

*Berkley Forum**No Religious Freedom for Traditional Native Religions***By: Melissa Tatum**

February 20, 2018

Using a Religious Freedom Framework to Protect the Rights of Native Americans

In 2016, the eyes of the world focused on the struggles of the Standing Rock Sioux Tribe to stop the construction of the Dakota Access Pipeline. As the administrative and environmental challenges to the pipeline failed, many began seeking other possible grounds to halt the pipeline. Inevitably, questions arose regarding whether the tribe could rely on laws protecting the free exercise of religion to help achieve its goals. A quick review of past religious freedom claims provides the answer.

In the late 1800s, the federal government adopted the Code of Indian Offenses to regulate conduct of Indians on reservations. That Code prohibited the practice of traditional Indian religions and punished those practices by withholding rations, imprisonment, and whipping.

During the same era, Congress funded the creation of the Indian boarding school system, which forced children to attend Christian church services and severely punished the practice of traditional religions.

Prohibiting the practice of traditional Native religions and inflicting physical punishment upon its practitioners would seem to constitute a clear violation of the First Amendment's guarantee that Congress make no law prohibiting the free exercise of religion.

In the 1970s the U.S Forest Service decided to allow commercial timber harvesting in a portion of the Six Rivers National Forest. As part of the proposal, the Forest Service declared its intent to complete a paved road through the forest. The area chosen for timber harvesting included sites sacred to several tribes, and members of those tribes protested the decision. The Forest Service commissioned a study, which concluded that permitting commercial timber harvesting would destroy the tribal members' ability to practice their religion. The report recommended against the proposal.

The Forest Service made a few minor changes to its proposal, but it continued forward with the plan to allow timber harvesting and to complete the road. Members of the tribes filed suit, arguing, among other things, that the proposed actions infringed on their ability to practice their religion. According to the test in force at the time, if the government substantially burdened the practice of religion, the government must prove that the burden was necessary to achieve a compelling government interest. Since the government's own report concluded that the government's plan would destroy their ability to practice their religion, it seemed like a clear-cut case.

The U.S. Supreme Court, however, changed the test, holding that "substantial burden" was a legal term of art and meant only being fined, jailed, or deprived of a government entitlement. The Supreme Court held that the tribal members could not satisfy that standard, and therefore the government had not substantially burdened their practice of religion.

The next major Indian religious freedom case to reach the U.S. Supreme Court involved two Natives who were fired from their jobs for testing positive for peyote, which they had ingested as part of sacrament in the Native American Church. They applied for and were denied unemployment benefits, as they had been fired for work-related misconduct. The facts were very similar to a leading religious freedom case at the time, in which a member of the Seventh-day Adventist Church was fired for refusing to work on the Sabbath. The U.S. Supreme Court held that the government decision to deny unemployment compensation benefits was a violation of the First Amendment's guarantee of religious freedom.

Again, however, the Supreme Court used the case to change the legal test, holding that a neutral law of general applicability could not, by definition, violate the First Amendment.

Indians who practice traditional religions have never won a case in the U.S. Supreme Court, despite Congress' declaration in the 1978 American Indian Religious Freedom Restoration Act, that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

The only conclusion is that Indians have no religious freedom unless they give up their traditional religions and adopt a Judeo-Christian one.

About the Author



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NATIONAL MUSEUM OF THE AMERICAN INDIAN

Native Perspectives on the 40th Anniversary of the American Indian Religious Freedom Act

The First Amendment of the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Forty years ago, the American Indian Religious Freedom Act finally finally extended that right to the country's Native citizens. Here Native Americans who observe traditional ways talk about religious freedom.

Dennis Zotigh

November 30th, 2018

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Nium (Comanche) peyote fan, ca. 1890. Oklahoma. 22/9197 (Ernest Amoroso, National Museum of the American Indian, Smithsonian)

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." —American Indian Religious Freedom Act, 1978

This year marks the 40th anniversary of the American Indian Religious Freedom Act (AIRFA), Public Law No. 95-341, 92 Stat. 469, passed by a joint resolution of Congress and signed into law by President Jimmy Carter on August 11, 1978. The First Amendment of the Constitution—the first article of the Bill of Rights—states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Yet Native Americans were not allowed to practice their religion and were persecuted for conducting tribal ceremonies integral to the continuation of traditional culture. At the same time, the federal government supported Indians' Christian conversion.



Beginning no later than the early 1800s, the government promoted Christian education among Native Americans. During the 1870s, in what was seen as a progressive decision, the administration of President Ulysses S. Grant assigned 13 Protestant denominations to take responsibility for managing more than 70 Indian agencies on or near reservations (leading the Catholic Church quickly to establish the Bureau of Catholic Indian Missions). In 1887, the Dawes Act dividing tribal lands into individual allotments included a provision allowing religious organizations working among Indians to keep up to 160 acres of federal land to support their missions.

The Department of Interior's 1883 Code of Indian Offenses—de facto laws that applied only to American Indians—punished Indian dances and feasts by imprisonment or withholding food (treaty rations) for up to 30 days. Any medicine



The code was amended 50 years after its adoption to remove the ban on dances and other customary cultural practices. Even so, despite the First Amendment's guarantees, American Indians' traditional religious practices were not protected until the passage of the American Indian Religious Freedom Act. The act also calls on federal departments and agencies to evaluate their policies and procedures in consultation with Native traditional leaders to protect and preserve Native American religious cultural rights and practices. The original law did not contain provisions for civil or criminal penalties for violations. As a result, additional legal protections were legislated, including the American Indian Religious Freedom Act Amendments of 1994.

To find out how Native Americans feel about the American Indian Religious Freedom Act, I asked people from across Indian Country who participate in their ceremonial traditions to share their stories. Here are their responses:

Kenny Frost, Ute Sundance Chief: "Sadly, prior to this law, Native people were prohibited from practicing our Native religion. The meat of the law enacted the basic civil liberties to protect and preserve American Indians' inherent right of freedom to believe, express, and exercise the traditional religious rights and cultural practices in Indian Country. These rights include, but are not limited to, access to sacred sites, freedom to worship through ceremonials, and the use and possession of objects considered sacred to Native people.

"This act brought to the forefront the need to continue a dialogue about how to safeguard for Native people our way of worshipping in our sacred places. This act was the first step to ensure that Native people can continue to worship.

“Sadly, due to the displacement of Native people to Indian reservations, many grassroots people do not know where their traditional sacred areas and territory lands are located. Manifest Destiny is still alive today. We risk losing the knowledge of traditional places as those people with traditional knowledge leave this world. We must continue to strive to pass this knowledge on to future generations. We must educate our tribal leaders to fund and provide transportation for our people to travel to our traditional homelands and reconnect to our sacred places.”

Casey Camp-Horinek, Ponca Scalp Dance Society leader: “AIRFA is an oxymoron. How can a law be made around a religion and then be called 'freedom'? Are we free to care for our own Eagle feathers without a permit from the U.S. government? No. Do we still need to prove who we are with a Certificate Degree of Indian Blood (C.D.I.B.)? Yes. Can we live freely within the Natural Laws and honor our one true Mother, the Earth? No, not when laws created by man are defining our relationship with Her. Balance must be restored through prayer and ceremony, not by written words in man's attempt to override the Great Mystery's original instructions.”

Katsi Cook, Mohawk elder and midwife: “I can't help but think about our many elders who made this protection of our Indigenous and human right to Indigenous spiritual expression real and protected. The act codified the religious freedom of Indigenous peoples, including my Mohawk people. My ancestor Col. Louis Cook fought in George Washington's army to ensure our Indigenous right to our ways of being and knowing. AIRFA is the historical antidote to the U.S. government's civilization regulations of the 1880s, which wrote into law the deprivation of Indigenous people and nations of our religious freedom.”

Andrew Wakonse Gray, Osage Native American Church leader: “The first thing that comes to mind is that the Native American Church (NAC) is not a religion but a ceremony. At the turn of the 19th century, many tribes had to hide their ceremonial ways within a religious structure called the Native American Church. Back then, the government and non-Indian community were afraid of us, as our ceremonies became associated with rebellion. This misunderstanding resulted in the Wounded Knee Massacre in 1890 and many other incidents. Many tribes took notice, including the Osage. We established our NAC ways with the help of John Wilson, a Caddo-Delaware Indian also known as Moonhead, and later of Francis Claremore, Blackdog, and others. We have included the NAC Ceremony into our Osage ways and have practiced our ways quite well. We still name, put our people away, use our pipe way by way of the corn shuck, paint, and follow other Osage ways. We believe in prayer. As my uncle used to say, ‘More prayer, more better.’”

Jackie Yellowtail, Crow Sundancer: “The AIRFA is very important to our traditional ways, which have survived thousands of years, even through times when we had to hide to practice them. Our family has kept these ways

Tim Tsoodle, Headsman of the Kiowa Gourd Clan: "This law allowed us to openly dance, sing, and mostly pray as our grandfathers did. It is ceremonies like the Kiowa Gourd Dance that make us Kiowa. To be able to do these things without outside interference is what makes the American Indian Religious Freedom Act significant."

Shirod Younker, Coquille ceremonial woodcarver: "In 1954, Congress terminated the Coquille as a federally recognized tribe. In 1989, the Coquille Indian Tribe was reinstated as a newly 'restored' federally recognized tribe. Prior to this, our religion and language had been stripped from us. So at this time, we are trying to replicate what was taken away from us by government policies. We are indebted to our cousin tribes the Tolowa and Siletz who have shared ceremonies with us."

"The American Indian Religious Freedom Act may not have affected my tribe directly, but it has had an impact on that door of reaffirming our shared ceremonial practices in the open again. It has been 40 years since this act was passed. The practices to remove and destroy our culture started more than 150 years ago, in the 1840s and '50s. It will take at least that amount of time to come close to restoring what we lost. These ceremonies and practices reinforce the need to bring back our many distinct languages from the Oregon Coast. Our ceremonial ways all come from the earth. We cannot effectively understand their importance or details until we restore the environment that helps sustain us physically and spiritually."

Dennis Zotigh

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AMERICAN

AMERICAN HISTORY

NATIVE

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American Indian Religious Freedom Act

Agencies: Federal departments, agencies, and other instrumentalities responsible for administering relevant laws, National Park Service, Department of the Interior.

Citation: [42 U.S.C. § 1996](#)

Enacted as: The American Indian Religious Freedom Act, on August 11, 1978

Where Law Applies:

Summary of the Law:

The American Indian Religious Freedom Act of 1978 (AIRFA) (42 U.S.C. § 1996.) protects the rights of Native Americans to exercise their traditional religions by ensuring access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. AIRFA is primarily a policy statement. Approximately half of the brief statute is devoted to Congressional findings. Following the Congressional findings, the Act makes a general policy statement regarding American Indian religious freedom: “On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” 42 U.S.C. § 1996 (2011).

The intent of AIRFA has been interpreted as ensuring that Native Americans obtain First Amendment protection, but not to grant Native Americans rights in excess of the First Amendment. Because such sites may be eligible for inclusion in the National Register, any effects that may occur, as a result of providing access to them, may trigger Section 106 review under the National Historic Preservation Act (NHPA). As a related law, the NHPA greatly strengthens the requirements for Federal agencies to ensure that tribal values are taken into account. Tribes are given greater control over patrimonial objects and are allowed to establish their own culturally-specific criteria of significance.

NPS Heritage Preservation Services has a major role in fulfilling AIRFA federal policy through its programs that provide:

- financial and technical assistance to tribes,
- leadership in the preservation of the prehistoric and historic resources of the United States,
- leadership in the administration of the national preservation program in partnership with states, Indian tribes, Native Hawaiians, and local governments,
- Assistance to state and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Although almost thirty years have passed since the passage of AIRFA, public resistance to the law continues in the present, signaling a continuing the need for public education.

Source: <http://www.achp.gov/book/sectionVIII.html>;
http://el.erdc.usace.army.mil/emrrp/emris/emrishelp5/american_indian_religious_freedom_act_legal_matters.htm; <http://www.nps.gov/ethnography/aah/AAheritage/HPNe.htm>

Cases:

- *Lyng v. Northwest Indian Cemetery Protective Association*, [485 U.S. 439 \(1998\)](#) (holding that AIRFA does not create a cause of action under which to sue, nor does it contain any judicially enforceable rights).

Other Relevant Sources:

Jimmy Carter, American Indian Religious Freedom Statement on Signing S.J. REs. 102 Into Law, August 12, 1978; www.presidency.ucsb.edu/ws/?pid=31173