

American Indian Religious Freedom Act

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The **American Indian Religious Freedom Act**, Public Law No. 95-341, 92 Stat. 469 (Aug. 11, 1978) (commonly abbreviated to AIRFA), codified at 42 U.S.C. § 1996

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Long title Joint resolution American Indians Religious Freedom

Acronyms AIRFA
(colloquial)

Enacted by the 95th United States Congress

Citations

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Statutes at Large 92 Stat. 469
(<http://www.gpo.gov/fdsys/granule/STATUTE-92/STATUTE-92-Pg469/content-detail.html>)

Legislative history

- **Introduced in the Senate as S.J.Res. 102** (<http://hdl.loc.gov/loc.uscongress/legislation.95sjres102>) **by** James Abourezk **on** December 15, 1977
- **Committee consideration by** Senate Indian Affairs
- **Passed the Senate on** April 3, 1978
- **Passed the House on** July 18, 1978 (in lieu of H.J.Res. 738 (<http://hdl.loc.gov/loc.uscongress/legislation.95hjres738>), 337–81) **with amendment**
- **Senate agreed to House amendment on** July 27, 1978 ()
- **Signed into law by President** Jimmy Carter **on** August 11, 1978

(<http://www.law.cornell.edu/uscode/42/1996.html>), is a United States federal law, enacted by joint resolution of the Congress in 1978. It was enacted to protect and preserve the traditional religious rights and cultural practices of American Indians, Eskimos, Aleuts, and Native Hawaiians.^[1] These rights include, but are not limited to, access of sacred sites, freedom to worship through ceremonial and traditional rights and use and possession of objects considered sacred.

The Act required policies of all governmental agencies to eliminate interference with the free exercise of Native American religion, based on the First Amendment, and to accommodate access to and use of religious sites to the extent that the use is practicable and is not inconsistent with an agency's essential functions.^[2] It also acknowledges the prior violation of that right.^[3]

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Passage

Due to the complex nature of American Indian religious beliefs, American Indian religions have often been at odds with existing federal laws and government policies. There have been three general areas of conflict. Firstly, American Indians did not have access to a number of sacred places that were used in religious ceremonies. Native American religious practices often came into conflict with the idea that American public lands exist for the use and benefit of the American people.^[4] The results of the passage of the Indian Removal Act and the General Allotment Act were the displacement of hundreds of tribes, including the Five Civilized Tribes of the southeastern United States, and the forced assimilation of Native American families into agricultural settler societies.

The second conflict was the possession of ceremonial items that are restricted by United States Law, such as eagle feathers or bones (a protected species) or peyote. The conflict lies in the fact that items such as peyote are integral parts of ceremonies practiced by members of churches such as the Native American Church. The use of eagle bones in ceremony has been brought up in any case involving Indian claims on hunting and fishing rights allowed for tribal member to hunt for eagles.^[5]

The third general area of conflict was an issue of interference. Sacred ceremonies were sometimes subject to interference from overzealous officials or curious onlookers.^[6]



An Eagle bone whistle, a sacred instrument used in the ceremonial practices of many Native American religions.

The act itself was more a policy statement, and it acknowledged prior infringement on the right of freedom of religion for American Indians by denying them their First Amendment right of "free exercise" of religion.^{[7][8]} President Jimmy Carter said, in a statement about the AIRFA, a very similar thing:

In the past, Government agencies and departments have on occasion denied Native Americans access to particular sites and interfered with religious practices and customs where such use conflicted with Federal regulations. In many instances, the Federal officials responsible for the enforcement of these regulations were unaware of the nature of traditional native religious practices and, consequently, of the degree to which their agencies interfered with such practices.

This legislation seeks to remedy this situation.^[9]

Section 2 of the AIRFA directs federal agencies to consult with American Indian spiritual leaders to determine appropriate procedures to protect the inherent rights of American Indians, as laid out in the act.^[10]

Original text

Public Law 95-341
95th Congress

Joint Resolution
American Indian Religious Freedom.

Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion, and as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition, and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge of the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, there, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned;

Now, therefore, be it Resolved by the Senate and the 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.

SEC. 2. The President shall direct that various Federal departments, agencies, and other instrumentalities responsible for the administering relevant laws to evaluate their policies and procedures in consultation with Native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

Approved August 11, 1978.^[11]

Effects

The different unique identities of Native American tribes often coincide with lands that animate and sustain their religious practices and beliefs. *Lyng v. Northwest Indian Cemetery Protective Association (1988)* is a landmark case in the Supreme Court's decisions affecting Native American religion under the AIRFA. The bureaucratic decisions to alter land sites implemented by the Court on this case, constitute invasions of tribal self-understanding. This case helped to prove that the dissipation of tribal identity is the consequence of land desecration.^[12] The fact that land desecration is allowed to happen so easily is a result of the absence of enforcement and stability within the terms of the American Indian Religious Freedom Act. *Lyng v. Northwest Indian Cemetery Protective Association*, in 1988, denied the Yurok, Tolowa, and Karok tribes their rights to religious freedom under the first amendment by ruling in favor of the United States Forest Service. The Forest Service wanted to build a road that went directly through the sacred lands of those tribes. Tribal leaders testified that the road would destroy parts of the pristine mountains and high country that the tribes considered sacred and essential to their religious beliefs and practices. They expressed their concerns in court, outlining the burden imposed upon their religious freedom in accordance with the provisions of the AIRFA. However, the court determined that because the tribes had not stated a requisite *legal* burden on those rights that they could not receive protection under the AIRFA. Herein lies the fault of the act, which is even more evident due to the Theodoratus Report^[13]

The Theodoratus Report was a comprehensive study prompted by the American Indian Religious Freedom Act during *Lyng v. Northwest Indian Cemetery Protective Association* and conducted by the United States Forest Service in order to evaluate policies and procedures to protect Native American religious cultural rights and practices.^[14] This study was done in order to provide definitive information on the impact that the Forest Service's actions would have on Native American religious culture in high country. This study was completed in April 1979 and was titled "Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest" and was written by Dr. Dorothea J. Theodoratus, Dr. Joseph L. Chartkoff, and Ms. Kerry K. Chartkoff.^[15] It was a compilation of ethnographic, archaeological and historical data that identified the culture contained in the area that the Forest Service proposed to be the site of the Chimney Rock Section of the Gasquet-Orleans Road. This culture belonged to the Yurok, Karok, and Tolowa peoples. In the final recommendations to the Forest Service of the report, it criticizes them for their ignorance towards the physical and historical significance and religious importance of the proposed site for the construction of a road. The report warned the Forest Service against the ruinous impact of road construction and its logging and mining operations and pointed out the fault in the administrative philosophy that high country is a natural resource that should be managed and improved. The basis for the report's claim is the fact that the site was a primary religious experience that was indispensable to the spiritual life of traditional people whose connection to the land can be traced from prehistory to the present. The resource improvements proposed by the Forest Service would double as the factors that destroyed the religious reality that was crucial to the religious practices of the Yurok, Karok, and Tolowa. The report stated that the only appropriate management of such land should be its preservation in a natural state.^[16]



The traditional homeland of the Yurok, Karok, Tolowa, and Hupa tribes exists in an area that includes the Six Rivers National Forest and the Klamath National Forest.

The Theodoratus Report, in effect, established a guideline by which the Forest Service would be able to understand the importance of land to Native American culture. Because they had commissioned the report and recognized its significance they conformed with the AIRFA in the *Lyng* case, but it was the Theodoratus Report, not the AIRFA, that compelled the Forest Service to follow the report's collection of data on the religious significance of the high country. However, nothing within the AIRFA prevented the Forest Service from ignoring the warning of its own commissioned concerning the destruction of the Yurok, Karok, and Tolowa religious traditions.^[17]

This case's decision states that tribes have no First Amendment right of religious freedom that can halt federal land management of public lands that contain sacred tribal spaces. This decision became the standing precedent that threatened the survival of any traditional Native American community whose sacred lands, by the fault of the government's history of Indian affairs, are on public land and off of reservations. The Supreme Court advocated its decision to refuse the countenance of the religious valuation of land as representing its responsibility towards enforcing the First Amendment rights of the Native American plaintiff.^[12]

Another example of the effects of the AIRFA in the Supreme Court is the case of *Employment Division v. Smith* in 1990, which denied the Native American Church its constitutional rights. Alfred Smith, a Native American who had been born on the Klamath Reservation in Oregon, was fired from his job at an agency in Roseburg, Oregon that helped develop services for Native American clientele.^[18] His termination was based on his attendance to the ceremonies of the Native American Church, which he had belonged to for several years, because the N.A.C.

makes use of peyote as a sacrament. Once he was fired, another member of the N.A.C. employed at the agency was also fired. Alfred Smith and his co-worker did not fight to win back their jobs, but fought for their rightful benefits when they were denied unemployment compensation. Smith took his case to the Oregon courts who vindicated his claim that his use of peyote was protected under the free-exercise clause, and in turn, the AIRFA. The Court passed the claim on to the U.S. Supreme Court which overturned Oregon's ruling.^[19] The Supreme Court stated that they could in fact be denied unemployment benefits because by using peyote they were in violation of state criminal law.^[20] The *Smith* decision prompted the development of the Native American Religious Freedom Project which involved and concerned almost every Native American tribe in the country. The case was taken up with Congress, and in 1993 the Religious Freedom Restoration Act was passed, and by 1994 the American Indian Religious Freedom Act Amendments were passed as Public Law 103-344. The Amendments restored the constitutional rights of the Native American Church.^[21]

Criticism

The major criticism of the American Indian Religious Freedom Act was its inability to enforce its provisions, therefore its inability to provide religious freedom without condition. The act served as more of a joint resolution than an actual law. Its failure to protect certain sacred sites proved detrimental to Native American culture and religion as a whole.

The *Lyng v. Northwest Indian Cemetery Association* decision represented a unique convergence of religion, law, and land, and confirmed the American Indian Religious Freedom Act as a hollow excess of words. The Supreme Court itself declared that the legislation had no firm grasp on what it stood for.^[22] There was nothing in the Act that mandated changes pursuant to the review process prior to its amendment in 1994. The case illustrates that compliance with the review procedure of the AIRFA does not provide any assurance that judicial protections or substantive agency will be offered to Native American religious belief and practice, even if the serious endangerment to Native American religion from proposed government action is recognized within that review procedure.^[22]

1994 Amendments – full text

Due to the criticism of the AIRFA and its inability to enforce the provisions it outlined in 1978, on June 10, 1994 the House of Representatives Committee on Natural resources, and later the Subcommittee on Native American Affairs, met to bring about H.R. 4155^[23] in order to provide for the management of federal lands in a way that doesn't frustrate the traditional religions and religious purposes of Native Americans. The full text is available on the Library of Congress website (<http://thomas.loc.gov/cgi-bin/query/z?c103:H.R.4155.IH.>). However, it never became law.^[24]



A Peyote Ceremony Tipi used by members of the Native American Church



Peyote is illegal in the United States and is classified as a Schedule One Drug.

In the same year, H.R. 4230 was set forth to amend the American Indian Religious Freedom Act to provide for the traditional use of peyote as sacrament in religious ceremonies. This became Public Law No 103-344 on October 6, 1994, with full text as below.

H.R. 4230.^{[25][26]}

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "American Indian Religious Freedom Act Amendments of 1994".

SECTION 2. TRADITIONAL INDIAN RELIGIOUS USE OF THE PEYOTE SACRAMENT.

The Act of August 11, 1978 (42 U.S.C. 1996), commonly referred to as the "American Indian Religious Freedom Act", is amended by adding at the end thereof the following new section:

"SECTION 3.

"(a) The Congress finds and declares that –

- (1) for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures;
- (2) since 1965, this ceremonial use of peyote by Indians has been protected by Federal regulation;
- (3) while at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, many States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies;
- (4) the Supreme Court of the United States, in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling of the State interest standard and

(5) the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment in violation of the religious guarantees of the First Amendment of the Constitution.

"(b)

(1) Notwithstanding any other provision of the law, the use, possession, or transportation of peyote by an Indian who uses peyote in a traditional manner for bona fide ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or by any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.

(2) This section does not prohibit such reasonable regulation and registration of those persons who cultivate, harvest, or distribute peyote as may be consistent with the purposes of this Act.

(3) This section does not prohibit application of the provisions of section 481.111(a) of Vernon's Texas Health and Safety Code Annotated, in effect on the date of enactment of this section, insofar as those provisions pertain to the cultivation, harvest, and distribution of peyote.

(4) Nothing in this section shall prohibit any Federal department or agency, in carrying out its statutory responsibilities and functions, from promulgating regulations establishing reasonable limitations on the use or ingestion of peyote prior to or during the performance of duties by sworn law enforcement officers or personnel directly involved in public transportation or any other safety-sensitive positions where the performance of such duties may be adversely affected by such use or ingestion. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice. Any regulation promulgated pursuant to this section shall be subject to the balancing test set forth in section 3 of the Religious Freedom Restoration Act (Public Law 103-141; 42 U.S.C. 2000bb-1).

(5) This section shall not be construed as requiring prison authorities to permit, nor shall it be construed to prohibit prison authorities from permitting, access to

peyote by Indians while incarcerated within Federal or State prison facilities.

(6) Subject to the provisions of the Religious Freedom Restoration Act (Public Law 103-141; 42 U.S.C. 2000bb-1), this section shall not be construed to prohibit States from enacting or enforcing reasonable traffic safety laws or regulations.

(7) Subject to the provisions of the Religious Freedom Restoration Act (Public Law 103-141; 42 USC 2000bb-1), this section does not prohibit the Secretary of Defense from promulgating regulations establishing reasonable limitations on the use, possession, transportation, or distribution of peyote to promote military readiness, safety, or compliance with international law or laws of other countries. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions for which the sacramental use of peyote is integral to their practice.

"(c) For purposes of this section –

(1) the term 'Indian' means a member of an Indian tribe;

(2) the term 'Indian tribe' means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alask Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.S. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(3) the term 'Indian religion' means any religion –

(A) which is practiced by Indians, and

(B) the origin and interpretation of which is from within a traditional Indian culture or community; and

(4) the term 'State' means any State of the United States, and any political subdivision thereof.

"(d) Nothing in this section shall be construed as abrogating, diminishing, or otherwise affecting –

(A) the inherent rights of any Indian tribe;

(B) the rights, express or implicit, of any Indian tribe which exist under treaties, executive orders, and laws of the United States;

(C) the inherent right of the Indians to practice their religions under any Federal or State law."

See also

- Outline of United States federal Indian law and policy
- Recognition of Native American sacred sites in the United States

Notes

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3. ^ Canby, John C. Jr. "American Indian Law in A Nutshell." West Publishing Company, 1988. Pg. 339, 340.
4. ^ Christopher Vacsey, Handbook of American Indian Religious Freedom (New York: Crossroad Press, 1991).
5. ^ Getches, David, Wilkinson, Charles F., Williams, Robert A. Jr. "Cases and Materials on Federal Indian Law, Fifth Edition." West Group, 1998. Pg. 764.
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the original on 6 September 2006. Retrieved July 29, 2006.

11. ^ Utter, Jack. "American Indians: Answers to Today's Question, Second Edition." University of Oklahoma Press, 2001. Pg. 157, 158.
12. ^ *a b* Brown, Brian Edward. "Religion, Law, and the Land: Native Americans and the Judicial Interpretations of Sacred Land." Greenwood Press, 1999. pp. 6, 7.
13. ^ Duthu, N. Bruce. "American Indians and the Law." The Penguin Group, 2008. P. 110.
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16. ^ Brown, Brian Edward. "Religion, Law, and the Land: Native Americans and the Judicial Interpretations of Sacred Land." Greenwood Press, 1999. Pg.129
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18. ^ Smith, Huston. "Why Religion Matters: The Fate of the Human Spirit In An Age of Disbelief." Harper Collins, 2001. P. 124.
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22. ^ *a b* Brown, Brian Edward. "Religion, Law, and the Land: Native Americans and the Judicial Interpretations of Sacred Land." Greenwood Press, 1999. Pg.172
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25. ^ H.R. 4230, 103 D Cong., U.S. Government Printing Office, Washington:1994 Congressional Record 10 (1994) (enacted). Print.
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External links

- "1994 Amendments to the American Indian Religious Freedom Act of 1978" (http://www.nps.gov/history/local-law/FHPL_IndianRelFreAct.pdf). *National Park Service*. Retrieved 2014-03-23.
- President Jimmy Carter commenting on the AIRFA, August 12th, 1978 (<http://www.presidency.ucsb.edu/ws/index.php?pid=31173>)
- "Protecting Religious Freedom and Sacred Sites"

(http://fcn.org/issues/nativeam/protecting_religious_freedom_and_sacred_sites/). Friends Committee on National Legislation. 2008. Retrieved 2014-09-25., a Quaker critique of the AIRFA

- Carpenter, Kristen A., *Limiting Principles and Empowering Practices in American Indian Religious Freedoms* (2012) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2015771)

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