STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-26

Date issued: December 13, 1988

Requested by: James E. Sperry, Superintendent

- QUESTIONS PRESENTED -

I.

Whether state law recognizes ownership interests in prehistoric skeletal remains.

II.

Whether it is necessary to determine ownership of skeletal remains in the State Historical Society collection before the State Historical Board may authorize reburial of the skeletal remains.

III.

Whether knowledge of provenience (time and space) data may have a bearing on ownership of the skeletal remains.

IV.

Whether the religious rights of Native Americans are violated by the State Historical Board's storage, analysis, and reburial of skeletal remains of Native Americans.

V.

Whether the terms "artifacts" and "grave goods" have the same legal meaning.

VI.

Whether the terms "cultural resources" and "collections" include human remains.

VII.

Whether state law requirements concerning burial transit and registered cemeteries apply to the reburial of prehistoric skeletal remains.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that state law recognizes ownership interests in prehistoric skeletal remains.

II.

It is my further opinion that it is necessary to determine ownership of human remains in the State Historical Society collection before the State Historical Board may authorize reburial of the skeletal remains.

III.

It is my further opinion that provenience (time and space) data may have a bearing on ownership of the skeletal remains.

IV.

It is my further opinion that although it is unlikely that a court would find that the religious rights of Native Americans are violated by the State Historical Board's storage, analysis, and reburial of skeletal remains of Native Americans, that question cannot be answered in this opinion because it involves factual questions. There is no specific case or statute that provides a definite answer.

V.

It is my further opinion that the terms "artifacts" and "grave goods" do not have the same legal meaning.

VI.

It is my further opinion that while the term "cultural resources" includes human remains, the term "collections" may not, in all circumstances, include human remains.

VII.

It is my further opinion that state law requirements relating to burial transit and registered cemeteries apply to the reburial of prehistoric skeletal remains only where reburial occurs on non-reservation land.

- ANALYSES -

I.

No North Dakota cases directly address the issue of whether skeletal remains, whether modern or prehistoric, may be "owned" under state law.

Several statutory provisions, however, explicitly or implicitly recognize ownership of prehistoric remains.

State law generally provides that all property has an owner. N.D.C.C. § 47-01-09. State law defines "land" as "the solid material of the earth,

whatever may be the ingredients of which it is composed, whether soil, rock or other substance." N.D.C.C. § 47-01-04. State law further provides that "the owner of land in fee has the right to the surface and to everything permanently situated beneath or above it." N.D.C.C. § 47-01-12.

The Legislature has also explicitly recognized that title to archeological materials may be held by the state. N.D.C.C. § 55-03-06 provides as follows:

55-03-06. Upon sale of land by state or municipality archaeological or paleontological materials retained. Where land is sold, conveyed, transferred, or leased by the state of North Dakota, or by any department or agency thereof, or by any municipal subdivision thereof, the title to any and all archaeological or paleontological materials, whether such materials are found upon the surface or below the surface of such land, shall be retained by the state or by the municipal subdivision thereof, as the case may be.

The statutory predecessor to N.D.C.C. ch. 55-03 indicates that the Legislature included material contained within burial mounds, which obviously would include skeletal remains, within the archeological materials covered by the statute. See 1939 N.D. Sess. Laws ch. 223. The 1939 statute included a section which concerned the ownership of archeological materials and which is, in significant part, identical to section 55-03-06. See 1939 N.D. Sess. Laws ch. 223, § 6. By adopting this law, the Legislature apparently intended that the state retain title to archeological materials in burial mounds as well as other archeological material.

In conclusion, state law appears to recognize that skeletal remains may be "owned." Such ownership, however, is not unfettered. Pursuant to its police power, the state has imposed numerous duties and obligations with respect to treatment of human remains. See, e.g., N.D.C.C. ch. 23-21.1 (cemetery organizations); N.D.C.C. § 23-06-30 (care of abandoned cemeteries by counties); N.D.C.C. §§ 23-06-01 to 23-06-30 (duty of burial); N.D.C.C. § 23-06-27 (crime to open grave without authority); N.D.C.C. ch. 42-01 (abatement of common nuisance that may offend "common decency").

II.

The skeletal remains in the State Historical Board's collection are not necessarily the property of the state, nor are they necessarily subject to the unfettered disposal authority of the State Historical Board. Some remains may be owned by the federal government, some by private persons, and some by the state. A different legal regime for disposition applies to each category, which will now be examined.

Skeletal Remains Found on Federal Lands

Skeletal remains which belong to the federal government or one of its agencies and which are simply being held by the State Historical Society as curator are subject to federal law.

Among the State Historical Society's collection are skeletal remains found on federal land (e.g., Park Service or Corps of Engineers land). Since 1906 federal law has provided that no one may excavate on federally owned land without a permit under the Antiquities Act of 1906 (16 U.S.C.A. § 432 (West

1974)). Any archeological items excavated pursuant to permits are required to be "for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums." Id. (emphasis supplied). The requirement of the "permanent preservation" of skeletal remains prohibits an entity holding the remains from disposing of them by reburial. This duty is made clearer in regulations implementing this law and in more recent federal legislation.

Uniform regulations to implement this Act were issued by the Secretaries of the Interior, Agriculture, and War in 1906. With minor modifications, these regulations are now printed at 43 C.F.R. pt. 3 (1987). 43 C.F.R. § 3.17 (1987) states in relevant part:

[E]very collection made under the authority of the act and of this part shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution and then only to another public museum, where it shall be accessible to the public.

Without repealing the Antiquities Act, Congress adopted the Archeological Resources Protection Act of 1979 (16 U.S.C.A. §§ 470aa-ll (West 1985)) (hereinafter referred to as ARPA). It specifically includes graves and human skeletal remains within the term "archeological resources." 16 U.S.C.A. § 470bb (West 1985). It allows the Secretary of the Interior to promulgate regulations providing for exchanges of collections among scientific institutions and to promulgate regulations providing for "the ultimate disposition of such resources" collected pursuant to the Antiquities Act of 1906 as well as other laws. Regulations implementing ARPA are found at 43 C.F.R. pt. 7 (1987).

The Secretary of the Interior's regulations govern exchanges of archeological resources among museums with consent of the appropriate federal land manager.[1] 43 C.F.R. pt. 7 (1987). These regulations, however, do not make any explicit provision for reinterment of federal collections. Cf. 43 C.F.R. §7.13 (1987). Proposed revisions to the regulations of the Department of Interior have been published for comment. The proposed regulations allow discretionary reinterment of archeological human remains that are not part of an existing collection. Curation of Federally-Owned and Administered Archeological Collections, 52 Fed. Reg. 32,740 (1987) (to be codified at 36 C.F.R. pt. 79.) However, the proposed regulation continues to prohibit any federal agency official from selling or discarding all or part of any archeological collection which was gathered pursuant to several federal laws. 52 Fed. Reg. 32,748 (1987) (to be codified at 36 C.F.R. § 79.8(e)). Final regulations have not been issued.

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[1] This regulation insofar as it requires the federal land manager's consent appears to conflict with the regulation requiring written permission of the Secretary of the Smithsonian prior to transfer of federally owned archeological collections. See 43 C.F.R. § 3.17 (1987).

In conclusion, it is my opinion that federal law prohibits the reinterment of any federally owned skeletal remains within the

State Historical Society's collection. Thus, the State Historical Board does not have the legal authority to reinter skeletons that belong to the federal government. The State Historical Board may request the transfer of such skeletons to some other depository so that the Society is no longer responsible for curation. It is necessary to have the written permission of the Secretary of the Smithsonian Museum, pursuant to 43 C.F.R. § 3.17 (1987), and the authorization of the responsible federal land manager, pursuant to 43 C.F.R. pt. 7 (1987), before such a transfer may occur.

Skeletal Materials found on Indian Trust Land or Land Subject to Restraints on Alienation

The Antiquities Act of 1906 also extends to land "controlled by" the federal government. 16 U.S.C.A. § 432 (West 1974). The Bureau of Indian Affairs interprets this language as extending to "Indian tribal lands or on individually owned trust or restricted Indian lands." 25 C.F.R. § 261.2 (1987). The Archeological Resources Preservation Act of 1979 also extends to "Indian land," i.e., land held on behalf of Indian tribes or individuals in trust or subject to restraints on alienation. 16 U.S.C.A. § 470aa-ll (West 1985).

The Antiquities Act of 1906 gave jurisdiction to the Secretary of the Interior on "lands owned or controlled by the Government of the United States." (Emphasis supplied.) 16 U.S.C.A. § 433 (West 1974). As discussed above, the Antiquities Act regulations have required permanent curation of all artifacts collected pursuant to that Act at museums. The Department of Interior's position is that all skeletal remains found on Indian lands are the property of the Department of Interior.

However, federal regulations implementing the Archeological Resources Protection Act of 1979 state that artifacts found on Indian land are the property of the tribe or tribal member on whose land the artifact was found. For example, 43 C.F.R. §7.13(b) (1987) provides:

Archeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources.

(Emphasis supplied.)

In addition, the proposed Department of Interior regulations discuss ownership of artifacts recovered from Indian lands:

Other federally funded or authorized archeological studies are conducted in connection with a Federal undertaking on Indian lands, State or local lands, or privately owned lands. They usually are conducted by non-Federal personnel under a contract with the agency. The archeological collections generated by those studies generally belong to the individual Indian or Indian tribe, State or local agency, or person or institution that owns or has jurisdiction over the said lands.

Supplementary Information, 52 Fed. Reg. 32,740 (1987) (emphasis supplied).

Because some of the skeletal remains in question here were excavated from tribal or Indian owned trust lands, ownership of such remains will either be with the tribes (if the remains were found on tribal trust lands) or individual Indian land owners and their descendants (if the remains were found on allotted trust land) or the federal government.

Contracts were executed between the Historical Society and the federal government acting through the Department of the Interior at the time of excavation of these remains. These contracts provided, inter alia, that the Society, as contractor, could "retain all artifact material (except representative collections as selected by the contractor and the service) for permanent preservation in its museum or for distribution to other reputable museums, universities, colleges, or other recognized scientific or educational institutions for such preservation." (Emphasis supplied.) With respect to artifacts obtained through such contracts, it appears that the federal government has ownership in these remains while the society's interest is in the curation of the remains. Those artifacts may only be disposed of pursuant to the federal law discussed in the preceding section of this opinion.

With respect to ownership of remains found on tribal or Indian owned land, it will be necessary to review documents for place of origin and date of acquisition. Artifacts discovered prior to the effective date of the Archeological Resources Protection Act of 1979 appear to be claimed by the federal government and would be subject to the federal ownership analysis discussed earlier in this opinion. But it is possible that tribes or individual Indians may be able to prove ownership of remains discovered on Indian lands thereafter. If the remains are subject to tribal or individual Indian ownership, the following analysis concerning skeletal remains found on private land will apply. In either case, it is not likely that the Society would own any such remains unless they were explicitly donated to the society.

Skeletal Remains found on Private Land

The question concerning who owns skeletal remains found on private land raises complex issues of state and federal law. A brief explanation of the source of the skeletal remains is necessary before legal analysis.

Based on conversations with Historical Society staff and review of documents, it appears that skeletal remains found on private land have come to the possession of the Society in several ways:

1. Donations of collections by professional or amateur archeologists;

2. Salvage work by state employees pursuant to partial or full federal funding;

3. Salvage work by state employees due to discovery of burial places exposed by the elements (e.g., erosion) or through intervention by man-made development (e.g., gravel mining, farming practices or other construction).

The Society's approach to interment may differ depending on the source and

method of acquisition.

Donated Material

The Society is subject to N.D.C.C. § 55-01-02(3) which provides:

55-01-02. State Historical Board -- Powers -- Limitations. The state historical board shall be authorized to:

. . . .

3. Dispose of such articles in the collections as the superintendent may recommend, by any appropriate means including but not limited to sale or exchange . . . . Unless other conditions are specified in a deed or gift, a reasonable attempt shall be made to return articles to the original donor prior to disposal by any other means.

(Emphasis supplied.)

This law has been implemented by the Artifact Collection Policies of the State Historical Society of North Dakota, Museum Division, approved by the Board on November 4, 1983, as follows:

VII. Deaccession.

7.1 The State Historical Society acts as custodian of artifactual materials for the people of North Dakota. To effectively manage and maintain appropriate collections, it may from time to time be necessary to transfer ownership or discard inappropriate and/or duplicate, extraneous artifacts.

. . . .

7.3 All deaccession policies and procedures shall be in compliance with section 55-01-02 of the North Dakota Century Code.

7.4 All prospective deaccession and methods of disposition shall be recommended by the Director of the Museum Division to the superintendent and approved by the State Historical Board.

7.5 Unless other conditions are specified in a deed of gift, a reasonable attempt shall be made to return prospective deaccession to the original donor prior to disposal by other means.

7.6 The manner of disposition shall be in the best interests of the Historical Society, the people of North Dakota, the public trust and the scholarly communities it represents. Methods of disposition shall be as follows:

a. An attempt shall be made to return the artifact(s) to the original donor in every appropriate case (see section 7.5).

. . . .

c. Artifacts inappropriately acquired and of no value to the Historical

Society or other institutions may be physically destroyed.

. . . .

7.10 Before any deaccession action, the Museum Division shall ascertain to the best of its knowledge that it has the legal title and ownership to do so.

The Society and the Board must decide what is a "reasonable attempt" to return items to an original donor. This will vary based upon the circumstances of each type of collection. If the donor cannot be found after reasonable attempts to find him or her, then the Board is authorized pursuant to N.D.C.C. § 55-01-02 to dispose of the item or items from the collection.

It is possible that third-parties may dispute the ownership rights of the donor of human remains; that is a landowner, tribe, or relatives of a deceased person may be able to establish that they, not the donor, own any remains in question. This opinion does not consider the issue of ownership if any such disputes arise. That issue would have to be decided between the donor and anyone else claiming ownership based on the facts in each case.

Salvaged Skeletal Remains from Private Land

Some of the skeletal remains were salvaged by state archeologists upon the request of private landowners or sheriffs. In these instances, the Society should ascertain whether an explicit or implicit donation to the state occurred. If so, the same analysis as to the donated items is applicable. If no donation occurred, the Board's interest would only be in a curatorial capacity and the owner's permission to reinter is necessary.

Again, this opinion does not consider or determine the ownership rights of the donor of human remains if that ownership is questioned.

Salvaged Skeletal Remains pursuant to Federal Funding

From 1935 to the present, the federal government has entered into cooperative agreements to preserve and study historical and archeological sites and objects. Pub. L. No. 292, 49 Stat. 666 (1935); Pub. L. No. 163, 69 Stat. 354 (1955); Pub. L. No. 86-523, 74 Stat. 220 (1960). These laws, as amended, are codified at 16 U.S.C.A. § 469 (West 1985). Antiquities collected through funding authorized by these laws are subject to regulations promulgated pursuant to ARPA, 16 U.S.C.A. § 470dd (West 1985).

As discussed above, the present ARPA regulations concerning custody of archeological remains are found at 43 C.F.R. § 7.13 (1987) and are silent concerning the ownership of materials found on private land. Commentary to the proposed regulations published in August 1987, however, provides that materials found on private land with federal funding belong to the private landowner:

Other federally funded or authorized archeological studies are conducted in connection with a Federal undertaking on Indian lands, state or local lands or privately owned lands. They usually are conducted by non-Federal personnel under a contract with the agency. The archeological collections generated by

those studies generally belong to the individual Indian or Indian tribe, State or local agency, or person or institution that owns or has jurisdiction over the said lands.

52 Fed. Reg. 32,740 (1987) (emphasis supplied).

As with the archeological material found on Indian lands, the state entered into contracts with the federal government as a condition of federal salvage funding. These contracts provided that the Society could "retain" the collection for public display.

The status of the federally funded salvaged remains is unclear and, if reinterment is recommended, the state should seek to obtain a release from its contractual commitment with the federal government to retain and preserve the materials. The state must also ascertain if the landowner consented to transfer of title to the state or if the federal government claims ownership of the remains.

III.

Provenience data (that is, information concerning the time and place of origin) obviously affects the scientific value of archeological remains. For example, curation of archeological items of unknown origin is of limited scientific value. Provenience also affects issues of legal ownership and issues of disposal pursuant to federal or state law. If skeletal remains cannot be identified by place of origin, identification of the original donor or landowner may be difficult or impossible to determine. The lack of identification would then affect the requirements of N.D.C.C. § 55-01-02 requiring the return of certain items.

IV.

Religious rights of Native Americans, and all people in North Dakota, are defined in the first amendment of the United States Constitution and in N.D. Const. art. I, § 3. The first amendment says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise [of religion]." This amendment is made applicable to the states by the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). N.D. Const. art. I, § 3 says: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state." Each constitutional provision protects the free exercise of religion, and they are in harmony with one another. State v. Rivinius, 328 N.W.2d 220, 228-29 (N.D. 1982), cert. denied, 460 U.S. 1070 (1983); Bendewald v. Ley, 168 N.W. 693, 696 (N.D. 1917).

Despite their similarity, it is not necessarily true that these two constitutional provisions are to receive the same interpretation. The North Dakota Constitution may provide greater protection of religious rights than the federal Constitution. See State v. Orr, 375 N.W.2d 171, 178 n.6 (N.D. 1986) ("[w]e have often recognized that our constitution may afford broader rights than those granted under the federal constitution"); City of Bismarck v. Altevogt, 353 N.W.2d 760, 766 (N.D. 1984).

The free exercise clause of the North Dakota Constitution, however, has

received little judicial comment and, as yet, North Dakota jurisprudence has not expanded protection of religious practices beyond that granted by the United States Constitution. Furthermore, in a North Dakota non-approved school case in which defendants relied on the free exercise clause in each constitution, the court used federal decisions to resolve the matter. See State v. Rivinius.

Because of these circumstances, the following analysis of the free exercise clauses relies on federal case law. It is, however, acknowledged that the free exercise clause of the North Dakota Constitution is undeveloped by case law. Consequently, it is possible that it could be interpreted in a future decision by the North Dakota Supreme Court to grant broader religious rights than does the federal free exercise clause.

Whether the storage, analysis, and reburial of Indian remains violates constitutional rights can be examined from two perspectives: from that of the individuals whose remains are being so used and from that of the family and tribal descendents of such individuals.

Regarding the former category, Roe v. Wade, 410 U.S. 113 (1973), offers guidance. There, the Supreme Court said that a fetus is not a person under the fourteenth amendment and has no rights thereunder. Id. at 158. If a being capable of sustaining life in the future is not a person, it would seem to follow that a corpse, having no potential for life, is not a person within the protection of the United States and North Dakota constitutions. Such an argument was used in a 42 U.S.C. § 1983 action, and the court found it persuasive. Whitehurst v. White, 592 F.2d 834, 840 n.9 (5th Cir. 1979).

Indeed, a person's constitutional rights do terminate at death. Estate of Cartwright v. City of Concord, Cal., 618 F.Supp. 722, 730 (N.D. Cal. 1985); State v. Powell, 497 So.2d 1188, 1190 (Fla. 1986), cert. denied, 107 S. Ct. 2202 (1987). "[T]he definition of a 'person' for purposes of protection of constitutional rights is limited only to a living human being." Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979), cert. denied, 445 U.S. 916 (1980). "After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived." Whitehurst v. Wright, 592 F.2d at 840.

There is no judicial decision specifically addressing the issue of whether the storage, analysis, and reburial of Indian remains violates the religious tenets of these dead persons. It is, of course, possible because of the uniqueness of this issue that a future decision could carve an exception from the rule that the dead are without constitutional rights. We cannot predict court rulings and must confine our analysis to the law as it is today.

Therefore, we conclude that even if it is assumed that the storage, analysis, and reburial of Indian remains conflicts with the religious tenets of these dead persons, such actions do not violate their religious rights, because dead persons no longer have constitutional protection. This does not mean that the State Historical Board is prohibited from adopting a policy more protective of any possible religious interests of the dead than the law requires.

Surviving family and tribal descendents comprise the second category of persons that may be harmed by the storage, analysis, and reburial of Indian

remains. Deciding whether their rights under the state and federal free exercise clauses are violated involves a two step process. First, it must be determined whether the activities at issue create a burden on the free exercise of their religion. "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against . . . the practice of religion." School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963). Second, if a burden exists, it must be balanced against the importance of the state's interest. To survive constitutional scrutiny, the government must establish either that the religious practices pose "some substantial threat to public safety, peace or order," Scherbert v. Verner, 374 U.S. 398, 403 (1963), or that an interest of "sufficient magnitude" overrides the interest claiming protection under the free exercise clause, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Even if the state's interest weighs heavier in this balance, the state activity still will be invalid if the state's interest can be achieved by less intrusive means. Crow v. Gullet, 541 F.Supp. 785, 790 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir.), cert. denied, 464 U.S. 977 (1983); State v. Shaver, 294 N.W.2d 883, 890 (N.D. 1980).

The first step will now be examined more closely to determine what constitutes a burden on the free exercise of religion. First, "[t]he practice allegedly infringed upon must be based on a system of belief that is religious." Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). It is insufficient if the practice is of one of personal or philosophical preference, is based on a feeling, or is related to culture, tradition, or family folklore. Wisconsin v. Yoder, 406 U.S. at 216; Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), cert. denied, 449 U.S. 953 (1980); State v. Rivinius, 328 N.W.2d at 223 n.3. Next the religious belief must be sincerely held. Wisconsin v. Yoder, 406 U.S. at 215-216; United States v. Ballard, 322 U.S. 78, 86 (1944); State v. Rivinius, 328 N.W.2d at 224-25.

Once these two factors are proven, the next step is to show that the practice infringed upon is central or indispensable to the religion. Northwest Indian Cemetery Protective v. Peterson, 795 F.2d 688, 692 (9th Cir. 1986), rev'd on other grounds, 108 S. Ct. 1319 (1988); Sequoyah v. Tennessee Valley Auth., 620 F.2d at 1164; United States v. Means, 627 F.Supp. 247, 258 (D.S.D. 1985). The opinion in Sequoyah sets forth examples in which the centrality or indispensability requirement was found:

In Wisconsin v. Yoder, supra, the Supreme Court found that the religious faith and the mode of life of the Amish are 'inseparable and interdependent,' and that 'the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.' . . . In Frank v. Alaska, 604 P.2d 1068 (Alaska 1979), the Supreme Court of Alaska reversed a conviction of an Athabascan Indian who had been found guilty of violating game laws when he killed a moose for a funeral feast, or potlatch. The court found that the '[t]he funeral potlatch is the most important institution in the Athabascan life' and that '[f]ood is the cornerstone of the ritual.' . . . In People v. Woody . . . 40 Cal.Rptr. 69, 394 P.2d 813 (1964), the hallucinogenic drug peyote was found to play a central role in the ceremony and practice of the Native American Church, an organization of American Indians. The 'meeting' ceremony, involving the use of peyote, was found to comprise a

cornerstone of the religion.

Sequoyah, 620 F.2d at 1164.

The Sequoyah decision is helpful in another respect, for it has come closest to answering the question posed by the State Historical Board's activities. In Sequoyah the plaintiffs brought a class action on behalf of all present or future Cherokee Indians who practice the traditional Cherokee religion and adhere to Cherokee Indian tradition and culture. They sought an injunction to prevent completion and flooding of Tellico Dam on the Little Tennessee River. The complaint alleged that the impoundment created by the dam would cause irreparable injury to the plaintiffs by flooding their sacred homeland resulting in a destruction of "'sacred sites, medicine gathering sites, holy places, and cemeteries, [and] will disturb the sacred balance of the land." Id. at 1160. Some of the affidavits submitted with the complaint said that flooding of the valley or digging up the bodies of Indians buried there would destroy "'the knowledge and beliefs of [the] people who are in the ground'" and destroy what they have taught. Id. at 1162. A number of the affidavits described the land in the valley as sacred to Cherokees and said burial sites should not be disturbed. Id. The court then noted:

The Cherokees . . . obviously have great reverence for their ancestors and believe that the places where their ancestors lived, gathered medicines, died and were buried have cultural and religious significance. Similar feelings are shared by most people to a greater or lesser extent. However, because of their beliefs respecting the transmission of knowledge and spiritual powers to succeeding generations, particular geographical locations figure more prominently in Indian religion and culture than in those of most other people.

Id. at 1162-63.

The court nonetheless found that the Indians had failed to prove the centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances. The court said:

Granting as we do the individual plaintiffs sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature, they have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (Yoder), the cornerstone of their religious observance (Frank), or plays the central role in their religious ceremonies and practices (Woody). Rather, the affidavits disclose . . . that it is believed by some that the knowledge of previous generations will be lost if graves are disturbed or flooded and that the locations of Chota and other village sites are sacred places. These affidavits appear to demonstrate 'personal preference' rather than convictions 'shared by an organized group,' . . . When the affidavits are 'indulgently treated,' . . . at most they establish a feeling by the individual affiants that the general location of the dam and impoundment has a religious significance which will be destroyed by the flooding. The claim of centrality of the Valley to the practice of the Cherokee religion, as required by Yoder, Woody, and Frank, is missing from this case. The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to

be at stake . . . . Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.

Id. at 1164-65.

If those activities of the State Historical Board under consideration do adversely affect a sincere religious practice that is central or indispensable, the next issue to consider is whether the negative impact is significant enough to be labeled a burden. "The Supreme Court has not set forth a precise test for determining whether or not a burden exists. To answer this question, a court or agency must take a sensible and realistic look at the facts and circumstances of the case and then decide whether there exists a real negative impact upon the exercise of the religion that is significant enough to be labeled a burden." United States v. Means, 627 F.Supp. at 258. Indeed, the United States Supreme Court has said the "crucial word" in the first amendment is "prohibit." Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1326 (1988). Based on this premise, the Court refused to stop construction of a public road in a wilderness area because it was "less than certain" the road "will be so disruptive that it will doom their religion." Id. Since the Court did acknowledge that the road's "threat to the efficacy of at least some religious practices is extremely grave," id., and yet allowed construction of the road, it seems a high standard must be met to prove a burden has been imposed.

Because of these criteria, the question whether the State Historical Board's storage, analysis, and reburial of Indian remains unconstitutionally burdens the religious practices of living Indians involves an interplay among complex legal and factual issues. No case or statute provides a definite answer. See also State v. Rivinius, 328 N.W.2d at 224 ("the constitutional analysis of cases arising under the free exercise clause are generally tailored to their particular factual situation"). Since we were not given information on religious practices and how they might be affected by the Board's activities, it is impossible to give a general opinion whether the activities violate the free exercise clauses. However, because of the strict standards for proving a unconstitutional burden on religion, it would not be an easy task to prove a burden. Furthermore, even if a burden were found, one must then go on to the next step in the process and balance the governmental interest in these activities against the burden on religious practices. This step also would involve factual determinations.

Whatever the result might be when this law is applied, the State Historical Board may choose to go beyond protections given by law and take action more respectful of asserted Indian religious interests than is required by law.

V.

The term "artifacts" is not defined in North Dakota law. Therefore, its definition is to be found in the common meaning of the word. See N.D.C.C. § 1-02-02. "Artifacts" are objects "produced or shaped by human workmanship; especially a simple tool, weapon, or ornament of archeological or historical interest." The American Heritage Dictionary of the English Language 75 (new college ed. 1981). Thus, the term is a generic one under which many categories might be delineated. Categories might be based on the kind of

artifacts, such as the categories of tools, weapons, and clothing. Categories might also be based on the location of discovery, such as a grave, dwelling, or battlefield.

The term "grave goods" does not have a general definition in North Dakota law. It is, however, defined in N.D. Admin. Code § 40-02-03-01 as "all artifacts and other items deliberately interred with human remains, including projectile points, knifes [sic], scrapers, articles of clothing, ornaments, or religious items." The definition helps implement N.D.C.C. § 23-06-27, a statute penalizing removal of a body from a grave and removal of objects buried with a body. Although the definition technically applies to just N.D. Admin. Code ch. 40-02-03, it appears to be a generally applicable definition of "grave goods."

In summary, "artifacts" is a generic term while "grave goods" is a particular kind of artifact defined by its place of discovery.

While defining the two terms is not difficult, it is reported that the Historical Board's inquiry also seeks guidance in application of the terms. Application can be difficult, for objects are often found near human remains but it is unclear whether they were buried with the corpse. For example, a body may be discovered in the side of a cliff and artifacts found on top of the cliff. Some Indian communities buried their dead in areas also used to dispose of trash. Some remains are found within what was once a village and, not surprisingly, artifacts are found near the remains. In each example it may be difficult to determine whether the artifacts were buried with the corpse; were used in some manner as a part of the burial ceremony, although not buried with the corpse; or had no relation to the corpse.

We cannot resolve the problem of determining which objects are grave goods and which are "mere" artifacts. This is purely a factual matter. Only the talents of the archeologist, anthropologist, and other professionals, along with the Native American community and its knowledge of tribal traditions and culture, can answer which objects are more likely grave goods and which are artifacts of another kind.

VI.

For three reasons, the term "cultural resources" includes human remains. The term "cultural resources" is defined in N.D.C.C. § 55-03-00.1 to include "prehistoric or historic archeological sites, burial mounds, unregistered graves, and paleontological sites and materials." The reference to burial mounds and unregistered graves makes it clear that human remains are within the term "cultural resources."

This conclusion is also supported by the inclusion of archeological sites in the definition of "cultural resources." Archeology is the recovery and study "of material evidence from man's life and culture in past ages." The American Heritage Dictionary of the English Language 67 (new college ed. 1981). The recovery and study of human remains may be useful in understanding life and culture of past ages.

In addition, the chapter in which the term "cultural resources" appears is N.D.C.C. ch. 55-03, entitled "Protection of Prehistoric Sites and Deposits."

The chapter's purpose is to regulate anyone who, in compliance with certain federal and state laws, identifies, evaluates, and mitigates "adverse effects on cultural resources, historic buildings, structures, or objects." N.D.C.C. § 55-03-01. The goal is to protect historic sites from slovenly exploration and destruction. See Hearings on H. 1220 before the Sen. Comm. on State and Federal Gov't, 48th Leg. (Feb. 15, 1983) (Statement of Louis Hafermehl, Dir. of the St. Historical Society's Div. of Archeological and Historic Preservation); Hearings on H. 1220 before the House Comm. on State and Federal Gov't, 48th Leg. (Jan. 17, 1983) (Statement of Louis Hafermehl, Dir. of the St. Historical Society's Div. of Archeological and Historic Preservation); N.D. Legislative Research Comm., Report of the North Dakota Legislative Research Committee 79 (1967). This legislative goal would not be fully achieved if human remains were excluded from the definition of "cultural resources."

We now turn to the question whether the term "collections" includes human remains.

The ordinary meaning of the word "collections" is "[a] group of objects to be seen, studied, or kept together." The American Heritage Dictionary of the English Language 261 (new college ed. 1981). Human remains are a kind of object, and they are kept together by the Historical Board as a distinct part of its holdings. Thus, human remains seem to be included within the term "collections," as that term is commonly understood.

In addition, statutory interpretation generally supports the idea that "collections" includes human remains.

The term "collections" appears in statutes that set forth the State Historical Board's authority. See N.D.C.C. §§ 55-01-02(2), (3), (4), (5), 55-01-06, 55-02-01.2(5). For example, N.D.C.C. § 55-01-06 says all historical collections and materials contributed to or bought by the state are to be controlled by the State Historical Board. Because the Board is the most qualified agency to care for a contribution of human remains, the reference in N.D.C.C. § 55-01-06 to "collections" would appear to include human remains. As another example, N.D.C.C. § 55-02-01.2(5) states that the Board's executive officer is to catalog "all of the collections of the board." It would be reasonable to include human remains in this reference to "collections" because the benefits of cataloging are as applicable to human remains as to any other objects held by the Board.

If human remains are included in the term "collections" as used in these three provisions, the Board could use human remains for sale and barter, N.D.C.C. § 55-01-02(3); for exhibition N.D.C.C. § 55-01-02(4); and for unspecified other purposes, N.D.C.C. § 55-01-02(5). Courts, however, have accorded human remains and burial grounds great respect. See e.g., Newman v. State, 174 So.2d 479, 484 (Fla. Ct. App. 1965); Seifer v. Schwimmer, 166 Misc. 329, 1 N.Y.S. 2d 730, 732 (N.Y. Sup. Ct. 1937). See also State v. Powell, 497 So.2d 1188, 1194 (Fla. 1986), cert. denied, 107 S. Ct. 2202 (1987). Although no judicial decision or other legal source specifically allows or prohibits a state's sale, barter, or exhibition of human remains that were originally acquired for learning about history, because of moral, ethical, theological, and philosophical concerns, a court could find that the use of remains for such purposes is unlawful.

In summary, the term "cultural resources" includes human remains. While the term "collections" also generally includes human remains, N.D.C.C. § 55-01-02(3), (4), and (5) may be insufficient authority for the use of human remains for the purposes set forth in those sections.

VII.

State requirements regarding registered cemeteries and burial-transit permits do not apply to Indians on reservation land. Generally, state jurisdiction does not extend to Indians in Indian Country. Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962); Williams v. Lee, 358 U.S. 217 (1959); The City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972); State of Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970); United States ex rel. Condon v. Erickson, 344 F.Supp. 777 (D.S.D. 1972); aff'd, 478 F.2d 684 (8th Cir. 1973); State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972).

The term "Indian Country" is defined in 18 U.S.C.A. § 1151 (West 1984) as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent."

The statutory definition of Indian Country applies to civil as well as criminal questions. Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (D.C. Utah 1981), aff'd in part and rev'd in part (on other grounds), 716 F.2d 1298 (10th Cir. 1983), cert. denied, 107 S. Ct. 596 (1986).

N.D. Const. art. XIII states, in part, as follows:

The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 1.

. . . .

Section 2. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

State jurisdiction does not extend to Indians in Indian Country, absent assumption of jurisdiction by the state pursuant to federal statutes. State v. Williamson, 87 S.D. 512, 211 N.W.2d 182 (1973).

25 U.S.C.A. § 231 (West 1983) is the specific federal statute regarding state health regulations and their effect on Indian land. It states:

§ 231. Enforcement of State laws affecting health and education; entry of State employees on Indian lands.

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this sub-paragraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application.

The Secretary of the Interior has not adopted any rules regarding state health regulations and their applicability to Indian lands. However, 25 C.F.R. ' 1.4 (1988) defines the manner in which state regulations may be applied to Indian lands:

§ 1.4 State and local regulations of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

Until the Secretary of Interior adopts rules under authority of 25 U.S.C.A. § 231 (West 1983) and North Dakota complies with such rules, state health regulations, including those regarding registered cemeteries and burial-transit permits, do not apply to Indians on reservation land.

On June 30, 1988, the State Historical Board adopted a policy calling for the reinterment without analysis of the human remains and grave goods in its possession. Because of this policy, a lawsuit was filed against the Board. Bratton v. State Historical Board, Civil No. 7853 (Dist. Ct., filed July 1, 1988). The litigation is still pending. At issue is the validity of the Board's June 30th policy. The subjects addressed in this opinion, while related to the reinterment issue, do not have a direct relationship with the issue to be resolved by the lawsuit.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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