawnee dead bodies.

109. See letter from Lawrence Goodfox, Jr. to Walter Huber, president of the NSHS executive board, 23 June 1988, 5 (available from NARF and the NSHS).

110. See article by Roger Echo-Hawk in this volume; letters from Lawrence Goodfox, Jr. to NSHS executive board (23 March, 23 June 1988); letter from Robert Perego to Walter Huber (6 July 1988) (available from NARF).

111. See "Legal Memorandum in Support of the Pawnee Tribe's Request for the Return of Pawnee Decedents and Associated Burial Goods Expropriated, Procured and Controlled by the Nebraska State Historical Society," from Walter Echo-Hawk and Robert M. Perego, attorneys for the Pawnee Tribe of Oklahoma, to Walter Huber, president, Nebraska State Historical Society, and NSHS board members, 30 September 1988 (hereafter "Legal Memorandum of the Pawnee Tribe") (available from NARF and NSHS). The legal authority delineated in the 1988 memorandum is summarized in this article.

112. See Minutes, NSHS Executive Board Meeting, 24 June 1988, 1 (available from NSHS).

113. The scientist was Douglas Owsley, an osteologist. The NSHS had entered into an agreement with Dr. Owsley in 1984 to study Pawnee remains in the custody of the NSHS. During 1988–90 the NSHS transferred the Pawnee skeletal remains to the Smithsonian Institution under the study of Dr. Owsley. Against the Pawnee Tribe's stated wishes, his study included destructive analyses of the Pawnee remains.

114. See letter from Robert Perego to Walter Huber, 6 July 1988, 16–17.

115. *Petition to Review Records Being Withheld by the Nebraska State Historical Society from Inspection by the Pawnee and Winnebago Tribes Pursuant to R. S. N. Sec. 84-712.03(2)*, 23 September 1988 (available from NARF). The cited provision of the public records law provides for several remedies available to an aggrieved party. Under the law, an aggrieved party may either file suit or petition the attorney general to review and act on the grievance. The Pawnee Tribe elected the latter remedy, in part to avoid costly, protracted litigation. Hanson evinced his reluctance to disclose NSHS burial records to Indian representatives prior to the public records controversy with the Pawnee Tribe. On 29 February 1988, he stated to Reba White Shirt, executive director of the Nebraska Indian Commission—a sister state agency—that his reluctance was based on the fact that the Indian Commission "is supporting legislation which would confiscate [NSHS] collection material, while this agency opposes it." See letter from James Hanson, director, NSHS, to Reba White Shirt, director, Nebraska Indian Commission (29 February 1988) (on file with author).

116. Letter from attorney general Robert Spire and assistant attorney general Charles Lowe to Walter Echo-Hawk and Robert Perego with copy to James Hanson, 6 October 1988 (available from NARF).

117. See Minutes, NSHS Executive Board Meeting, 8 October 1988, 3 (available from the NSHS).

118. See David Swartzlander, "Indian leaders get access to records," *Lincoln Journal*, 7 October 1988; letter from Robert Perego to Attorney General Spire, 12 October 1988 (available from NARF).

119. Letter from attorney general Robert Spire and assistant attorney general Charles Lowe to Robert M. Perego, 21 October 1988, 1 (available from NARF). The specific information that the executive director attempted to withhold concerned archaeological site files that describe the exact location of Pawnee burial grounds in the state. Hanson withheld the information and later demanded confidential treatment, alleging that he was concerned that public access

"would have devastating effects on the security of the collections and of archeological materials *in situ*." See Spire and Lowe letter, *supra*, 6 October 1988, note 116 (emphasis in original). The Pawnee Tribe subsequently learned that the NSHS had published numerous studies over the years that describe the precise location of virtually all known Pawnee burial grounds in the state. Most of these publications have been available in public libraries for years. The author has chosen not to cite these studies in the interest of protecting the security of the sites.

120. Thus, the NSHS director reversed his earlier, unsubstantiated claim that the NSHS "owns or has title to all of the human skeletal remains in its possession." See letter from James Hanson to Walter Echo-Hawk, 26 August 1988, 3.

121. See David Swartzlander, "Rule cited in reburial case doesn't exist," *Lincoln Journal*, 26 October 1988; letter from Robert Peregoy to Frederick Wefso, president, Nebraska State Historical Society, 13 October 1988, 2-6 (available from NARF and the NSHS); Fred Thomas, "Argument on Skeletons May Flare," *Omaha World-Herald*, 3 October 1988.

122. See letter from Robert Peregoy to Frederick Wefso, president, NSHS executive board, 13 October 1988, 2-6. Tribal research revealed that the NSHS executive director's "legal cite" was apparently based on a rule that was *proposed* by the National Park Service in 1977 but was never promulgated into law and therefore was void and of no effect. *Id.*, 3 (citing 42 Fed. Reg. 1977, pp. 5375-85). The proposed rule read by Hanson to the executive board at the October 1988 meeting provided that "[d]ata recovered from lands not under the control or jurisdiction of a federal agency but as a condition of a federal license, permit or other entitlement are recovered on behalf of the people of the United States and thus are the properties of the United States government." *Id.*

123. See AlLaukaitis, "Decision delayed on Indian remains," *Lincoln Journal-Star*, 9 October 1988.

124. See Swartzlander, "Rule cited in reburial case."

125. See Thomas, "Argument on Skeletons May Flare."

126. See Thomas, "Indians Hire Lobbyists in Bid for Items," *Omaha World-Herald*, 16 November 1988; Thomas, "Foes Prepare Arguments in Burial-Goods Dispute," *Omaha World-Herald*, 13 December 1988; see also letter from Bennie Keel, departmental consulting archaeologist, National Park Service, to James Hanson, 16 November 1988 (available from the National Park Service and NSHS); letter from Walter Echo-Hawk to F. A. Calabrese, Midwest Archaeological Center, National Park Service, 28 November 1988 (available from NARF); letter from Walter Echo-Hawk to Bennie Keel, 29 November 1988 (available from NARF and the National Park Service). The NSHS director also sought the support of the Smithsonian Institution in his efforts to block Pawnee reburial. See letter from James Hanson to Lauryn Guttenplan Grant, assistant general counsel, Smithsonian Institution, 13 January 1989 (available from the NSHS). However, the Smithsonian Institution refused involvement in the dispute. See letter from Lauryn Guttenplan Grant to James Hanson, 23 March 1989 (available from the NSHS).

127. Telephone conference between F. A. Calabrese and Robert M. Peregoy, 16 November 1988 (*Statement of F. A. Calabrese*); personal conference between attorneys for the Pawnee Tribe, Robert M. Peregoy and Walter Echo-Hawk, together with attorney James Botsford and F. A. Calabrese, held at the Midwest Archaeological Center, Lincoln, Nebraska, 17 November 1988. See also letter from Walter Echo-Hawk to F. A. Calabrese, 28 November 1988 (available from the National Park Service and NARF).

128. *Id.*

129. See *Additional Legal Authorities in Support of the Proposed Repatriation Policy and Request of the Pawnee Tribe*, October 1988 (citing Antiquities Act, 16 U. S. C. §§ 431, 433) (available from NARF); letter from Robert Peregoy to Frederick Wefso, 14 November 1988, 1–3 (available from NARF or the NSHS). Specifically, tribal attorneys pointed out that the NSHS executive director had admitted several months earlier that the Pawnee dead bodies and burial offerings held by the agency were disinterred from private or state lands. See letter from James Hanson to Walter Echo-Hawk, 26 August 1988, 2 (available from NARF and the NSHS). Accordingly, the tribe asserted that the Antiquities Act did not provide any basis for the federal government's threatened "ownership" claim, because the federal law is expressly limited to regulating "archaeological resources" acquired exclusively from federal lands. The Native American Graves Protection and Repatriation Act, 25 U. S. C. § 3005 (1990), forecloses any such future threat by the NPS or any other federal agency.

130. See letter from F. A. Calabrese, NPS, to Walter Echo-Hawk, 5 December 1988 (available from the NPS and NARF).

131. See letter from Bennie Keel, NPS, to James Hanson, 16 November 1988 (available from NARF and the NSHS).

132. *Id.*

133. See, e. g., letter from Robert Peregoy to Frederick Wefso, 15 December 1988, 3–6 (citing *United States v. City of Columbus*, 54 F. Supp 37, 40 (D. N. D. 1943)) (holding that the federal government has no legal interest in or control over WPA projects once they are completed and turned over to the sponsoring entity).

134. A special meeting of the NSHS executive board scheduled for mid-November 1988 was canceled when the NPS intervened in the dispute, alleging that the federal government "may" have an "interest" in the Pawnee skeletal remains and burial offerings.

135. Letter from Robert Spire, attorney general of Nebraska, to Reba White Shirt, executive director, Nebraska Indian Commission, 14 December 1988, 9–10 (available from NARF).

136. See Minutes, Nebraska State Historical Society Executive Board Meeting, 17 December 1988, 1–2 (available from the NSHS). This action *sub silentio* constituted a rejection of the policy proposed by the tribes. Not surprisingly, the negative vote was based in large part on the advice of the NSHS director that the federal government "owned" the Pawnee collection and that federal "officials are standing by their opinion that the society cannot release skeletal remains or artifacts since [the NSHS] agreed to preserve them as a condition of receiving federal funds." *Id.* During the meeting, the NSHS board did vote to return a limited number of Pawnee remains and burial offerings, subject to certain conditions. The Pawnee Tribe had previously rejected these conditions as arbitrary and repugnant to tribal traditions and religious beliefs. See letter from Walter Echo-Hawk to Frederick C. Luebke, NSHS board member, 2 December 1988 (available from NARF and the NSHS). The Pawnee Tribe rejected the NSHS proposal on the basis that the NSHS (1) refused to repatriate any burial offerings; (2) would not repatriate any of the hundreds of deceased Pawnees who lived before the year 1750 A. D.; and (3) demanded that all repatriated dead bodies be placed in a waterproof burial vault that would prevent decomposition. This latter demand was particularly repugnant to tribal religious and mortuary practices, because it would allow for future disturbances of the deceased and would preclude the deceased from going from "dust to dust" as required by tribal



practices. Id.

137. See Fred Thomas, "Foes Prepare Arguments in Burial-Goods Dispute," *Omaha World-Herald*, 13 December 1988; see Minutes, Nebraska State Historical Society Executive Board Meeting, 17 December 1988, 1 (available from the NSHS).

138. See letter from Ross O. Swimmer, assistant secretary of the Department of the Interior, to Walter Echo-Hawk, 20 December 1988 (available from NARF).

139. See letter from Walter Echo-Hawk to Frederick Wefso, 3 January 1989 (available from NARF and the NSHS).

140. See David Swartzlander, "Society asked to reconsider action on remains," *Lincoln Journal*, 5 January 1989.

141. The Pawnee and Nebraska tribes conducted an intensive lobbying effort in the Nebraska legislature's 1989 session in an effort to enlighten senators as to the religious practices and human rights vindicated through the grave protection and repatriation legislation. As a key part of this effort, NARF, on behalf of the Pawnee and Winnebago tribes, disseminated a comprehensive briefing document on LB 340, which outlined the legal, cultural, moral, and scientific bases of the legislation and provided a brief background on Pawnee religious beliefs and disinterments by the NSHS. See "Briefing Document: LB 340—Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act," Native American Rights Fund, January 1989 (available from NARF). In addition to this comprehensive document, tribal lobbyists furnished senators with numerous analyses of hostile amendments proposed by senators opposing LB 340.

142. Senator James Pappas, the sponsor of the reburial legislation (LB 612) in the two previous sessions of the legislature, lost his 1988 bid for reelection. Senator Chambers also introduced a bill, LB 151, in the 1989 legislature to reorganize the NSHS to bring the agency and its executive director under the direct control of the governor. As currently organized, the NSHS executive board, largely elected by the NSHS membership, has hiring and firing authority over the executive director. LB 151 was designed to statutorily impose accountability on the state agency, particularly in light of NSHS mistreatment of the tribes throughout the repatriation controversy. LB 151 was killed in committee. See transcripts of hearing on LB 151, 91st Neb. Leg., 1st sess. (1989, 1–83. Notwithstanding, key senators are committed to the prospective enactment of such a measure.

143. See transcripts of hearing on LB 340, Government, Military and Veterans' Affairs Committee, 91st Neb. Leg., 1st sess. (25 January 1989), 83–190.

144. See Neb. Rev. Stat. § 12-1204(1) (Supp. 1990). Funerary objects outside the statutory definition of burial goods include those removed from burials without the dead bodies and those with no documentation or other reasonable means to trace to the skeletal remains. The tribal governments reluctantly agreed to this restrictive statutory definition of *burial goods*, recognizing that various common law causes of action remained available to tribes seeking the return of tribally identifiable funerary objects outside the scope of the act. See discussion, *supra*, regarding *Charrier v. Bell*, pp. 8–9.

145. See "Historical Society chief backs bill to return Indian remains," *Lincoln Star*, 31 January 1989. The NSHS executive director made his promise in front of the media immediately following a two-hour negotiation session with Senator Baack and Robert Peregoy, representing the Pawnee Tribe. Committee chairman Baack called the meeting to craft an agreement to eliminate "blood-

shed" on the legislative floor. After this meeting, the bill was sent to the floor of the legislature. In addition to this meeting, the speaker of the legislature, Senator William Barrett, now a member of Congress, subsequently held two lengthy sessions attended by key senators and NSHS and tribal representatives for the same purpose.

146. Martha Stoddard, "Historical Society board backs LB 340 if amended," *Lincoln Journal*, 4 February 1989. The policy-making body of the state agency sought to include the following additional conditions in amendments to LB 340: (1) the allowance of three years' study time for all collections to be returned for reburial, rather than one year; (2) a requirement that reburial take place in Nebraska; (3) a provision that museums not be restricted in what they exhibit or how they label exhibits; and (4) the establishment of a committee for dispute resolution purposes. *Id.*

147. See Ed Howard, J. L. Schmidt, "Hanson 'reneged' on remains bill," *Lincoln Journal*, 7 February 1989.

148. Floor debate on LB 340, 91st Neb. Leg., 1st sess., 2862-63 (daily ed., 27 March 1989) (statement of Senator Baack).

149. "Most Favored Giving Remains to Tribes," *Omaha World Herald*, 16 February 1989. The poll indicated only 19 percent of those polled were opposed to such repatriation, while 11 percent were undecided.

150. Interview with James Hanson by radio station KFOR, "Lincoln Live," 20 January 1989, Lincoln, Nebraska (transcripts and tape available from NARF).

151. *Id.*

152. See Thomas, "Tribal Lawyer Criticizes Board President," *Omaha World-Herald*, 11 January 1989. To counter this self-serving misinformation, the Pawnee Tribe held a press conference with tribal chairman Lawrence Goodfox, Jr. to publicly dispel these myths. See John Share, "Pawnee Leader Says Burial Goods Wouldn't Be Sold," *Omaha World-Herald*, 22 February 1989.

153. See Vicki Quade, "Who Owns the Past?" *Barrister* (Spring 1990): 30.

154. See Thomas, "3 Medals Are Part of Burial Site Controversy," *Omaha World-Herald*, 22 February 1989.

155. See Thomas, "3 Medals"; Share, "Warner: Give up Bones, Nothing Else," *Omaha World-Herald*, 11 February 1989. In 1990, the NSHS purchased a comparable copy of the George III peace medal disinterred from a Pawnee burial. LB 340 opponents alleged during the 1989 legislative session that this type of medal was worth up to \$1 million. The 1990 purchase price of the second medal was under \$4,000. See, e. g., "Not only does peace medal exist—it has a twin," *Lincoln Star*, 11 September 1990. See also "Pawnees to get George III medal back," *Lincoln Journal-Star*, 2 November 1991.

156. See Thomas, "Hanson Says Bill Should Exclude Non-Tribal Items," *Omaha World-Herald*, 11 February 1989.

157. See Thomas, "3 Medals Are Part of Burial Sites Controversy." The NSHS ultimately refused to return the George III medal to the Pawnee Tribe after LB 340 was enacted into law on the basis, in part, of attempting to impeach the accuracy of its own burial recordkeeping system. See discussion, *infra*.

158. Floor debate on LB 340, *supra*, note 148, 1700-1701 (daily ed., 1 March 1988) (statement of Senator Chambers).

159. Floor debate on LB 340, *supra*, note 148, 2866 (daily ed., 27 March 1989) (statement of Senator Baack).

160. The third round vote was 30-16 to enact LB 340 into law. See floor debate on LB 340, *supra*, note 148, 7402 (daily ed. 19 May 1989). A simple majority of

twenty-five votes of the forty-nine senators is required on each of three separate votes to pass a bill in the nation's only unicameral legislature. Accordingly, LB 340 passed by a comfortable margin.

161. Throughout the LB 340 process, the tribes garnered the support of many non-Indian individuals, religious groups, and political, educational, and human rights organizations. This broad-based support was crucial in the enactment of LB 340 into law.

162. Neb. Rev. Stat. §§ 12-1201 through 12-1212 (Supp. 1990); Neb. Rev. Stat. § 28-1301 (Supp. 1990).

163. Neb. Rev. Stat. § 12-1203(1) (Supp. 1990).

164. See Neb. Rev. Stat. §§ 12-1209 - 12-1211 (Supp. 1990).

165. See Neb. Rev. Stat. §§ 12-1205 - 12-1208 (Supp. 1990).

166. Neb. Rev. Stat. § 12-1209 (Supp. 1990). Although § 12-1209 facially requires repatriation to a qualifying Indian tribe, Nebraska's public counsel interpreted the intent of the legislature to require repatriation to multiple tribes where such human remains and burial offerings can be linked to more than one tribe but not to one alone. See "Arbitration Award in the Matter of the Pawnee Tribe of Oklahoma, et al., and the Nebraska State Historical Society," Office of the Public Counsel/Ombudsman, state of Nebraska, 12 March 1991, 52-53 (hereafter "First Arbitration Award") (available from NARF). Thus, the act contemplates the possibility of joint claims by two or more Indian tribes in order to repatriate the skeletal remains and burial offerings of common ancestors. The term *Indian tribe* is defined as "any federally recognized or state-recognized Indian tribe, band or community." Neb. Rev. Stat. § 12-1204(4) (Supp. 1990). The repatriation provisions of the act focus on the return and reburial of dead Indian bodies and associated burial offerings held by Nebraska institutions, precisely because such entities never targeted the dead of other races on a systematic, massive scale for exhumation, curation, study, or display.

167. See floor debate on LB 340, *supra*, note 148, 1706-1707 (daily ed., 1 March 1989) (statement of Senator Landis). The one-year study period was also included to enable institutions such as the NSHS to "duplicate" burial offerings deemed important to history and education prior to reburial.

168. The legislature considered the fact that the NSHS had retained possession of the Pawnee dead bodies and burial offerings at issue for at least fifty years when it provided for a one-year study period. *Id.*, 2862.

169. Neb. Rev. Stat. § 12-1204(6) (Supp. 1990).

170. This provision was unanimously adopted by the legislature as a floor amendment to LB 340 in order to clarify the extent of human skeletal remains and burial offerings subject to repatriation and reburial under the act. See floor debate on LB 340, *supra*, note 148, 2815-16 (daily ed., 23 March 1989) (statement of Senator Bernard-Stevens). Thus, it removed any question that repatriation was limited to "historic" skeletal remains and burial offerings dating from 1700 A. D. in Nebraska, as was the understanding of one senator three weeks prior to the adoption of the clarifying amendment. *Id.*, 1698. See also, "First Arbitration Award," *supra*, note 166, 31-61.

171. See, e. g., article by Roger Echo-Hawk, in this volume.

172. Neb. Rev. Stat. § 12-1204(1) (Supp. 1990).

173. See floor debate of LB 340, *supra*, note 148, 1695-97 (daily ed., 1 March 1990).

174. *Id.*

175. *Id.*

176. *Id.* See "First Arbitration Award," *supra*, note 166, 19–27, 61.

177. Funerary objects that fall outside the statutory definition of *burial goods* include those that were disinterred from burials where the dead bodies were not removed from the graves or where there is no documentation or other reasonable means to trace such burial offerings to the specific human skeletal remains with which they were originally buried. In the original version of LB 340, all funerary objects that were identifiable to a specific Indian tribe or tribes were defined as burial goods subject to reburial. However, in order to move the bill out of committee to the floor, it was necessary for the tribes to compromise and support a committee amendment that restricted the statutory scope of *burial goods*. See floor debate on LB 340, *supra*, note 148, 1966–98 (daily ed., 1 March 1989). Notwithstanding this restricted statutory definition, various causes of action under the common law remain available to Indian tribes seeking the repatriation of tribally identifiable burial offerings that fall outside the scope of the act. Moreover, the 1990 federal Native American Graves Protection and Repatriation Act requires museums receiving federal funds, such as the NSHS, to return such "unassociated" tribally identifiable burial offerings to requesting Indian tribes that establish cultural affiliation by a preponderance of the evidence. See 25 U. S. C. § 3005(a)(4) (1990).

178. Neb. Rev. Stat. § 12-1210 (Supp. 1990).

179. *Id.* The legislature enacted this requirement to provide assurances to the parties, in particular Indian tribes, that all items listed on the statutory inventory would in fact be repatriated and reburied. The legislature was particularly sensitive to unfounded allegations by the NSHS and the National Park Service (NPS) that the Pawnee Tribe sought repatriation in order to sell tribal burial offerings on the antiquities market, rather than for purposes of reburial in accordance with Pawnee mortuary traditions and practices. See discussion, *supra*. The signature requirement serves to preclude agencies such as the NSHS from withholding items listed on the inventory and from subsequent allegations that the tribe sold its burial offerings, should any be found on the antiquities market.

180. See floor debate on LB 340, *supra*, note 148, 2810–11 (daily ed., 23 March 1991) (statement of Senator Conway). In any event, records held by public institutions or agencies in Nebraska are public records subject to disclosure under the state's Public Records Act. Neb. Rev. Stat. §§ 84-712 et seq. (1987). See also Ops. Neb. Att'y Gen. (6 October 1988, Spire and Lowe to Echo-Hawk and Peregoy; 21 October 1988, Spire and Lowe to Peregoy; 28 June 1989, Spire to Peregoy and Hanson); Order, *Nebraska State Historical Society v. Pawnee Tribe of Oklahoma et al. v. State of Nebraska*, docket 448, page 217, District Court of Lancaster County, Nebraska, 31 May 1991, 10–11.

181. See, e. g., floor debate on LB 340, *supra*, note 148, 2812 (daily ed., 23 March 1988) (statement of Senator Conway).

182. See Neb. Rev. Stat. §§ 12-1205–12-1208 (Supp. 1990).

183. Neb. Rev. Stat. § 12-1205(1) (Supp. 1990). Subsection 2 of § 12-1205 contains similar requirements for the state Department of Roads when it encounters unmarked burials in the course of highway construction projects. This provision authorizes the removal of such burials following examination by appropriate agencies pursuant to Neb. Rev. Stat. § 39-1363 (reissue 1988) and compliance with applicable federal requirements. However, such human skeletal remains and burial offerings are required to be treated and reburied in accordance with the requirements of §§ 12-1207 and 12-1208 of the Unmarked

**Human Burial Sites and Skeletal Remains Protection Act.**

184. Failure to make such a report is a misdemeanor under § 12-1205.
185. Neb. Rev. Stat. § 12-1206 (Supp. 1990).
186. Neb. Rev. Stat. § 12-1207 (Supp. 1990).
187. *Id.*
188. Neb. Rev. Stat. § 12-1208(1) (Supp. 1990).
189. Neb. Rev. Stat. § 12-1208(2) (Supp. 1990). The “pre-existing state statutes” primarily include Neb. Rev. Stat. § 71-1339 (1959), which lists the next of kin vested with the right to rebury the dead body of a relative. Under § 12-1208(2) (Supp. 1990), if next of kin are known, they are responsible for paying for the reburial. If there are no known relatives, reburial is at the expense of the county in which the remains are reinterred.
190. Neb. Rev. Stat. § 12-1208(3) (Supp. 1990).
191. *Id.*
192. *Id.* This subsection requires reburial at the expense of a known relative or affected Indian tribe. In cases where reasonably identifiable Indian skeletal remains or burial offerings are unclaimed by a known relative or tribe, reburial is required pursuant to § 12-1208(2).
193. Neb. Rev. Stat. § 12-1208(2) (Supp. 1990).
194. *Id.* While this provision authorizes the “curation” of such human skeletal remains and burial offerings, it does not authorize their display.
195. *Id.*
196. Neb. Rev. Stat. § 12-1211 (Supp. 1990).
197. *Id.*
198. *Id.*
199. *Id.*
200. Neb. Rev. Stat. § 12-1212(1) (Supp. 1990).
201. *Id.*
202. Neb. Rev. Stat. § 12-1212(2)(b) (Supp. 1990).
203. Neb. Rev. Stat. § 12-1212(2)(a) (Supp. 1990).
204. *Id.*
205. Neb. Rev. Stat. §§ 12-1212(2)(a), (3) (Supp. 1990).
206. Neb. Rev. Stat. § 28-1301(2) (Supp. 1990).
207. Neb. Rev. Stat. § 28-1301(2)(a) (Supp. 1990).
208. Neb. Rev. Stat. § 28-1301(2)(b) and (c) (Supp. 1990).
209. Neb. Rev. Stat. § 28-1301(4) (Supp. 1990). In addition to reenacting prior statutory exemptions to § 28-1301 concerning disinterment and reinterment of dead bodies—i. e., authorized dissections of dead bodies, reinterment by cemetery officials pursuant to permit, reinterment by relative or intimate friend pursuant to lawful authority and permit—the act subjects burial offerings to the statutory permit requirement when cemetery officials or a friend or relative intends to disinter and reinter a dead body and associated burial offerings. The act further exempts the following from its criminal prohibitions: (1) a professional archaeologist engaged in an otherwise lawful and scholarly excavation of a *nonburial* site, who unintentionally encounters human skeletal remains or associated burial goods, if the archaeologist complies with the notice requirements of the act; and (2) any archaeological investigation by the Nebraska State Historical Society, if any human skeletal remains or associated burial offerings discovered during such investigation are lawfully disposed of pursuant to § 12-1208 of the act. See Neb. Rev. Stat. § 28-1301(3) (Supp. 1990).
210. See Neb. Rev. Stat. § 12-1210 (Supp. 1990).

211. See letters from Robert Spire to Walter Echo-Hawk and Robert M. Peregoy, Native American Rights Fund, 6, 21 October 1988.

212. See letter from Robert Spire, attorney general of Nebraska, to Robert M. Peregoy and James Hanson, 28 June 1989 (available from NARF).

213. See "Spire, Attorney Vow to Sue for Records," *Omaha World-Herald*, 17 June 1989.

214. See Minutes, Nebraska State Historical Society Executive Board, 23 June 1989, 3. See also Robert Reeves, "Board makes records available to Indians," *Lincoln Star*, 24 June 1989.

215. See David Swartzlander, "Hanson criticizes state on Indian remains issue," *Lincoln Journal*, 24 September 1989.

216. See Reeves, "Indians say director won't cooperate," *Lincoln Star*, 5 January 1990.

217. See letters from Steven C. Moore to James Hanson, 14 October 1989; 21 November 1989; 14 December 1989; 10 January 1990 (available from NARF and the NSHS).

218. See letter from Steve Moore to James Hanson, 10 January 1990 (available from NARF and the NSHS).

219. See order, *supra*, note 180, docket 448, page 217, District Court of Lancaster County, Nebraska, filed 23 January 1990.

220. At the pretrial conference in September 1990, the NSHS stipulated that the Pawnee Tribe is a "person" within the meaning of the open records law.

221. See Order, *supra*, note 180, *Nebraska State Historical Society v. Pawnee Tribe of Oklahoma v. State of Nebraska*, 31 May 1991, 9–11. The evidence established that the NSHS's executive director filed the lawsuit without receiving authorization or approval from the executive board, the agency's policy-making body. The court listed extensive evidence showing that the NSHS is a state agency, including (1) a 108-year-old statutory scheme expressly establishing the NSHS as a state agency; (2) legislative appropriations exceeding \$21 million dollars since 1980, accounting for over 75 percent of the agency's annual operating budget; and (3) numerous express representations of the NSHS to the state and federal governments that the NSHS is a state agency. *Id.*, 6. The court rejected the society's claim that the 1883 statute making the NSHS a state agency was unconstitutional. *Id.*, 4–5. The court further found that the NSHS had never complied with the reporting requirements for a private nonprofit corporation. *Id.*, 6–7.

222. See *id.* On 30 October 1991, the court entered its final order in the public records law case and awarded the Pawnee Tribe of Oklahoma \$61,017.79 in attorneys' fees and other litigation costs, pursuant to the attorneys' fees provision of the public records law, Neb. Rev. Stat. § 84-712.07 (reissue 1987). The court also overruled the Nebraska State Historical Society's motion for a new trial in the case. See order, *Nebraska State Historical Society v. Pawnee Tribe of Oklahoma v. State of Nebraska*, No. 448, page 217 at 3–4 (Lancaster County District Court, 30 October 1991.)

223. See Robynn Tysver, "Historical Society to appeal," *Lincoln Journal*, 14 November 1991; see also order, *Nebraska State Historical Society v. Pawnee Tribe of Oklahoma et al. v. State of Nebraska*, docket 448, page 217, District Court of Lancaster County, Nebraska, 30 October 1991; "Statement of the Issues to Be Raised on Appeal," *Nebraska State Historical Society v. Pawnee Tribe of Oklahoma et al. v. State of Nebraska*, docket 448, page 217, Lancaster County District Court, filed 27 November 1991 by the NSHS.

224. See "Court victory could wreck the state's historical society," *Lincoln*

*Journal-Star*, 17 November 1991.

225. See id.

226. The society's lawsuit and posture that it is a private corporation has caused the agency additional problems. State auditor John Breslow has taken the position that if the NSHS is a private corporation, as it contends, it owes the auditor's office \$48,000 for past state-funded audits of the NSHS. Breslow also withheld the state's audit of federal funds expended by the NSHS, causing the NSHS to claim that more than \$600,000 in federal funds are in jeopardy as long as the state audit of NSHS federal funds is withheld. Further, auditor Breslow, citing a Texas situation involving a misappropriation of artifacts, called for an audit of all artifacts in the NSHS collection to "ensure that the society's house is in order." In the midst of all these problems, James Hanson resigned as executive director of the Nebraska State Historical Society, effective 31 January 1992. See Robynn Tysver, "Historical society, auditor toe to toe," *Lincoln Journal*, 10 January 1992.

227. LB 1097, 91st Neb. Leg., 2nd sess., 1990. See "Bill Would Reverse Indian-Remains Law," *Omaha World-Herald*, 11 January 1990.

228. See "Historian Says Artifacts Worth More Than \$1 Million," *Omaha World-Herald*, 20 January 1990; Hearing on LB 1097, Committee on Government, Military and Veterans Affairs, 91st Neb. Legis., 2d sess., 22 February 1990, pp. 38-59, 73-75.

229. See "2 senators seek to undo remains law," *Lincoln Journal*, 11 January 1990.

230. See hearing on LB 1097, *supra*, notes 227, 75.

231. See Inventory of Human Remains and Burial Goods to Be Repatriated to the Pawnee Tribe, Nebraska State Historical Society, 12 June 1990.

232. Since 1988, the Pawnee Tribe had retained historians and archival experts Orlan Svingen and Anne P. Diffendal to conduct an independent review and analysis of the society's archaeological site files believed to contain information pertaining to Pawnee skeletal remains and burial offerings held by the NSHS. Diffendal was formerly employed by the NSHS for thirteen years, where she served as state archivist. She currently is the executive director of the Society of American Archivists in Chicago. In the tribe's estimation, approximately 25 percent of the data presented in the NSHS inventory was flawed in some way. Diffendal met with NSHS officials four times between June and August 1990 to resolve these discrepancies. While many were resolved, the major omissions concerning "reasonably identifiable" Pawnee skeletal remains and burial offerings were not. See "Petition of the Pawnee Tribe of Oklahoma for Repatriation of Human Remains and Burial Goods from the Nebraska State Historical Society," Office of the Public Counsel, state of Nebraska, 11 December 1990, 3-4 (hereafter "First Pawnee Repatriation Petition").

233. See Neb. Rev. Stat. § 12-1211 (Supp. 1990).

234. See "First Pawnee Repatriation Petition," *supra*, note 232, 4 "Rebuttal of the Pawnee Tribe of Oklahoma to the Position of the Nebraska State Historical Society on the Subject of the Repatriation of Human Remains and Associated Burial Goods," Office of the Public Counsel, state of Nebraska, 27 February 1991, 2-15 (hereafter "First Rebuttal of Pawnee Tribe").

235. See "First Rebuttal of Pawnee Tribe," *supra*, note 234, 14, exhibit G.

236. Thomas, "Hanson Says Bill Should Exclude Non-Tribal Items," *Omaha World Herald*, 11 February 1989.

237. See "First Pawnee Repatriation Petition," *supra*, note 232, 7-28; "First

Rebuttal of Pawnee Tribe," *supra*, note 234, 2–15.

238. See Thomas, "Dispute Arises on Pawnee Artifacts Transfer," *Omaha World-Herald*, 5 September 1990.

239. See Reeves, "Legislators to view 'peace medals' as dispute over Indian artifacts rages on," *Lincoln Star*, 7 September 1990.

240. See Swartzlander, "Remains and artifacts of Pawnees put on truck for burial at Genoa," *Lincoln Journal*, 10 September 1990; "Not only does peace medal exist—it has a twin," *Lincoln Star*, 11 September 1990.

241. See "Pawnees to get George III medal back," *Lincoln Journal-Star*, 2 November 1991.

242. See "First Pawnee Repatriation Petition," *supra*, note 234, 28–41; "First Rebuttal of Pawnee Tribe," *supra*, note 234, 42–51.

243. See "Nebraska State Historical Society Position Statement for Native American Rights Fund Filing of Grievance under LB 340," dated 26 July 1990, as amended dated 13 September 1990 and "Petition Before Public Counsel" dated 11 December 1990 (14 January 1991), section B at 7–8 (hereafter "NSHS Position Statement") (available from the NSHS).

244. See "First Pawnee Repatriation Petition," *supra*, note 232, 41–47; "First Rebuttal of Pawnee Tribe," *supra*, note 234, 15–42.

245. *Id.*

246. See "First Rebuttal of Pawnee Tribe," *supra*, note 234, 27–40.

247. *Id.*, 29–30.

248. *Id.*, 30. Dr. Zimmerman served as the tribe's primary expert witness in the grievance proceedings.

249. *Id.*, 30; see "NSHS Position Statement," *supra*, note 243, 9–34 (Section B, 14 January 1991).

250. See "First Rebuttal of Pawnee Tribe," *supra*, note 234, 30 (statement of Larry Zimmerman).

251. While the society rejected the tribe's nominee, a professor of the University of Nebraska, the tribe did accept one of the NSHS's four nominees, a former chief justice of the Nebraska Supreme Court. However, he declined to serve. The NSHS submitted the names of all four of its nominees without their knowledge or consent.

252. See Neb. Rev. Stat. §12-1211 (Supp. 1990).

253. See "First Petition of Pawnee Tribe," *supra*, note 232. The supporting documentation included an extensive report by Larry Zimmerman, professor of anthropology at the University of South Dakota. In addition, the tribe submitted supporting affidavits and accompanying information by numerous anthropologists and archaeologists and an extensive ethnohistorical report by tribal member and historian Roger Echo-Hawk.

254. See "NSHS Position Statement," *supra*, note 243. Therein, the NSHS relied on staff archaeologists and the affidavits of external anthropologists and archaeologists.

255. See "First Rebuttal of the Pawnee Tribe," *supra*, note 234. Therein, Zimmerman responded to the archaeological and anthropological assertions of the NSHS.

256. "Arbitration Award, in the Matter of the Pawnee Tribe of Oklahoma, et al., and the Nebraska State Historical Society," Office of the Public Counsel, state of Nebraska, 12 March 1991 (hereafter "First Arbitration Award").

257. *Id.*, 25–26.

258. *Id.*



259. *Id.*, 61. The public counsel indicated that, in order for the tribe to obtain the return of these burial goods at issue, "there would need to be sufficient independent evidence to establish that the items were, in fact, burial goods within the meaning of the law. Thus, there would need to be independent evidence that the item or items (1) were intentionally placed with the human skeletal remains of an individual at the time of burial, and (2) can be traced with a reasonable degree of certainty to the specific skeletal remains with which it or they were buried. There would also need to be sufficient independence to identify the human skeletal remains disinterred in association with the item or items in question as to familial or tribal origin." *Id.*, 26. Because the tribe's "First Repatriation Petition" was primarily limited to the legal question of whether such funerary objects constitute "burial goods" under the law, the public counsel did not decide specific fact questions as to the individual burial goods at issue. He left that question open for a follow-up arbitration, without the necessity of going through the preliminary steps of § 12-1211, in light of the fact that the tribe raised these specific fact questions with the NSHS during the informal dispute resolution process. *Id.*, 30. Importantly, in light of the fact that the evidence necessary to decide these questions of fact is in the sole possession of the NSHS, the public counsel placed the burden of proof on the NSHS. *Id.*, 31. This ruling ultimately placed the NSHS in the untenable position of impeaching its own records kept in the normal course of business. As a follow-up to this matter, the Pawnee Tribe filed a second petition seeking an award directing the NSHS to return the specific burial goods at issue. See "Petition of Pawnee Tribe of Oklahoma for Pawnee Burial Goods from the Nebraska State Historical Society," Office of the Public Counsel, state of Nebraska, 9 August 1991.

260. See "First Arbitration Award," *supra*, note 256, 51.

261. *Id.*, 50-51.

262. *Id.*, 61.

263. *Id.*, 60.

264. *Id.*, 58-60.

265. *Id.*, 60.

266. *Id.*, 52-53. At the date of this writing, the Pawnee and other tribes were in the process of preparing the revised petition for submission to the public counsel.

267. See Reeves, "Pawnee remains going 'home' after long wait," *Lincoln Star*, 11 September 1990. These deceased individuals and burial goods were listed on the NSHS inventory, initially produced in June 1990 and amended thereafter.

268. The tribe employed Anne Diffendal and Tom Witty, Kansas state archaeologist, to verify and document the transfer of each dead body and burial good. To protect against previous allegations that the tribe sought repatriation to sell its burial goods on the antiquities market, the tribe videotaped the contents of the small coffins, nailed each shut and sealed the top and sides with the tribal seal to prevent reopening. Moreover, the tribe invited NSHS officials to accompany tribal officials to the funeral ceremony to observe burial of the sealed caskets. However, the NSHS declined.

269. The Pawnee Tribe selected Genoa as the site for reburial in recognition of the fact that the area was the last ancestral home of the Pawnee people before they were forced to move to Oklahoma in the 1870s. Reinterment was in the well-lit city cemetery, which is patrolled on a regular basis by local police. The caskets were placed in a mass grave, which was reinforced on the top with a six-inch concrete slab with holes to allow seepage and natural decomposition in the "dust

to dust" burial traditions and practices of the tribe. These measures were taken to protect the burials eternally from any further disturbance.

270. The Pawnee Tribe also is preparing other repatriation claims to be filed with other entities in the state affected by Nebraska's repatriation statute. However, the tribe anticipates that these other institutions will readily cooperate with the tribe, thus avoiding the time, expense, and trouble of invoking the act's grievance mechanisms.

271. See "Pawnees to get George III medal back," *supra*, note 241.

272. See Thomas, "Society to Relinquish Remaining Indian Bones," *Omaha World-Herald*, 15 November 1991.

273. *Id.*

274. See Thomas, "University Will Return Remains of Omaha Tribe," *Omaha World-Herald*, 15 August 1989.

275. Telephone interview with Dennis Hastings, historian, Omaha Tribe (1991); telephone interview with Clyde Tyndall, Omaha tribal planner (15 October 1991).

276. In 1988, the Omaha Tribe took official tribal government action, declaring a moratorium on all tribal dealings with the NSHS. To date, the moratorium still stands. Telephone interview with Dennis Hastings, historian of the Omaha Tribe, 8 August 1991.

277. See Vicki Quade, "Who Owns History?" *Barrister* (Spring 1990): 30.

278. See, e. g., Testimony of Walter Echo-Hawk Before the House Committees on Interior and Insular Affairs, Administration and Public Works and Transportation on the National American Museum Act, H. R. 2688 (20 July 1989) 101st Cong., 1st sess.; Statement of Walter Echo-Hawk, Hearing Before the Senate Select Committee on Indian Affairs on Native American Museum Claims Commission Act, S. 187 (29 July 1988), 100th Cong., 2nd sess., 86-90, 233-315; Statement of Walter Echo-Hawk, Hearing Before the Senate Select Committee on Indian Affairs on the Native American Grave and Burial Protection Act (Repatriation), Native American Repatriation of Cultural Patrimony Act, and Heard Museum Report (14 May 1990), 101st Cong., 2nd sess., 50-53, 174-267.