

## **NATIVE AMERICAN CULTURAL PROPERTY LAW: HUMAN RIGHTS LEGISLATION**

by Sherry Hutt

In the larger scope of history this is a small thing, in the smaller scope of conscience, it may be the biggest thing we have ever done. (Congressman Morris Udall, Oct. 1990)<sup>1</sup>

This decade began with a resurgence of human rights activism on a scale not seen for thirty years. The recent events were quiet ones. The scene of the activity was the U.S. Congress and the state legislatures of almost every state in the country, including Arizona. This venue posed a certain irony since it was the legislative process which proved unresponsive in the 1960's, and forced human rights issues into the courts. This time it was the judicial system which failed to respond.

The beneficiaries of this recent activity have been Native Americans, a group only indirectly benefited by the sensitivity to diversity and human equality of the 1960's civil rights laws. The new laws are not concerned with equality in employment, housing and education, but pertain to the previously overlooked issue of cultural property rights of Native Americans. The laws discussed in this article do not create new or special rights for Native Americans. Rather they guarantee to them property rights otherwise protected by our constitution and laws. The enforcement of existing but abridged rights is the essence of human rights legislation.<sup>2</sup>

### **Recognition of Cultural Property Rights as Protected Human Rights**

Cultural property can be defined as an evolving irreplaceable resource that defines the unique existence of a group of people. It is the underpinning of group identity in a spatial and temporal context. It may be the tangible expression of humans interacting with their environment,<sup>3</sup> or the intellectual property of groups such as

Navajo ceremonial songs, or ethnobiological knowledge.<sup>4</sup> The preservation of cultural property rights is essential to give meaning to human existence and as a bond against enslaving a people by diminishing the definition of their existence.<sup>5</sup>

"The distinction sometimes made between property rights and human rights is spurious. Human rights are simply part of a person's property rights."<sup>6</sup> The concept is so simple it can be taken for granted, unless you are within a group of people whose property is administered by a government which historically has assigned their rights to others. Since 1906, the United States has retained the authority to control permits for excavations on lands under its jurisdiction, the fruits of which are to be placed in public museums.<sup>7</sup> A social ethic developed in this country which allowed items held in common and placed in accessible areas, not under lock and key, to be available for personal collection. Even burials, the rights to the disposition of which under English common law and American property law are reserved to descendants, have been assumed to be government property when they are the burials of Native Americans.<sup>8</sup>

Native people recognize that there is a connection between their well-being and the places and items which define their culture and which may be deified. In contrast, the modern, Christian, and anthropocentric views have allowed a linear concept of a beginning and end to time on earth to rule the use of cultural and natural resources. "This linear concept is accompanied by an implicit faith in perpetual progress."<sup>9</sup> The result has been a lack of respect for the cultural traditions of native people. We have come to a point in time where respect for the cultural property of Native Americans must be viewed as a human right.

The questions which are addressed by an examination of cultural property law are not whether scientific inquiry in archeological excavations, or mass development of the landscape for human occupation, should occur. Rather, the issues are framed in terms of who has the right to decide. There must always be an initial inquiry into who has the right to control the disposition of an item. "The forced sharing of space brings

home the forced coexistence with other people in the world and the forced sharing of the decision-making power."<sup>10</sup> The recognition of Native American cultural property rights brings to an end the domination of Europocentric assumptions concerning property rights. The recent example of the dinosaur "Sue" illustrates this point. Scientists criticized the sale of "Sue," but neglected to consider the the property rights of the Native American landowner. Dinosaur remains are periodically sold in this country and Native Americans have the same property rights as all other landowners.

#### **Failure of the Courts to Uphold Cultural Property Rights**

It may be asked, if cultural property rights are inherent within existing law, why was there a need to devise specific new legislation? The answer given to this question during the Senate hearings before the Interior and Insular Affairs Committee in 1990, was that attempts to enforce property rights using available legal means would not be upheld in court.<sup>11</sup> Numerous examples were cited in the Congressional hearings to illustrate the present status of the legal culture. Only two examples will be noted here.

During a frolic in the Florida swamps in 1964, Arnold Clifford Newman came across the coffin of a Seminole Indian, who had been resting in peace for about two years and removed the skull and other items. In overturning his grave defacement conviction on appeal the court classified the law as analogous to malicious mischief, which must be perpetrated "wantonly and maliciously."<sup>12</sup> The court discussed at length the virtues of Mr. Newman, and found that such a paragon of virtue was not capable of wanton and malicious acts and quashed the conviction.

In Ohio, grave desecrations of older remains were routinely ignored as the courts there have long held that remains in an advanced stage of decomposition no longer constitute a corpse.<sup>13</sup>

Although Native American mortuary traditions have not been given great weight in court, return of cultural property to tribal people has occurred on a voluntary basis.

The Heard Museum in Phoenix repatriated Apache War Shields as an action of the Board of Directors prior to the imposition of legal requirements. The Heard's Director, Dr. Martin Sullivan, had overseen the return of Wampum Belts to the Onondaga Nation, while in his previous capacity of Director of the New York State Museum. The Onondaga had not fared as well in court. They had brought an action in 1899 for return of stolen property and the matter was unresolved for 75 years.<sup>14</sup>

When pursuing stolen property, common law theories should have been adequate. However, property held by the government or discovered pursuant to an excavation permit is deemed by law to be government property and may not be deacquisitioned by even the most well meaning public servant.

#### **State and Federal Legislation**

STATE LAWS: Most states have health and safety laws which regulate care of the dead and cemeteries. Prior to 1988, most of these laws only pertained to marked graves in clearly established cemeteries. In the often cited opinion of the California Court of Appeals in *Wana the Bear v. Community Construction, Inc.*,<sup>15</sup> the California burial law was held not to apply to unmarked Native American burial grounds which predated the law. In states where protection was afforded to Native American traditional burials the penalties were minor and were insufficient to deter looting or vandalism.

Public attention was focused on the the issue of Native American burials in 1988, when the National Geographic published a lengthy article on the massive destruction of over 800 burial sites on a private farm in Kentucky and the failure of the government to respond. Between 1988 and 1990, almost every state in the country amended their laws to include protection for Native American burial sites.<sup>16</sup> States which previously had mild protection laws amended them to add felony sanctions for destruction and theft of items from sites whether or not the sites were marked. This new generation of laws also included state statutes which required private land owners

to report the presence of burials on their land to a state authority and to become involved in repatriation of remains to the appropriate tribal authority.

ARIZONA LAW: Arizona was at the forefront of the recognition and protection movement when in 1990 it amended the Arizona Antiquities Act to include comprehensive provisions for the repatriation of sensitive Indian material.<sup>17</sup> Arizona statutes Title 41, Article 4, protects "Archaeological Discoveries." Section 844A requires that the person in charge of any excavation on state land report to "the director of the Arizona state museum the existence of any archaeological, paleontological or historical site or object that is at least fifty years old," and take reasonable steps to secure and preserve the object. The state museum was made responsible for the curation of the item as property of the state. As of September 20, 1990, the statute was amended to add a process for notice to tribes and an opportunity for tribes to assert their ownership rights to "human remains, funerary objects, sacred ceremonial objects or objects of national or tribal patrimony."<sup>18</sup>

The Arizona repatriation law provides that the director of the Arizona state museum will give notice of discoveries to all individuals with a kinship relationship to the human remains, all groups that may have a cultural or religious affinity to objects, curatorial staff of the Arizona state museum, faculty members of state universities who may have significant interest in the items, and to the state historic preservation officer. Notice will also be given to tribes which occupy or have occupied the land on which the discovery is made, the Arizona commission on Indian affairs and the intertribal council of Arizona. The director is then charged with overseeing consultation and agreements on the disposition of items. If no agreement is reached the director shall defer to the nearest relative for the treatment of human remains and if no relative is known, or if the items in question are religious or cultural items, a disposition will be made in accordance with the desires of the culturally affiliated tribe. In any event the disposition of items shall be handled in an efficient manner so that an affected

construction project may be completed in a timely manner.

When there is no claim for the return of human remains by a tribe, the state museum is charged with leaving the remains in place when possible or reintering them when removal is necessary. Reburial may occur up to a year after the excavation to allow for scientific study. Claims may also be made by a tribe for culturally affiliated human remains or objects in the possession of a state agency as of September 20, 1990. When there is a dispute between parties the statute requires arbitration and the arbitrator may be the state historic preservation officer. Arbitration decisions are appealable to the Superior Court.<sup>19</sup>

The Arizona burial law, Title 41, section 865, which pertains to burial places over fifty years old on state or private land, was also amended in 1990. It is now a class 5 felony to intentionally disturb human remains or funerary objects on state, local government or private lands, without permission of the director of the state museum. It is also a class 5 felony to unintentionally disturb burials and then neglect to report the find to the director or to further disturb a burial.<sup>20</sup> A person "who intentionally possess, sells or transfers any human remains or funerary objects that are excavated or removed" in violation of this section are also subject to felony prosecution and forfeiture to the state of the item and the proceeds of any sale.<sup>21</sup>

FEDERAL LAW: There are two main pieces of federal legislation which concern Native American cultural property: The Archeological Resources Protection Act (ARPA), of 1979, which is focused on the preservation of resources for their scientific value, and the Native American Graves Protection and Repatriation Act (NAGPRA), of 1990, which is truly Native American cultural property rights legislation.

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ARPA provides the federal government with a flexible tool to preserve and protect irreplaceable archeological resources. Archeological resource is defined as "material remains of past human life or activities" and which are at least 100 years of

age.<sup>23</sup> ARPA contains a uniform system of permitting for excavations on federal land, and criminal or civil sanctions for the excavation, removal, damage or defacement of archeological resources on federal or Indian lands without a permit.<sup>24</sup> Prosecution is also provided for the interstate transportation for sale or exchange of archeological resources obtained in violation of state or local law from state or private land,<sup>25</sup> and for sale in the United States of items stolen from foreign entities.<sup>26</sup>

Thus this law affords protection to ancient Indian burials and cultural property, which are all deemed to be property of the federal government, to be curated and studied under federal government direction. An exception to federal government ownership arises only if the items are located on tribal land, which creates a presumption of ownership in the tribal landowner.

ARPA is repugnant to many Native Americans because it treats sensitive objects and human remains as scientific resources. In the course of a criminal prosecution a dollar value must be placed on these items. The fundamental flaws in the law, from the standpoint of human rights, are the failure to determine property rights and the underlying assumption that items on federal land are federal property.

NAGPRA was drafted to overcome the shortcomings of ARPA and to institutionalize the consideration of Native American property rights with regard to human remains, funerary objects, sacred items and objects of cultural patrimony. In large part NAGPRA and the Arizona legislation are parallel treatments of Native American cultural property rights. Both laws require a determination of property rights from the time of discovery of human remains and cultural items and both laws allow for the repatriation of items previously regarded as government property. Both laws contain provisions for felony prosecution for trafficking in Native American human remains and cultural items without proper authority.

NAGPRA goes farther than the Arizona law to specify a process for the disclosure of items in the possession of federal repositories and museums which

receive federal funds. These institutions must have completed a general summary of all Native American cultural items in their possession and disseminate those compilations to all federally recognized tribes which might have an interest in the items. The purpose of the summary is to give notice to tribes of the contents of the collection so that they may dialogue with museums and identify the protected items which they may desire to have returned. The federal agencies and museums which receive federal funds must also complete an item by item inventory of human remains and associated funerary items and furnish those lists to all parties who may have an interest. A statement of cultural affiliation on an inventory is a binding statement of the right of the culturally identified group or lineal descendent to claim the remains. If a museum which receives federal funds sells an item in its collection that is protected by NAGPRA, the institution is subject to criminal sanctions.<sup>27</sup> NAGPRA provides a good faith defense to later claims when it has repatriated an item in adherence to the NAGPRA process.<sup>28</sup>

#### **Pending Native American Cultural Property Issues**

THE CUSTODY BATTLE FOR KENNEWICK MAN: Near Kennewick, Oregon the remains of a 9,300 year old man were found and the battle which looms over him may be greater than that of the altercation which caused a spear point to become lodged in his hip. The Corps of Engineers, on whose land the remains were found, made a determination that the individual was Native American and they issued a NAGPRA notice of intent to repatriate to the Umatilla tribe, the aboriginal occupants of the area. A group of scientists and an anglo religious group, the Asatru Folk Assembly, have each brought suit in federal court in Oregon to claim the remains, one for science and the other on personal religious grounds.<sup>29</sup> The court must now answer the threshold question, is Kennewick Man Native American? If so, NAGPRA applies and the law is clear that only federally recognized tribal groups have standing to make a claim. If not, the Corps will utilize their regular procedures outside of

NAGPRA.

This author has no idea whether Kennewick man is a Native American. However, one thing is undisputably clear under the law, and that is that the decision rests with the Corps. The court may or may not find that the Corps' decision was arbitrary, capricious or an abuse of discretion and remand the matter back to the Corps for further action. The decision begins and ends with the land managing agency.

If Kennewick man is determined to be Native American the next step is to determine by a preponderance of the evidence which tribe among competing claimants shall have custody of the remains. Again, this decision begins with the Corps.

**EVIDENCE IN SUPPORT OF CULTURAL PROPERTY CLAIMS:** Tribes may have had difficulty in the past perfecting claims to property, because the court did not recognize the common ownership of the property or because the evidence of cultural patrimony was offered by oral tradition. NAGPRA has legislated the admission of evidence based upon "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."<sup>30</sup> Since the essence of all evidence is relevance and competence, the law now recognizes that evidence of the status of an object has inherent reliability when offered by the people who are in a position to know its substance, such as an elder of the tribe or a religious leader.

### **Conclusion**

This decade will be marked in history as a human rights period, one in which government action was predicated on a determination of the property rights of individuals. NAGPRA and the laws of its genre provide a process for establishing Native American cultural property rights.

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co-author of *Heritage Resources Law* (in press John Wiley & Sons).

ENDNOTES:

- 1 Statement to the House of Representatives upon the passage of HR 5237.
- 2 Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35 (1992). See generally 24 ARIZ. ST. L. J., *Symposium: The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation*.
- 3 F. Berkes & C. Folke, *Investing in Cultural Capital for Sustainable Use of Capital*, INVESTING IN NATURAL CAPITAL 1994.
- 4 Lawrence Yano, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 UCLA L. R. 443 (1993).
5. Joseph Sax, *Heritage Preservation As A Public Duty: The Abbe Gregorie and the Origins of an Idea*, 88 MICH. L.R. 1142 (1990).
6. Yoram Barzel, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS*, p. 4 (1997).
- 7 16 USC 431-433.
- 8 Margaret Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. R. 147 (1989).
- 9 L. White Jr., *The Historical Roots of Our Ecological Crisis*, 155 SCIENCE 1203 (1967).
- 10 Margaret Jane Radin, *REINTERPRETING PROPERTY* (1993).
- 11 *Hearings on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. (May 14, 1990).
- 12 *Newman v. State*, 174 So. 2d 479 (Fla. App. 1965).
- 13 *State v. Glass*, 273 N.E. 2d 893 (Ohio App. 1971).
- 14 *Onondaga Nation v. Thatcher*, 61 NYS 1027 (1899).
- 15 128 Cal. App. 3d 536, 180 Cal. Rptr. 423 (1982).
- 16 Thomas H. Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation*, 55 MO. L. R. 883, 901, 903 (1990).

- 17 Paul Bender, *1990 Arizona Repatriation Legislation*, 24 ARIZ. ST. L. J. 391 (1992).
- 18 A.R.S. 41-844(B).
- 19 A.R.S. 41-844(J).
- 20 A.R.S. 41-865 (A,B,G).
- 21 A.R.S. 41-865(G).
- 22 ARPA 16 USC 470aa-mm (1979), NAGPRA 25 USC 3001-3013 (1990).
- 23 16 USC 470bb(1).
- 24 16 USC 470 ee.
- 25 *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), *cert denied*, 114 S.Ct. 898 (1994).
- 26 *United States v. Melnikas*, CR 2-96-107, Dis. Ohio (1996), conviction under 16 USC 470ee(c) and 18 USC 2315, for the theft of documents from the Vatican library and a cathedral library in Toledo Spain, which were sold to art dealers in the United States.
- 27 18 USC 1170(b). *United States v. Slater Museum of Norwich Conn.* (pre-trial diversion). The sale of a bowl subject to NAGPRA consultation with the Narragansett tribe was sold through Christies for \$90,000. The sale was reversed.
- 28 25 USC 3005 (f).
- 29 *Bonnichsen v. United States*, No. 96-1481 (D. Ore.). *Asatru Folk Assembly v. United States*, No. 96-1516 (D. Ore.).
- 30 25 USC 3005 (a)(4).

# CONTROL OF CULTURAL PROPERTY AS HUMAN RIGHTS LAW

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In the larger scope of history this is a small thing, in the smaller scope of conscience, it may be the biggest thing we have ever done.<sup>1</sup>

## I. INTRODUCTION

The 1980s ended with a resurgence of human rights activism on a scale not seen for twenty years. Unlike the turbulent 1960s, however, the more recent activism was quiet and orderly. There were few marches or explosive stories on the evening news. There was also relatively little litigation. The venue for human rights activism shifted from the streets and the courts to state houses across the country and the United States Congress.

The shift to legislation poses a certain irony, since it was the legislative process that proved unresponsive in the 1960s and forced human rights issues into the courts. In the late 1980s, it was the failure of the judicial system that forced human rights activism to petition the legislatures.

The newer laws are not concerned with equality in employment, housing, or education, as was the 1960s litigation. They pertain to the previously overlooked issue of Native American cultural property rights. These laws will shake some time-honored assumptions concerning control over cultural property and to place them firmly within the realm of traditional American property law.

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1. Congressman Morris Udall (D-AZ), Statement to the U.S. House of Representatives on the passage of H.R. 5237, the Native American Graves Protection and Repatriation Act (Oct. 27, 1990).

on lands under its jurisdiction. The fruits of such excavations were to be placed in public museums.<sup>6</sup> In 1979, the Archaeological Resources Protection Act (ARPA) strengthened federal control over "material remains of past human life or activities" which are at least 100 years of age.<sup>7</sup> While archaeological resources found on non-Indian federal land remained the property of the United States, ARPA permits were usually granted to scientific institutions for the purpose of study and potentially long-term analysis. In practice, the excavating institutions retained possession of items in perpetuity. It was only with the adoption of the Federal Curation Regulations<sup>8</sup> that the line was clearly drawn between the fiduciary duty of the federal government and the repository institution. Federal responsibility to care and account for cultural property from federal and Indian lands can not be delegated.

Recognition of cultural property rights has been obstructed by the disparity between Eurocentric views of personal private property, which dominate American jurisprudence, and the traditional communal property practices of some native people. The legal basis of the crime of theft, for instance, is the control of property of another without their permission. Eurocentric notions of property define personal property interests as assets under lock and key. The inability of native people to assign cultural property to a person and the traditional practices of storing items in open areas or caves, have left government prosecutors hesitant to pursue cases of theft of communally owned Native American cultural property. Treasure salvors have ridden a wave of opportunism despite the legal principle that intentionally placed items are not treasure trove,<sup>9</sup> and the fact that the removal of items from federal land is simply theft of government property and a violation of ARPA.<sup>10</sup>

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6. See 16 U.S.C. §§ 431-33 (1994).

7. 16 U.S.C. § 470bb(1) (1994).

8. See 36 C.F.R. pt. 79 (1990).

9. A private action in tort for damages was suggested by the court in *Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986). For years an amateur archeologist extracted items from burials on a private plantation, which later became state property. See *id.* at 602. When the state sought to halt the digging and requested the return of items removed, the individual claimed the items were treasure trove and that the items could not be taken from him. See *id.* at 605. He also claimed the state was equitably estopped from obfuscating years of his work and that he had expended efforts in detrimental reliance on the ability to dig at will. See *id.* at 606. The court found that there is no treasure trove in intentionally placed property and that he had no reasonable basis to believe that he could remove items without permission from the landowner. See *id.* Further, the court commented that descendants of those whose burials have been desecrated have the right to demand respect for the burials, for return of property, and for damages for the pain of desecration. See *id.* at 607.

10. See 16 U.S.C. § 470ee.

the Constitution.<sup>14</sup> Any distinction made between property rights and human rights is spurious.<sup>15</sup> Human rights are simply part of a person's property rights. The property rights include cultural property rights.

Questions of Native American cultural property are not about the relative worth of science or religion. Rather, the central issue is one of control. Who has the right to decide? The forced sharing of space brings home the forced coexistence with other people in the world and the forced sharing of the decision-making power.<sup>16</sup> The recognition of Native American cultural property rights brings to an end the domination of Eurocentric assumptions concerning property rights and the disparate treatment of human remains.

### III. THE FAILURE OF THE COURTS

If cultural property rights are fundamental rights and inherent within existing law, why was there a need to devise specific new legislation? The answer given to this question during a 1990 hearing before the Senate Select Committee on Indian Affairs was that attempts to enforce property rights using available legal means would not be upheld in court.<sup>17</sup>

It has been 100 years since the Onondaga Nation first brought action in New York state court requesting the return of Wampum Belts belonging to them.<sup>18</sup> The state court consistently failed to give recognition to the property rights of the Onondaga and the state museum retained the items. Finally, in 1989, the director of the New York State Museum, Dr. Martin Sullivan, made an administrative decision to return the Wampum Belts to their rightful owner, the Onondaga Nation. The case was thus resolved outside of court.

During a frolic in the Florida swamps in 1964, Arnold Clifford Newman came across the coffin of a Seminole Indian which had been undisturbed for about two years.<sup>19</sup> Newman entertained the young lady he was with that evening by removing the Seminole individual's skull and taking pictures of himself and his companion with remnants of the deceased.<sup>20</sup> Those photos and the testimony of relatives of the deceased resulted in Newman's misdemeanor conviction for violating a Florida law that prohibited willful

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14. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

15. See YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 4 (2d ed. 1997).

16. See generally MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993).

17. See *Hearings on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong. 192 (1990) (statement of Walter Echo-Hawk).

18. See *Onondaga Nation v. Thatcher*, 61 N.Y.S. 1027 (1899).

19. See *Newman v. State*, 174 So. 2d 479, 480 (Fla. Dist. Ct. App. 1965).

20. See *id.* at 482.

200 Miwok graves. Ancient burial sites lacked all protection in states, such as Ohio, where decomposed remains are no longer considered burials.<sup>31</sup>

When pursuing stolen property, common law theories should have been adequate in all of these cases. However, property held by the government or discovered pursuant to an excavation permit is deemed by law to be government property and may not be deacquired by even the most well meaning public servant.<sup>32</sup> Clearly there was a need for specific legislation.

#### IV. THE SHIFT TO LEGISLATION

Congressional attention was forcibly drawn to the issue of Native American burials in 1988, when the National Geographic published a lengthy article on the massive destruction of over 800 burial sites on a private farm in Kentucky and the government's inadequate response.<sup>33</sup> Representative Charles Bennett of Florida specifically referenced this influential article as stimulating his introduction of the Native American Burial Site Preservation Act, one of the twenty bills dealing in whole or in part with the disposition of Native American cultural property introduced in the United States House or Senate between 1986 and 1990.<sup>34</sup>

By 1990, almost every state in the country had amended its law to include protection for Native American burial sites.<sup>35</sup> States that previously had mild protection laws amended them to add felony sanctions for the destruction and theft of items from burials, whether or not the sites were marked. This new generation of laws also included state statutes that required private landowners to report the presence of burials on their land to a state authority and to become involved in repatriating the remains to the appropriate tribal authorities.

The National Museum of the American Indian Act of 1989 (NMAIA)<sup>36</sup> was the first federal legislation to address disposition of Native American

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31. See PRICE, *supra* note 29, at 96.

32. See 16 U.S.C. § 470cc (1994) (permit); 16 U.S.C. § 470dd (custody of resources); 36 C.F.R. pt. 79 (1990) (curation regulations generally).

33. See Harvey Arden, *Who Owns Our Past?*, NAT'L GEOGRAPHIC, Mar. 1989, at 376, 378.

34. See *Protection of Native American Graves and the Repatriation of Human Remains and Savred Objects, Hearing on H.R. 1381 Before the House Comm. on Interior and Insular Affairs*, 101st Cong. 45-47 (1990) (statement of Rep. Charles Bennett). "Not only did the National Geographic article stimulate me to think in this field," explained Bennett, "but also the sadness that I felt when I saw some of these great mounds being chopped down, and not even properly archaeologically studied as they were taken down . . . . It was a chilling experience for me to see." *Id.* at 47.

35. See Boyd, *supra* note 11, at 903-07.

36. 20 U.S.C. § 80q (1990).

construed broadly to include the physical remains of a human "body of a person of Native American ancestry."<sup>45</sup> "Funerary objects" means items placed with or near individual human remains at the time of death or later "as part of the death rite or ceremony of a culture."<sup>46</sup> "Sacred objects" are defined as "specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents."<sup>47</sup> Lastly, "objects of cultural patrimony" are defined as items having ongoing importance to an Indian tribe or Native Hawaiian organization as a whole rather than property owned by an individual.<sup>48</sup>

NAGPRA provides procedures to determine the proper repatriation of previously collected Native American cultural items<sup>49</sup> as well as the disposition of current discoveries and excavations on either federal or tribal lands.<sup>50</sup> Additional provisions preclude the illegal trafficking of human remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>51</sup>

NAGPRA supports claims made by lineal descendants, federally recognized Indian tribes, and Native Hawaiian organizations. Consistent with both English and American common law, priority goes to the lineal descendants of the individual whose body, funerary objects, or sacred objects are being claimed.<sup>52</sup> If a lineal descendant can not be identified, federally recognized Indian tribes and Native Hawaiian organizations may claim the objects.<sup>53</sup> Only Indian tribes and Native Hawaiian organizations can claim communally owned objects of cultural patrimony.<sup>54</sup> In this way, the law recognizes not only the property rights of individuals for all but communally owned property, but also the unique government-to-government relationship which exists between the U.S. government and the various Indian tribes, Alaskan Village corporations and the Native Hawaiian organizations.<sup>55</sup>

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45. 43 C.F.R. § 10.2(d)(1) (1998).

46. *Id.* § 10.2(d)(2).

47. *Id.* § 10.2(d)(3).

48. *See id.* § 10.2(d)(4).

49. *See id.* §§ 10.8-13; 25 U.S.C. § 3005(a) (1994).

50. *See* 43 C.F.R. § 10.3-7; 25 U.S.C. § 3005(a)(4).

51. *See* 18 U.S.C. 1170 (1994).

52. *See generally* Bowman, *supra* note 5.

53. *See* 25 U.S.C. § 3005(a)(1)(1994).

54. *See id.* §§ 3005(a)(1), 3002(a)(1).

55. Congress has found elsewhere that the historical and unique legal relationship between the United States and American Indian, Alaska Native, Eskimo, and Aleut communities extends in some cases to Native Hawaiians. *See* 20 U.S.C. § 7902 (1994); 42 U.S.C. § 11701 (1994).

with common law notions of property law. If an item is unlawfully removed in the first instance, it does not become lawfully separated from the owner simply due to the passage of time. Conversely, if property was freely given by an individual or group that had the authority to do so at the time of the transfer, and the item is now deemed to be patrimony, the designation does not have retroactive effect.<sup>60</sup> Unlike some foreign nations, which have statutes that allow the possessor to retain an item held over time where the possessor was not on notice that the item was illegally removed from the initial owner, under NAGPRA the innocent owner defense may bar criminal prosecution, but it does not confer rightful ownership hostile to the previously disenfranchised victim. Where criminal intent is absent there is still no assumption of a property right.

NAGPRA does not protect any class of property not protected within the tenants of American property law. NAGPRA does not create any new or special rights for Native Americans. Rather, the statute applies common law property rights principles consistent with the enumerated NAGPRA categories. NAGPRA affords Native Americans equal protection under the law.

NAGPRA establishes a set of procedures to assist in rectifying these past wrongs. The statute requires federal land managers to consult with lineal descendants, Indian tribes, and Native Hawaiian organizations prior to planned excavations and after the inadvertent discovery of Native American human remains and cultural items on federal or tribal lands.<sup>61</sup> NAGPRA also requires federal agencies and museums to provide summaries of their Native American collections and more detailed inventories of Native American human remains and associated funerary objects to lineal descendants, Indian tribes, and Native Hawaiian organizations.<sup>62</sup> The property rights to items in collections, within the narrow NAGPRA protected categories, are subject to determination, and the property right of ownership to newly discovered items is determined upon discovery, before the item is accessioned by the government.

NAGPRA's discovery/excavation provisions and collection provisions have occasionally been misapplied. The two sections are not interdependent. The discovery/excavation provisions are concerned with the disposition of items on federal or tribal lands after the enactment of the law. Federal

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study would have to be of sufficient benefit to deny a person's control of his or her parent's corpse. Such restrictions are usually limited to matters under criminal investigation. *See* 42 U.S.C. § 14132(a) (1994).

60. *See* 25 U.S.C. § 3001(c).

61. *See id.* § 3002.

62. *See id.* § 3003-3004.

tandem with property rights. Such regulations promote the fair allocation of the burdens and benefits associated with property ownership. Inherent in property rights are non-compensable limits on the owner's use of the land.<sup>65</sup> These limits include the ability of a government to restrict harmful uses, such as the removal or destruction of burials.<sup>66</sup> The public trust doctrine imposes a fiduciary obligation on the government to protect resources on the land for the public good and to protect traditional uses of the land.<sup>67</sup>

A compensable taking will occur when the property owner loses the "bundle of sticks" which comprises the totality of the attribute of property rights.<sup>68</sup> Use of the land has been defined as historic or reasonably expected use and not all speculative or potentially possible uses.<sup>69</sup> A property owner does not have a complete right to all economically feasible uses of the land. A landowner cannot complain of a taking when he proposes a change in use that is encumbered by a prior restriction.<sup>70</sup>

Under common law, objects embedded in the land belonged to the landowner. More recently, ownership in land has evolved to delineate between property ownership on the surface and subsurface minerals or water.<sup>71</sup> However, even under old English common law, human burials were afforded the same treatment now bestowed in American property law.<sup>72</sup> Descendants of the deceased retain property rights in the remains.<sup>73</sup> Therefore, a landowner does not have the authority to alter burials on his or her land, as they lack the property right to do so.

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65. See James McElfish Jr. et al., *Property: Past, Present, Future*, ENVTL. FORUM, Sept.-Oct. 1996, at 20, 23, 26-27.

66. See *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994).

67. See *id.* (finding that prior use as a burial was sufficient to give rise to protection even prior to the statute).

68. See generally, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

69. See *Consolidated Rock Prod. Co. v. City of Los Angeles*, 370 P.2d 342, 351-52 (Cal. 1962) (holding that the denial of a permit to extract sand and gravel from land purchased by a gravel company on the basis of zoning restrictions is not a taking where the property was formerly farm land).

70. See generally *Just v. Marionette County*, 201 N.W.2d 761 (Wis. 1972) (stating that the Army Corps of Engineers did not create a taking when it denied a permit to a private landowner to drain a swamp for a housing project). The court held that the natural use of the land was as a wetland and there is no property interest in the possible uses of land given unlimited resources to change topography. See *id.* at 768-69, 771.

71. See generally Ellen Avery, *The Terminology of Florida's New Property Rights Law: Will It Allow Equity to Prevail or Government to Be "Taken" to the Cleaners?*, 11 J. LAND USE & ENVTL. L. 181 (1995) (asserting that in Florida, where the lowering of water tables is causing salination of the drinking water, the restriction on development is not a taking, despite new legislation that considers diminution of property value grounds for compensation from the public because there is no right to cause a public nuisance to occur or to be compensated for the inability to cause harm).

72. See generally *Bowman*, *supra* note 5.

73. See *id.*

Remaining to be resolved is the issue of the method and manner of determining how much compensation is due when there has been a taking. In Minnesota, claimants requested compensation for the diminution of market value of their entire parcel, as their proposed use was restricted where it would require the removal of Indian burial mounds.<sup>80</sup> The court denied compensation absent a showing that there were no other marketable uses for the land.<sup>81</sup> That the owners had traditionally farmed the land and then chose to lease a portion of it for the extraction of fill dirt which would impact burials did not provide a basis for a compensable claim when it was appropriate to view the parcel as a whole.<sup>82</sup> The court espoused the recurring theme that a landowner does not have the right to use every inch of land to its highest commercial potential.<sup>83</sup> States are not required to compensate landowners for complying with traditional property law.<sup>84</sup> The case did not discuss potential compensation for aggrieved descendants of those whose burials were being destroyed.

Thus far the discussion of takings has focused on the claims of landowners who have discovered that prior obligations and limitations come with the land. There are also the interests of those who have cultural property rights. Descendants of those whose burials have been desecrated have the right to demand respect for the burials, return of property wrongfully held, and damages for the pain of desecration.<sup>85</sup> Cultural property is a form of capital common to a group of people. The responsibility for the preservation of the stock of cultural capital falls upon government. When a dam is to be built, or the level of a waterway is to be raised, it is the responsibility of government to internalize the cost to cultural capital within the cost of constructing the project. Cultural capital, like natural capital and monetary capital, is necessary to the healthy being and continuation of

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80. See *Thompson v. City of Red Wing*, 455 N.W.2d 512, 515 (Minn. Ct. App. 1990).

81. See *id.* at 517.

82. See *id.* at 516-18.

83. See *id.* at 518. See also *Zealy v. City of Waukesha*, 534 N.W.2d 917 (Wis. Ct. App. 1995). The landowner was able to recoup the value of his expected total return on 10% of a parcel which he successfully rezoned and leased to commercial use. See *id.* at 917. A taking was claimed when development for residential use on the remainder of the parcel was hampered by city restrictions on use to accommodate water containment. See *id.* at 919. The landowner urged that the court consider the impact to the portions separately and the city urged that the parcel be valued as a whole. See *id.* at 923. The court found that there was no single bright line test which would require one method of valuation in all circumstances, but rather focused on factors to be considered in a balancing test. See *id.* at 923-24. The court declined to find a taking and remanded the matter back to the trial court to consider whether the unaffected portion was relevant to the anticipated use of the affected portion of the parcel. See *id.* at 924.

84. See 43 C.F.R. §§ 10.3-7 (1998).

85. See *supra* note 9.

court ruled that the Bureau of Reclamation had failed to consult with the appropriate Indian tribes prior to their planned excavations and granted a temporary injunction which, incidentally, was still in effect in late 1998.<sup>92</sup> NAGPRA consultation is intended as a comprehensive step toward open communication and not a tortuous process or a permanent obstacle to otherwise legal activities on federal lands.<sup>93</sup>

In *Klamath Tribes v. Bureau of Land Management*,<sup>94</sup> the tribe objected to the federal agency permitting activities on private land that involved the illegal destruction of archeological resources on federal land. A private landowner, wishing to raise the level of an earthen embankment on his property, obtained a wetland permit from the United States Army Corps of Engineers. He then leased use of the proposed wetland to the United States Fish and Wildlife Service as a bird sanctuary. The plan hit a snag when a Bureau of Land Management archeologist chanced by the newly heightened embankment and discovered human remains protruding from the surface. To his horror, he discovered the remains had originated from an identified burial site on adjoining BLM land. The Corps of Engineers rescinded its permit. The Fish and Wildlife Service canceled their contract and the landowner sued for breach of contract. The Bureau of Land Management collected the remains from the surface of the embankment and charged the landowner with a violation of ARPA. The various federal agencies ultimately reached a settlement with the landowner involving a guilty plea on the ARPA violation and reinstatement of the Fish and Wildlife Service contract. The federal court then dismissed the claims of the Klamath, finding that disposition of the human remains collected from the surface of the embankment would soon be resolved when the Bureau of Land Management completed its inventory. The facts of this case make it clear that no law can be considered in a vacuum. Neither the settlement nor the court opinion resolved the disposition of the human remains that originated on federal land but were now part of the embankment on private land. The landowner takes the position that he need not dismantle his dam. The Bureau of Land Management believes that they are no longer responsible for remains not on

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92. *See id.*

93. In an October 26, 1990, interchange in the Senate, Senator Simpson asked for clarification of the legislative intent of some potential ambiguities in the language of the proposed bill. The first concerned legal balances in the law to protect the interests of industries that are critical to the economy. Senator McCain assured Simpson that the excavation and discovery provisions of the bill did not apply to state or private lands. Further, nothing in the bill would result in a permanent interruption of development activity on federal lands. *See* 136 CONG. REC. S17,173, S17,176 (daily ed. Oct. 26, 1990).

94. CV95-975MA (D. Or.) (July 29, 1997) (unpublished opinion, on file with authors).

In *Asatru Folk Assembly v. United States Army Corps of Engineers*,<sup>98</sup> a religious organization claimed the remains to be those of one of its European ancestors and requested to take possession. The court declined to dismiss the *Bonnichsen* plaintiffs, ruling that they had standing to bring the claim, upholding their assertion of a First Amendment right of study, the latter despite a Ninth Circuit ruling that there is no First Amendment right to private claims or resources on public lands for study or possession.<sup>99</sup> The court vacated the Corps of Engineers decision regarding the disposition of the human remains and remanded the decision back to them.<sup>100</sup> The court, recognizing that this was a new area of the law, included seventeen specific questions for the Corps of Engineers to consider in reevaluating its decision.<sup>101</sup> These questions—including the meaning of the term “Native American” and the place of scientific study in making decisions—have recently been clarified by the National Park Service, the agency responsible for national implementation of NAGPRA.<sup>102</sup> The court has not yet acted on the submissions. While the plaintiffs certainly have standing to challenge the Corps of Engineers decision, they do not have standing to actually assume control of the human remains.<sup>103</sup> The court can act on the claim that the agency’s actions are arbitrary and capricious and demand compliance with the law. NAGPRA is silent regarding the scientific study of human remains that are excavated or discovered on federal or tribal lands after November 16, 1990. It is within the federal land manager’s discretion to conduct scientific study to determine the status of discovered or excavated human remains in order to determine if NAGPRA applies. If the land manager determines the human remains are Native American, then NAGPRA applies and the only question is whether the federal agency has complied with the statutory procedures. The issue is not one of science versus religion.

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98. CR96-1516 JE (D. Or.) (unpublished opinion, on file with authors) (consolidated in 969 F. Supp. 628 (D. Or. 1997)).

99. See *United States v. Austin*, 902 F.2d 743, 745 (9th Cir. 1990), *cert. denied*, 498 U.S. 874 (1990). Austin was charged with violation of ARPA for digging in a cave on BLM land. See *id.* at 743. He unsuccessfully asserted a First Amendment right to knowledge, access, and possession. See *id.* at 745.

100. See *id.*

101. See *id.*

102. See Letter from Francis P. McManamon, Departmental Consulting Archeologist, National Park Service, to Donald Curtis, Walla Walla District Commander, United States Army Corps of Engineers (Dec. 23, 1997) (on file with authors).

103. See *Idrogo v. United States Army*, 18 F. Supp.2d 25 (D.D.C. 1998) (holding that neither non-tribe plaintiff had standing to bring a claim, and dismissing the case with prejudice, where a non-Indian, non-lineal descendant and the Americans for Repatriation of Geronimo sought to compel the army to repatriate to them the remains of Geronimo).

from the Mokapu remains. Under the law, a claim of lineal descent requires the claimant to establish a continuous and unbroken line between the items being claimed and the claimant. Monet proposed to establish his lineal descent from the Mokapu remains through DNA studies. Monet also alleged that the Marine Corps lacked authority to determine the proper recipient of the human remains and funerary objects because of inadequate expertise. Lastly, Monet requested access to the military base where the remains had been recovered and the costs of reinternment. The Marine Corps had not completed its inventory of the remains at the time the complaint was filed. The court dismissed Monet's complaint against the United States, finding that the Marine Corps is a federal agency and thus has authority to determine the cultural affiliation of Native American human remains and funerary objects. The court considered the agency's expertise irrelevant. The court considered those issues related to completion of the inventory and repatriation not ripe for judicial decisions. The district court's opinion was affirmed by the Ninth Circuit.<sup>111</sup>

The case of *San Ildefonso v. Ridlon*<sup>112</sup> grew out of a contorted set of facts. In 1978, twelve-year-old Ridlon found an intriguing item on land belonging to Los Alamos County, New Mexico. He picked it up and eventually turned it over to the Bradbury Museum, a federally funded institution that was part of the University of California-Berkeley. The museum held the item uncontested in open collections for ten years. In 1988, Ridlon appears to have had "givers remorse," and asked for the return of the item. When the museum refused, Ridlon successfully sued in state court for conversion. That decision was later vacated as the court acknowledged that NAGPRA may apply and the Pueblo of San Ildefonso was allowed to intervene. The county assigned its rights to the pueblo and the matter continued in federal district court. The federal court ruled against the pueblo, holding that items discovered on state lands were not covered by NAGPRA. The pueblo appealed and the Tenth Circuit Court of Appeals held that the district court had misapplied the excavation provisions of the statute to a collection.<sup>113</sup> The matter was remanded back to the trial court for rulings consistent with NAGPRA.<sup>114</sup> At this point the pueblo, faced with making a NAGPRA claim, declined to do so as they felt they would be required to make public certain secret rituals. The item was then released to Ridlon.

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111. See *Monet v. United States*, 114 F.3d 1195 (9th Cir. 1997).

112. CV95-2197 MV (D. N. Mex.) (unpublished opinion, on file with authors) (outlining facts in 103 F.3d 936 (10th Cir. 1996)).

113. See *San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996).

114. See *id.*

The third major facet of NAGPRA applies criminal penalties to the trafficking of Native American human remains and other cultural items. Since 1990, there have been eleven successful prosecutions under these provisions, nine of which resulted in plea agreements.

In *United States v. Corrow*,<sup>117</sup> a dealer in Navajo items was convicted by a jury in federal court in New Mexico of knowingly selling an object of cultural patrimony obtained in violation of the statute. Corrow had purchased the "jish," or prayer bundle, of a deceased Navajo traditional religious leader from his widow and then attempted to sell the item.<sup>118</sup> At trial, both sides used testimony of Navajo traditional religious leaders to document whether the jish fit the statutory category of cultural patrimony and therefore was protected by the statute. A defense witness testified that an individual owner could sell his jish. The government witness agreed, but added that it could only be transferred for use within the four sacred mountains defining the Navajo country. In surprising testimony under cross examination, a defense witness, a renowned academic expert on Navajo ceremonial items, admitted that she warned Corrow to avoid trafficking in what she knew to be protected items.<sup>119</sup> On appeal, Corrow attacked both the sufficiency of the facts used to prove the protected status of the item and the law itself for having a defective intent requirement.<sup>120</sup> The Tenth Circuit held that the standard of knowledge is that of the defendant and what he knew of cultural practices. In this case, Corrow was a well-established trader.<sup>121</sup> Both the Supreme Court and the Tenth Circuit rejected the argument that the statute was unconstitutionally vague, thus upholding the statute.<sup>122</sup>

## VII. BACK TO THE LEGISLATURE

Two separate legislative efforts to amend NAGPRA recently have occurred. Neither was successful, but both are worthy of mention as they are indicative of diverse viewpoints which still exist. Neither bill seeks to streamline or improve the operation of the statute. Rather, they each represent the different goals and desires of the diverse parties that initially created the statute in a moment of compromise.

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117. 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 1089 (1998).

118. *See id.* at 798-99.

119. *See id.* at 803.

120. *See id.* at 798.

121. *See id.* at 804.

122. *See id.* at 805.

purported search for balance, this amendment would be counterproductive. The Department of the Interior did not support H.R. 2893.<sup>125</sup>

Several other possible amendments appear to be consistent with the civil rights and property rights aspects of the original statute. Some question has arisen regarding the disposition of human remains and cultural items that are excavated or discovered on federal lands where no lineal descendant or culturally affiliated Indian tribe can be identified. The current statutory language then refers to claims based on aboriginal territory as determined by the Indian Claims Commission or the United States Court of Claims. Claims based on aboriginal territory as determined by treaty or act of Congress are not explicitly discussed, although aboriginal occupation was likewise used as the basis for these documents.<sup>126</sup> A possible amendment would be to add text at 25 U.S.C. § 3002 (a)(1)(C) to clarify this issue.<sup>127</sup>

Several aspects of the collection provisions of NAGPRA might also be amended to facilitate implementation. In 25 U.S.C. § 3006 (c)(5), the Native American Graves Protection and Repatriation Review Committee is directed to compile an "inventory of culturally unidentifiable human remains that are in the possession or control of each federal agency and museum and recommend specific actions for developing a process for" their disposition.<sup>128</sup> Funerary objects associated with these human remains are not included in the mandate. Revising the text of that section to treat the human remains and funerary objects equally would be consistent with otherwise applicable property law. The review committee has recommended this amendment in

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125. See Statement of Katherine H. Stevenson, Associate Director, Cultural Resource Stewardship and Partnerships, National Park Service, Department of the Interior, to the House Resources Committee, June 10, 1998. *Hearing on H.R. 2893 Before the House Resources Committee*, 105th Cong. (1998) (statement of Katherine H. Stevenson, Associate Director, Cultural Resource Stewardship and Partnerships, Nat'l Park Serv., Dept. of the Interior).

126. The preamble to the final rule states that while the drafters consider the final judgments of the Indian Claims Commission a valuable tool for identifying areas occupied aboriginally by a present-day Indian tribe, other sources should also be consulted. See 60 Fed. Reg. 62,140 (1995). However, recent interpretation of the term by the Department of the Interior indicates a more literal reliance on only the final judgments of the Indian Claims Commission and the United States Court of Claims. See Francis P. McManamon, *Approach to Documentation, Analysis, Interpretation, and Disposition of Human Remains Inadvertently Discovered at Columbia Park, Kennewick, WA* (unpublished public document) (on file with the authors).

127. NAGPRA directs the Secretary of the Interior to promulgate regulations regarding the disposition of so-called "unclaimed" cultural items excavated or discovered on federal land. See 25 U.S.C. § 3002(b) (1994). A regulatory section has been reserved at 43 C.F.R. § 10.7 (1998). Other federal law regarding the disposition of unclaimed human remains requires the appropriate federal agency to stand *in loco parentis*. See 10 U.S.C. § 1482(c) (1994); see also 24 U.S.C. § 240 (1994); 38 U.S.C. § 8501 (1994).

128. 25 U.S.C. § 3006(c)(5) (1994).

upon which claims to property are made will come from the tribes, rather than being dictated to them.

# REVISION

## of the *ICOM Code of Professional Ethics*

French version

Spanish version

[2 June 2000]

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### PROPOSED MODIFICATIONS ARE INDICATED IN BOLD

The Ethics Committee is revising the *ICOM Code of Professional Ethics*. A draft of the current revisions, received at the recent meetings of the Executive Council and Advisory Committee, is now given below.

This work is continuing and members of ICOM are invited to comment on the text and to submit case studies. These should be sent to me at the address below by **30 SEPTEMBER 2000**. Any comments will then be considered by the Committee in time for inclusion in the new version of the Code of Professional Ethics to be submitted to the ICOM General Assembly in Barcelona, 2001.

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#### I. Preamble

##### 1. Definitions

#### II. Institutional Ethics

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3. Acquisitions to Museum Collections
4. Disposal of Collections

#### III. Professional Conduct

5. General Principles
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## I. PREAMBLE

The *ICOM Code of Professional Ethics* was first adopted by the unanimous decision of the 15th General Assembly of ICOM, meeting in Buenos Aires, Argentina on 4 November 1986. [This revised version was adopted by ]

This *Code* provides a general statement of professional ethics. It may be regarded as a minimum standard of practice for members of the museum profession. It will be possible to strengthen the *Code* to meet particular national or specialised requirements and ICOM wishes to encourage this so long as it promotes the highest standards in the museum profession. A copy of such developments of the *Code* should be sent to the Secretary-General of ICOM, Maison de l'UNESCO, 1 rue Miollis, 75732 Paris cedex 15, France.

This *Code* is deemed to be the statement of professional ethics referred to in the *ICOM Statutes*, Articles 2 (2), 9(1(d)), 14(17(b)), 15(7(c)), 17(12(e)) and 18(7(d)), and payment of the annual subscription to ICOM by individual and institutional members is taken as an affirmation of this *Code of Professional Ethics*.

### 1. Definitions

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### 1.1 The International Council of Museums (ICOM)

The International Council of Museums (ICOM) is defined in Article 1(1) of its *Statutes* as "the international non-governmental organisation of museums and professional museum workers established to advance the interests of museology and other disciplines concerned with museum management and operations."

The objectives of ICOM, as defined in Article 3(1) of its *Statutes*, are:

- "(a) To encourage and support the establishment, development and professional management of museums of all kinds;
- (b) To advance knowledge and understanding of the nature, functions and role of museums in the service of society and of its development;
- (c) To organise co-operation and mutual assistance between museums and between professional museum workers in the different countries;
- (d) To represent, support and advance the interests of professional museum personnel of all kinds
- (e) To advance and disseminate knowledge in museology and other disciplines concerned with museum management and operations".

**The words "International Council of Museums" and its logo may not be used by members of ICOM in any published material, printed or electronic, to promote a member or any commercial service or product.**

### 1.2 Museum

A museum is defined in Article 2(1) of the ICOM *Statutes* as:

"a non-profit making, permanent institution in the service of society and of its development and open to the public which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment."

(a) The above definition of a museum shall be applied without limitation arising from the nature of the governing body, the territorial character, the functional structure or the orientation of the collections of the institution concerned.

(b) In addition to institutions designated as 'museums' the following qualify as museums for the purposes of this definition:

- (i) natural, archaeological and ethnographic monuments and sites of a museum nature that acquire, conserve and communicate material evidence of people and their environment;
- (ii) institutions holding collections of and displaying live specimens of plants and animals, such as botanical and zoological gardens, aquaria and vivaria;
- (iii) science centres and planetaria;
- (iv) conservation institutes and exhibition galleries permanently maintained by libraries and archive centres;
- (v) nature reserves;
- (vi) international or national or regional or local museum organisations, ministries or departments or public agencies responsible for museums as per the definition given under this article;
- (vii) non-profit institutions or organisations undertaking research, education, training, documentation and other activities relating to museums and museology;
- (viii) such other institutions as the Executive Council, after seeking the advice of the Advisory Committee, considers as having some or all of the characteristics of a museum, or as supporting museums and professional museum workers through museological research, education or training.
- [(ix) cultural centres engaged in the preservation, continuation and management of living heritage systems on a non-profit basis.]**

### 1.3 The Museum Profession

ICOM defines the members of the museum profession, under Article 2(2) of its *Statutes*, as follows:

- "Professional museum personnel include all the personnel of museums or institutions qualifying as museums in accordance with the definition in Article 2(1) (as detailed under para. 1.2 above), having received specialised training, or possessing an equivalent practical experience, in any field relevant to the management and operations of a museum and independent persons respecting the ICOM *Code of Professional Ethics* and working for museums as defined above, either in a professional or advisory capacity, but not promoting or dealing with any commercial products and equipment required for museums and services."

### 1.4 Governing Body

**The governance and strategic control** of museums in terms of policy, finance and administration, varies greatly from one museum to another according to the legal and other national or local provisions in force.

In this *Code* the term "governing body" has been used throughout to signify the superior authority concerned with the policy, finance and administration of the museum. This may be a government minister or official, a ministry, a local authority, a board of trustees, a society, a non-profit company, the **head** of the museum or another **authorised** individual or body.

**The professional head of the museum is normally appointed by and directly responsible to the governing body for the proper care and management of the museum.**

### 1.5 Social Responsibility

**Museums are provided by a variety of public and private agencies. Those who work for museums represent many different disciplines and skills, are engaged under different contractual conditions. Despite this diversity, all involved in the provision of museums — governing bodies and staff — are responsible for the preservation and interpretation of a part of the world's cultural heritage. All conduct their work in the service of society and of its development. This responsibility has an important bearing on the fundamental values and ethics of museums and museum work. All persons and institutions are publicly accountable for their actions. Therefore, every aspect of museum work should be conducted in an open and honest manner, and the public interest must be predominant in decision-making.**

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## II. INSTITUTIONAL ETHICS

**This section assumes that the institution is a museum providing a public service. Where the institution is a museum service provider, the relevant paragraphs are still applicable.**

### 2. Basic Principles for Museum Governance

#### 2.1 Minimum Standards for Museums

The governing body of a museum has an ethical duty to maintain and enhance all aspects of the museum, its collections and its services. Above all, it **has the responsibility of ensuring** that all collections in its care are adequately housed, conserved and documented.

The minimum standards for museum finance, premises, staffing and services **may be defined by law or other government regulation in some countries**. In others, guidance on and assessment of minimum standards is available in the form of 'Accreditation', 'Registration' or similar evaluative schemes. Where such standards are not available locally they can be obtained through the National Committee, the appropriate International Committee of ICOM or the ICOM Secretariat.

#### 2.2 Constitution

Each museum should have a written constitution or other document setting out clearly its legal status, **mission** and permanent, non-profit nature, in accordance with the appropriate national laws. The governing body of a museum should prepare and publicise a clear statement of the aims, objectives and policies of the museum and of the role and composition of the governing body.

#### 2.3 Finance

The governing body holds the ultimate financial responsibility for the museum and for protecting **all its resources, including** the collections and related documentation, the premises, facilities and equipment, the financial assets and the staff. It is **required** to develop and define the purposes and related policies of the institution, and to ensure that all assets are **used** properly and effectively for museum purposes. Sufficient funds must be available on a regular basis, either from public or private sources, to carry out and develop the work of the museum. Proper accounting procedures must be adopted and maintained in accordance with the relevant national laws and professional **accounting** standards. **The collections are held in public trust and may not be treated as a financial asset.**

#### 2.4 Premises

The **governing body** has an obligation to provide a suitable environment for the physical security and preservation of the collections. **The buildings and facilities** must be adequate for the museum to fulfil its basic functions of collection, research, storage, conservation, education and display. **They** should comply with all appropriate national legislation in relation to the **health, safety and accessibility of the premises having regard for the special needs of disabled people**. Proper standards of protection should be in place at all times against hazards such as theft, fire, flood, vandalism and deterioration. **The course of action to be taken in the event of emergency should be clearly specified.**

#### 2.5 Personnel

The governing body has an obligation to ensure that the museum has sufficient staff and **expertise** to meet its responsibilities. The size of the staff and its nature (permanent or temporary), will depend on the size of the museum, its collections and its responsibilities. Proper arrangements **have to be made** in relation to the care of the collections, public access and services, research and security.

The governing body has a particularly important obligation in relation to the appointment of the director or head of the museum and should have regard to the knowledge and skills required to fill the post effectively. The director of a museum should be directly responsible to and have direct access to the governing body in which trusteeship of the collections is vested.

Members of the museum profession require appropriate and continuing academic, technical and professional training in order to fulfil their role in the operation of the museum and the care for the heritage. The governing body should recognise the need for, and value of, a properly qualified and trained staff, and offer adequate opportunities for further training and re-training to maintain current awareness and an effective workforce.

The governing body should ensure that when the appointment, promotion, dismissal or demotion of any member of staff occurs, such action is taken only in accordance with appropriate procedures under the legal or other constitutional arrangements and policies of the museum. Even when such action has been delegated to the director or senior staff, it should ensure that such staff changes are made in a professional and ethical manner and in the best interests of the museum, rather than through any personal or external factor or prejudice.

A governing body should never require a member of the museum staff to act in a way that could reasonably be judged to conflict with the provisions of this *Code of Professional Ethics*, or any national law or national or specialist code of ethics.

## 2.6 Friends of Museums and Supporting Organisations

Museums depend on the public to encourage their growth and development. Many museums have Friends and supporting organisations and it is the institution's responsibility to create a favourable environment for their promotion and support and to recognise their contribution, encourage the practice, and promote a harmonious relationship between them and the professional staff.

## 2.7 Educational and Community Role of the Museum

A museum is an institution in the service of society and of its development and is generally open to the public (even though the participating public may be limited in the case of certain specialised museums).

The museum has an important duty to develop its educational role and attract wider audiences from all levels of the community, locality or group that it aims to serve. It should offer opportunities for such people to become involved in the museum and to support its aims and activities. Interaction with the constituent community is an integral part in realising the educational role of the museum and specialist staff are likely to be required for this purpose.

## 2.8 Public Access

The museum's displays and other facilities should be physically and intellectually accessible to the public during reasonable hours and for regular periods. The museum should also offer the public reasonable access to members of staff and to undisplayed collections by appointment or other arrangement with access to requested information about the collections subject to restrictions for reasons of confidentiality and security (see 7.3 below).

## 2.9 Displays, Exhibitions and Special Activities

The primary duty of the museum is to preserve its collections for the future and use them for the creation and dissemination of knowledge, through research, educational work, permanent displays, temporary exhibitions and other special activities. These should be in accordance with the stated policy and educational purpose of the museum and should not compromise either the quality or the proper care of the collections. The museum should seek to ensure that the information it publishes, whether through displays, exhibitions, publications or electronically is accurate, honest, objective and well-founded academically.

## 2.10 Commercial Support and Sponsorship

Museums may seek and accept financial or other support from commercial or industrial organisations, or from other outside sources, a policy is needed to define clearly the relationship between the museum and the sponsor. It is of particular importance that the standards and objectives of the museum are not compromised by such a relationship.

## 2.11 Income-Generating Activities

Many museums provide visitor facilities such as shops and restaurants which have income-generating potential. In some cases there are other opportunities for collaboration with commercial or promotional activities. To address these issues the governing body should have a clearly defined income-generating policy regarding the use of collections and the purpose of the museum which does not compromise the quality or care of the collections or the institution. This policy should clearly differentiate between knowledge-driven and income-generating activities. Income-generating activities should be financially beneficial for the museum but consistent with its non-profit status. All such activities should be planned and operated as an enhancement to the visitor experience.

Where voluntary or commercial organisations are involved in the provision of income generating activities, relationships with the museum must be clearly defined as well as an understanding of the activity in its museum context. The related publicity and products

**should conform to agreed standards. Replicas, reproductions and copies of items in a museum's collection must respect the integrity of the original and be permanently marked as facsimiles. All items offered for sale should comply with relevant national and local legislation.**

### 2.12 Legal Obligations

**Each governing body should ensure that the museum complies fully with all legal obligations, whether in relation to international, regional, national or local legislation and treaty obligations. The governing body should also comply with any legally binding trusts or conditions relating to any aspect of the museum collections or facilities.**

## 3. Acquisitions to Museum Collections

### 3.1 Collections Policies

**Each museum authority should adopt and publish a written statement of its collections policy. This policy should address issues relevant to existing public collections (documentation, care, and use), and include guidelines for maintaining the collections in perpetuity. Except in very exceptional circumstances, all objects acquired should be consistent with the objectives defined in the collections policy and selected with the expectation of permanency and not for eventual disposal. Acquisitions of objects outside the stated policy should only be made after careful consideration by the governing body of the museum having regard to the interests of the object under consideration, the national or other cultural heritage and the special interests of other museums. However, even in these circumstances objects without a valid title should not be acquired. The policies should include instructions on acquisitions with conditions and limitation as well as the restriction against acquiring material that cannot be catalogued, conserved, stored or exhibited properly. New acquisitions should normally be made known in a regular and consistent manner. The collections policies should be reviewed at least once every five years.**

### 3.2 Acquisition of Illicit Material

**The illicit trade in objects destined for public and private collections encourages the destruction of historic sites and ethnic cultures and promotes theft at local, national and international levels. It places at risk endangered species of flora and fauna, and contravenes the spirit of national and international patrimony. Museums should recognise the relationship between the market place and the destruction of objects for the market. The museum professional must recognise that it is highly unethical for a museum to support the illicit market in any way, directly or indirectly.**

**A museum should not acquire any object by purchase, gift, bequest or exchange unless the governing body and responsible officer are satisfied that a valid title to it can be secured. Every endeavour must be made to ensure that it has not been acquired in, or exported from, its country of origin or any intermediate country in which it may have been owned legally (including the museum's own country), in violation of that country's laws.**

**In addition to the safeguards set out above, a museum should not acquire objects by any means where the governing body or responsible officer has reasonable cause to believe that their recovery involved the unauthorised or unscientific or intentional destruction or damage of ancient monuments or archaeological sites, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.**

**A museum should not acquire, directly or indirectly, biological or geological material that has been collected, sold or otherwise transferred in contravention of any national or international wildlife protection or natural history conservation law or treaty of the museum's own country or any other country.**

**If appropriate and feasible, the same tests outlined in the preceding paragraphs should be applied in determining whether or not to accept loans for exhibition or other purposes.**

**Nothing in this section shall prevent a museum from acting as the authorised repository for objects or specimens recovered from illicit trading or export in the country in which it is situated.**

### 3.3 Field Study and Collecting

**Museums should assume a position of leadership in the effort to halt the degradation of the world's natural history, archaeological, ethnographic, historic and artistic resources. Each museum should develop policies that allow it to conduct its activities within appropriate national and international laws and treaty obligations, and with a reasonable certainty that its approach is consistent with the spirit and intent of both national and international efforts to protect and enhance the cultural heritage.**

**Field exploration, collecting and excavation should only be conducted in accordance with the laws and regulations of the host country. Planning for field studies and field collecting must be preceded by investigation, disclosure and consultation with the proper authorities and any interested museums or academic institutions in the country or area of the proposed study. This consultation should ascertain if the proposed activity is both legal and justifiable on academic and scientific grounds. Any field programme must be executed in such a way that all participants act legally and responsibly in acquiring specimens and data, and that they discourage unethical, illegal and destructive practices by all practical means.**

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### 3.4 Co-operation Between Museums on Collections Policies

Each museum should recognise the need for co-operation and consultation between museums with similar interests and collecting policies, and should consult with such other institutions both on acquisitions where a conflict of interest is possible and on defining areas of specialisation. Museums should respect the collecting areas of other museums.

### 3.5 Conditional Acquisitions and Other Special Factors

Gifts, bequests and loans should only be accepted if they conform to the stated **collections** and exhibitions policies of the museum. Offers that are subject to special conditions may have to be rejected if the conditions proposed are judged to be contrary to the long-term interests of the museum and its public.

### 3.6 Loans to and from Museums

**The loan** of objects and the mounting or borrowing of loan exhibitions can have an important role in enhancing the interest and quality of a museum and its services. However, the ethical principles outlined above (**paras. 3.1 to 3.5**) must apply to the consideration of proposed loans and loan exhibitions **as well as** to the acceptance or rejection of items offered to the permanent collections. Loans should not be accepted or **exhibited** if they do not have a valid educational, scientific or academic purpose.

**Objects from a museum collection should be loaned only to other scientific, research or educational institutions and not to private individuals. Such loans should support valid educational, scientific or academic activities.**

### 3.7 Conflicts of Interest

The **collections** policy or regulations of a museum should include provisions to ensure that no person involved in the policy or management of **that** museum, such as a trustee or other member of a governing body, or a member of the museum staff, may compete with the museum for objects or may take advantage of privileged information received because of his or her position. Should a conflict of interest develop between the needs of the individual and the museum, those of the museum **should** prevail. Special care is also required in considering any offer of an item either for sale or as a tax-benefit gift, from members of governing bodies, members of staff, or the families or close associates of these **persons**.

## 4. Disposal of Collections

### 4.1 General Presumption of Permanence of Collections

**One** of the key functions of almost every kind of museum is to acquire objects and keep them for posterity. Consequently, there must always be a strong presumption against the disposal of **objects** or specimens to which a museum has assumed formal title. Any form of disposal, whether by donation, exchange, sale or destruction requires a high order of curatorial judgement and should be approved by the governing body only after full expert and legal advice has been taken.

Special considerations may apply to certain kinds of specialised institutions such as "living" or "working" museums and some teaching and other educational museums. Museums and other institutions **which** display living specimens, such as botanical and zoological gardens and aquaria, may find it necessary to regard at least part of their collections as replaceable or renewable. **In other cases destructive analytical techniques for investigative purposes may result in the loss of part of a specimen or object. In all cases** there is a clear ethical obligation to ensure that such activities are not detrimental to the long-term survival of examples of the material studied, displayed or used **and that a detailed report of all such activities becomes a permanent part of the collections record.**

### 4.2 Legal or Other Powers of Disposal

The laws **on** the protection and permanence of museum collections and the power of museums to dispose of items from their collection vary greatly from one museum to another. **No** disposals are permitted by **some institutions**, except for items that have been seriously damaged by natural or accidental deterioration. Elsewhere, there may be no explicit restriction on disposals.

Where the museum has legal powers permitting disposals, or has acquired objects subject to conditions of disposal, the legal or other requirements and procedures must **fully be complied with**. Even where legal powers of disposal exist, a museum may not be completely free to dispose of items acquired **with** financial assistance from an outside source (e.g. public or private grants, donations from a Friends of the Museum organisation, or private benefactor). These disposals normally require the consent of all parties who had contributed to the original purchase.

Where the original acquisition was subject to mandatory restrictions these must be observed unless it can be clearly shown that adherence to such restrictions is impossible or substantially detrimental to the institution. Even in these circumstances the museum **can be relieved only** from such restrictions through appropriate legal procedures.

### 4.3 Deaccessioning Policies and Procedures

Where a museum has the necessary legal powers to dispose of an object the decision to sell or otherwise dispose of material from the collections

should be taken only after due consideration and such material should be offered first by exchange, gift or private treaty sale to other museums before sale by public auction or other means is considered. **The manner of disposal should reflect the best interest of the museum, the public trust it fulfils in maintaining and preserving its collections and the scholarly community it represents.** A decision to dispose of a museum object or specimen whether by exchange, sale or destruction should be the responsibility of the governing body of the museum acting in conjunction with the director and the curator of the collection. **The manner of deaccessioning should reflect the ethical and legal responsibilities of the museum, the character of its collections (whether renewable or non-renewable) and the public trust it fulfils in preserving its collections.** Full records must be kept of all such decisions and the objects involved and proper arrangements made for the preservation and/or transfer, as appropriate, of the documentation relating to the object, including photographic records and any other technological media where practicable.

**Members of the museum staff, the governing body, or their families or close associates, should never be permitted to purchase objects that have been de-accessioned from a collection.** Similarly, no such person should be permitted to appropriate items from the museum collections, even temporarily, to any personal collection or for personal use.

#### 4.4 Return and Restitution of Cultural Property

If a museum should come into possession of an object that can be demonstrated to have been exported or otherwise transferred in violation of the principles of the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970) and the country or people of origin seek its return and demonstrate that it is part of the country's or people's cultural heritage, the museum should, if legally free to do so, take prompt and responsible steps to co-operate in the return of the object.

**In response to the return of cultural property to the country or people of origin, museums should be prepared to initiate dialogues with an open-minded attitude based on scientific and professional principles (in preference to action at a governmental or political level). In addition the possibility of developing bilateral or multilateral partnerships with museums in countries which have lost a significant part of their cultural heritage should be explored.**

Museums should also respect fully the terms of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (The Hague Convention, 1954 and its Second Protocol, 1999). In support of this Convention, museums should abstain from purchasing, appropriating or acquiring cultural objects from any occupied country.

#### 4.5. Income from Deaccessioning of Collections

**Moneys or compensation received from the deaccessioning and disposal of objects and specimens from a museum collection should be used for the purchase of additions to the collection.**

### III. PROFESSIONAL CONDUCT

**This section assumes that the museum professional is employed in a museum. Where the individual provides a service to a museum through a specialised agency or as a museum service provider, the relevant sections are still applicable.**

#### 5. General Principles

##### 5.1. Ethical Obligations of Members of the Museum Profession

Employment by a museum, whether publicly or privately supported, is a public trust involving great responsibility. **Therefore, museum employees must act with integrity and in accordance with the most stringent ethical principles as well as the highest standards of objectivity in all activities.**

An essential element of membership of a profession is the implication of both rights and obligations. Although the conduct of a professional is ordinarily regulated by the basic rules of moral behaviour which govern human relationships, every occupation involves standards, as well as particular duties, responsibilities and opportunities that create the need for a statement of guiding principles. The museum professional should understand two guiding principles: first, that museums are the object of a public trust whose value to the community is in direct proportion to the quality of service rendered; and, second, that intellectual ability and professional knowledge are not, in themselves, sufficient, but must be inspired by a high standard of ethical conduct.

The director and other professional staff owe professional and academic allegiance to their museum and should **always** act in accordance with the approved policies of the museum. The director or other principal museum officer **should comply with the terms of the ICOM Code of Professional Ethics.** The director or other principal museum officer should also be aware of any other codes or policies on ethics relevant to museum work, and should urge the governing body to comply with these standards whenever appropriate.

##### 5.2 Personal Conduct

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Loyalty to colleagues and to the employing museum is an important professional responsibility and must be based on allegiance to fundamental ethical principles applicable to the profession as a whole.

Applicants for any professional post should divulge frankly and in confidence all information relevant to the consideration of their applications and, if appointed, should recognise that museum work is normally regarded as a full-time vocation. Even when the terms of employment permit outside employment or business interests, the director and other senior staff should not undertake other paid employment or accept outside commissions that are in conflict with the ethical and legal interests of the museum. In accepting such paid or unpaid assignments museum staff should be alert to the personal and institutional ethical principles that should not be compromised.

### 5.3 Private Interests

While members of a profession are entitled to a measure of personal independence, museum professionals must realise that no private business or professional interest can be wholly separated from their institution or other official affiliation, despite disclaimers that may be offered. Any museum-related activity by the individual may reflect on the institution or be attributed to it. The professional must be concerned not only with true personal motivations and interests, but also with the way in which such actions might be construed by the outside observer.

Museum employees and others in a close relationship with them must not accept gifts, favours, loans or other personal benefits that may be offered to them in connection with their duties for the museum (see also 8.4 below).

## 6. Professional Responsibility to the Collections

### 6.1 Acquisitions to Museum Collections

The director and professional staff should take all possible steps to ensure that a written collections policy is adopted by the governing body of the museum and thereafter reviewed and revised at regular intervals. This policy, as formally adopted and revised by the governing body, should form the basis of all professional decisions and recommendations in relation to acquisitions.

Negotiations concerning the acquisition of items for museum collections from members of the public must be conducted with scrupulous fairness to the seller or donor. No object should be deliberately or misleadingly identified for the benefit of the museum. Also, an object should not be taken or retained on loan with the deliberate intention of improperly procuring it for the collections.

### 6.2 Care of Collections

It is a crucial professional obligation to care for the collections. It is, therefore, an important professional responsibility to ensure that all items accepted temporarily or permanently by the museum are properly and fully documented to facilitate provenance, identification, condition and treatment. All objects accepted by the museum should be properly housed and maintained.

Careful attention should be given to the development of policies to protect the collections against natural and man-made disasters and the means of ensuring the best possible security as a protection against theft in displays, exhibitions, working or storage areas, against accidental damage when handling objects and against damage or theft in transit. Where it is the national or local policy to use commercial insurance arrangements, the staff should ensure that the insurance cover is adequate, especially for objects in transit and loan items, or other objects which are not owned by the museum but are its current responsibility.

Members of the museum profession should not delegate important curatorial, conservation, or other professional responsibilities to persons who lack the appropriate knowledge and skill, or who are inadequately supervised to assist in the care of the collections. There is also a clear duty to consult professional colleagues within or outside the museum if at any time the expertise available in a particular museum or department is insufficient to ensure the welfare of items in the collections under its care.

### 6.3 Conservation and Restoration of Collections

One of the essential ethical obligations of each member of the museum profession is to ensure the proper care and conservation of collections and individual items for which the employing institutions are responsible and to ensure that the collections are passed on to future generations in as good and safe a condition as practicable having regard to current knowledge and resources.

Special attention must be paid to preventative conservation, including the provision of suitable environmental protection against natural or artificial causes of deterioration of museum collections.

The degree of replacement or restoration of lost or damaged parts of an object, specimen or work of art that may be ethically acceptable calls for proper co-operation between all who have a specialised responsibility for the object and should not be decided unilaterally. The restoration of sacred objects may be unacceptable to the communities which produced them and have on-going associations with them.

### 6.4 Documentation of Collections

The recording and documenting of collections in accordance with appropriate standards is an important professional obligation and responsibility. It is particularly important that collection documentation should include a complete description of all items, their provenance and source and the conditions of acceptance by the museum. Collection data should be maintained actively and augmented in the on-going

**life of the museum.** Such data should be kept in a secure environment and be supported with retrieval systems providing access to the data by the staff and other legitimate users (see 2.7).

#### 6.5 Welfare of Live Animals

Where museums and related institutions maintain **living animals** for exhibition or research purposes, the health and well-being of any such creatures must be a **basic ethical consideration**. It is essential that **the animals and their living conditions are inspected regularly by a veterinary surgeon or other equally qualified persons**. The museum should prepare and implement a safety code for the protection of staff and visitors which has been approved by an expert in the veterinary field.

#### 6.6 Human Remains and Material of Sacred Significance

**Where a museum maintains collections of human remains and material of sacred significance, these should be housed securely and respectfully, and carefully maintained as archival collections in scholarly institutions and be available for legitimate study on request. Research on such objects, their housing and care as well as any replication of them must be accomplished in a manner acceptable not only to fellow professionals but also to those of various beliefs, including particular members of the community, ethnic or religious groups concerned. Although there may be occasion to use sensitive material in interpretative exhibits, this must be done with great tact and with respect for the feelings of human dignity held by all peoples.**

**Furthermore, requests for removal from public display of human remains or material of sacred significance must be addressed expeditiously with respect and sensitivity. Requests for the return of such material should be addressed similarly. Museum policies should clearly define the process for responding to such requests.**

#### 6.7 Private Collecting

The acquiring, collecting and owning of objects by a museum professional for a personal collection may not in itself be unethical **but** may be regarded as a valuable way of enhancing professional knowledge and judgement. However, **no member of the museum profession should compete with their institution either in the acquisition of objects or in any personal collecting activity**. In some countries and in many individual museums, members of the museum profession are not permitted to have private collections and such rules must be respected. **Where there are no such restrictions, a member of the museum profession with a private collection should, on appointment, provide the governing body with a description of the collection and a statement of the extent of the practised collecting. An agreement between the museum professional and the governing body concerning the private collection must be formulated and scrupulously followed.** (See also 8.4 below).

### 7. Professional Responsibility to the Public

#### 7.1. Upholding Professional Standards

Members of the museum profession should observe accepted standards and laws and uphold the dignity and honour of their profession. **They should safeguard the public against illegal or unethical professional conduct. Every opportunity should be used to inform and educate the public in the aims, purposes and aspirations of the profession in order to develop a better public understanding of the purposes and responsibilities of museums and of the profession.**

#### 7.2. Relations with the Public

Members of the museum profession should **always** deal with the public efficiently and courteously and should **respond** promptly to all correspondence and enquiries. Subject to the requirements of confidentiality, museum professionals should share their expertise **with the public and specialists**, allowing **legitimate** researchers controlled but full access to **requested** material or documentation in their care even when this is subject of personal research or special field of interest.

#### 7.3. Confidentiality

Members of the museum profession must protect all confidential information about the source of material owned by or loaned to the museum, as well as information concerning the security arrangements of the museum, **or of private collections and locations visited during official duties (see also 2.7 above).**

**Items brought to the museum for identification and information associated with them can result in a strong conflict of interest over the professional requirement to disseminate and advance knowledge and the wish of a private person or institution to maintain confidentiality. The advantages of advancing knowledge should be explained to the informant but such information should not be passed to any other institution or person without specific authority from the owner. Information recorded for oral histories and other purposes must be treated in the same way. This situation is subject to a legal obligation to assist the police or other proper authorities in investigating possible stolen, illicitly acquired or transferred property.**

### 8. Professional Responsibility to Colleagues and the Profession

### 8.1 Professional Responsibility

**Members of the profession may properly object to proposals or practices which are perceived to have a damaging effect on a museum or museums, or the profession on matters of professional ethics. Such differences should be expressed in an objective manner.**

### 8.2 Professional Relationships

Members of the museum profession have an obligation to share their knowledge and experience with their colleagues and with scholars and students in relevant fields. They should respect **and acknowledge** those from whom they have learned and **should pass on** such advancements in techniques and experience which may be of benefit to others **without thought of personal gain**.

The training of personnel in the specialised activities involved in museum work is of great importance in the development of the profession and all should accept responsibility, where appropriate, in the training of colleagues. Members of the profession who **have responsibility** for junior staff, trainees, students and assistants undertaking formal or informal professional training, should give these **persons** the benefit of their experience and knowledge and should also treat them with the consideration and respect customary among members of the profession.

**Similarly, the development of beneficial volunteer work depends on a positive relationship between members of the museum profession and volunteers. The professional staff of museums should give constructive attention to volunteers to sustain a viable and harmonious working environment. (See 1.5 and 2.6 above)**

Members of the profession form working relationships with numerous other people, professional **and volunteer**, within and outside the museum in which they are employed. They are expected to conduct these relationships with courtesy and fair-mindedness and to render their professional services to others efficiently and to a high standard.

### 8.3 Dealing

No member of the museum profession should participate in any dealing (buying or selling for profit), **in cultural property**. Dealing by museum employees can present serious problems even if there is no risk of direct conflict with the employing museum and **should not be permitted. (See Article 7(5) of the ICOM Statutes)**

### 8.4 Other Potential Conflicts of Interest

Generally, members of the museum profession should refrain from all acts or activities which may be construed as a conflict of interest. Museum professionals by virtue of their knowledge, experience and contacts are frequently offered opportunities, such as advisory and consultancy services, teaching, writing and broadcasting opportunities, or requests for valuations, in a personal capacity. Even where the national law and the individual's conditions of employment permit such activities, these may appear **to colleagues, the employing authority, or the public**, to create a conflict of interest. In such situations, all legal and employment contract conditions must be scrupulously followed and, **if a potential conflict arises**, the matter should be reported immediately to an appropriate superior officer or the museum governing body and steps must be taken to eliminate the potential conflict of interest.

Great care should be taken to ensure **that outside** interests do not interfere in any way with the proper discharge of official duties and responsibilities.

### 8.5 Authentication and Valuation (Appraisal)

**Sharing knowledge and expertise with professional colleagues and the public (see 7.2 above) is integral with the purpose of museums. This service should be conducted to the highest scholarly standards. However, conflicts of interest can arise in the authentication and valuation or appraisal of objects. Opinions on the monetary value of objects should be given only on official request from other museums or competent legal, governmental or other responsible public authorities. Where the museum may be the beneficiary for financial or legal reasons, appraisal must be undertaken independently.**

Members of the museum profession should not identify or otherwise authenticate objects **which they believe, or suspect, have been illegally or illicitly acquired**, transferred, imported or exported. **They should not act in any way that could be regarded as benefiting such activity, directly or indirectly.** Where there is reason to believe, or suspect, **illegal or illicit conduct**, the **appropriate authorities** should be notified.

### 8.6 Unprofessional Conduct

Every member of the museum profession should be conversant **with national and local laws, conditions of employment, as well as rules concerning corrupt practices**. They should avoid situations which could be construed as corrupt or improper conduct of any kind. No museum official should accept any gift, hospitality, or any form of reward from any dealer, auctioneer or other person as an improper inducement of **soliciting favour** or in respect of the purchase or disposal of museum items **or any other benefit**.

A museum professional should not recommend a particular dealer, auctioneer or appraiser to a member of the public **to avoid any suspicion of corruption**. Nor should a museum employee accept any "special price" or discount for personal purchases from any dealer with whom the **individual** or employing museum has a professional relationship.

[Current version of the Code]

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## Fighting the Illicit Traffic of Cultural Property

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- [The Illicit Traffic of Cultural Property Throughout the World](#)
- [ICOM in the Fight against the Illicit Traffic of Cultural Property](#)
- [The ICOM Red List](#)
- [Stop the Looting of African Archaeological Objects: The ICOM Red List \(Press Release, April 2000\)](#)
- [Customs and Police partners to museums in the fight against the illicit traffic of cultural property](#)
- [International Museum Day Activities 1997](#)
- [The UNESCO and UNIDROIT Conventions](#)
- [Bibliography](#)

Information: [Valérie Jullien](#) - ICOM Secretariat.

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*[ICOM Welcome Page](#)*

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# Archaeological Heritage Management

## ICOMOS Charter for the Protection and Management of the Archaeological Heritage (1990)

### Introduction

#### Art. 1. Definitions and Introduction

#### Art. 2. Integrated Protection Policies

#### Art. 3. Legislation and Economy

#### Art. 4. Survey

#### Art. 5. Investigation

#### Art. 6. Maintenance and Conservation

#### Art. 7. Presentation, Information, Reconstruction

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## INTRODUCTION

It is widely recognized that a knowledge and understanding of the origins and development of human societies is of fundamental importance to humanity in identifying its cultural and social roots.

The archaeological heritage constitutes the basic record of past human activities. Its protection and proper management is therefore essential to enable archaeologists and other scholars to study and interpret it on behalf of and for the benefit of present and future generations.

The protection of this heritage cannot be based upon the application of archaeological techniques alone. It requires a wider basis of professional and scientific knowledge and skills. Some elements of the archaeological heritage are components of architectural structures and in such cases must be protected in accordance with the criteria for the protection of such structures laid down in the 1966 Venice Charter on the Conservation and Restoration of Monuments and Sites. Other elements of the archaeological heritage constitute part of the living traditions of indigenous peoples, and for such sites and monuments the participation of local cultural groups is essential for their protection and preservation.

For these and other reasons the protection of the archaeological heritage must be based upon effective collaboration between professionals from many disciplines. It also requires the cooperation of government authorities, academic researchers, private or public enterprise, and the general public. This charter therefore lays down principles relating to the different aspects of archaeological heritage management. These include the responsibilities of public authorities and legislators, principles relating to the professional performance of the processes of inventORIZATION, survey, excavation, documentation, research, maintenance, conservation, preservation, reconstruction, information, presentation, public access and use of the heritage, and the qualification of professionals involved in the protection of the archaeological heritage.

The charter has been inspired by the success of the Venice Charter as guidelines and source of ideas for policies and practice of governments as well as scholars and professionals.

The charter has to reflect very basic principles and guidelines with global validity. For this reason it cannot take into account the specific problems and possibilities of regions or countries. The charter should therefore be supplemented at regional and national levels by further principles and guidelines for these needs.

### *ARTICLE 1. DEFINITION AND INTRODUCTION*

The "archaeological heritage" is that part of the material heritage in respect of which archaeological methods provide primary information. It comprises all vestiges of human existence and consists of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds (including subterranean and underwater sites), together with all the portable cultural material associated with them.

#### *ARTICLE 2. INTEGRATED PROTECTION POLICIES*

The archaeological heritage is a fragile and non-renewable cultural resource. Land use must therefore be controlled and developed in order to minimize the destruction of the archaeological heritage.

Policies for the protection of the archaeological heritage should constitute an integral component of policies relating to land use, development, and planning as well as of cultural, environmental and educational policies. The policies for the protection of the archaeological heritage should be kept under continual review, so that they stay up to date. The creation of archaeological reserves should form part of such policies.

The protection of the archaeological heritage should be integrated into planning policies at international, national, regional and local levels.

Active participation by the general public must form part of policies for the protection of the archaeological heritage. This is essential where the heritage of indigenous peoples is involved. Participation must be based upon access to the knowledge necessary for decision-making. The provision of information to the general public is therefore an important element in integrated protection.

#### *ARTICLE 3. LEGISLATION AND ECONOMY*

The protection of the archaeological heritage should be considered as a moral obligation upon all human beings; it is also a collective public responsibility. This obligation must be acknowledged through relevant legislation and the provision of adequate funds for the supporting programmes necessary for effective heritage management.

The archaeological heritage is common to all human society and it should therefore be the duty of every country to ensure that adequate funds are available for its protection.

Legislation should afford protection to the archaeological heritage that is appropriate to the needs, history, and traditions of each country and region, providing for in situ protection and research needs.

Legislation should be based on the concept of the archaeological heritage as the heritage of all humanity and of groups of peoples, and not restricted to any individual person or nation.

Legislation should forbid the destruction, degradation or alteration through changes of any archaeological site or monument or to their surroundings without the consent of the relevant archaeological authority.

Legislation should in principle require full archaeological investigation and documentation in cases where the destruction of the archaeological heritage is authorized.

Legislation should require, and make provision for, the proper maintenance, management and conservation of the archaeological heritage. Adequate legal sanctions should be prescribed in respect of violations of archaeological heritage legislation.

If legislation affords protection only to those elements of the archaeological heritage which are registered in a selective statutory inventory, provision should be made for the temporary protection of unprotected or newly discovered sites and monuments until an archaeological evaluation can be carried

out.

Development projects constitute one of the greatest physical threats to the archaeological heritage. A duty for developers to ensure that archaeological heritage impact studies are carried out before development schemes are implemented, should therefore be embodied in appropriate legislation, with a stipulation that the costs of such studies are to be included in project costs. The principle should also be established in legislation that development schemes should be designed in such a way as to minimize their impact upon the archaeological heritage.

#### *ARTICLE 4. SURVEY*

The protection of the archaeological heritage must be based upon the fullest possible knowledge of its extent and nature. General survey of archaeological resources is therefore an essential working tool in developing strategies for the protection of the archaeological heritage. Consequently archaeological survey should be a basic obligation in the protection and management of the archaeological heritage.

At the same time, inventories constitute primary resource databases for scientific study and research. The compilation of inventories should therefore be regarded as a continuous, dynamic process. It follows that inventories should comprise information at various levels of significance and reliability, since even superficial knowledge can form the starting point for protectional measures.

#### *ARTICLE 5. INVESTIGATION*

Archaeological knowledge is based principally on the scientific investigation of the archaeological heritage. Such investigation embraces the whole range of methods from non-destructive techniques through sampling to total excavation.

It must be an overriding principle that the gathering of information about the archaeological heritage should not destroy any more archaeological evidence than is necessary for the protectional or scientific objectives of the investigation. Non-destructive techniques, aerial and ground survey, and sampling should therefore be encouraged wherever possible, in preference to total excavation.

As excavation always implies the necessity of making a selection of evidence to be documented and preserved at the cost of losing other information and possibly even the total destruction of the monument, a decision to excavate should only be taken after thorough consideration.

Excavation should be carried out on sites and monuments threatened by development, land-use change, looting, or natural deterioration.

In exceptional cases, unthreatened sites may be excavated to elucidate research problems or to interpret them more effectively for the purpose of presenting them to the public. In such cases excavation must be preceded by thorough scientific evaluation of the significance of the site. Excavation should be partial, leaving a portion undisturbed for future research.

A report conforming to an agreed standard should be made available to the scientific community and should be incorporated in the relevant inventory within a reasonable period after the conclusion of the excavation.

Excavations should be conducted in accordance with the principles embodied in the 1956 UNESCO Recommendations on International Principles Applicable to Archaeological Excavations and with agreed international and national professional standards.

#### *ARTICLE 6. MAINTENANCE AND CONSERVATION*

The overall objective of archaeological heritage management should be the preservation of monuments

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and sites in situ, including proper long-term conservation and curation of all related records and collections etc. Any transfer of elements of the heritage to new locations represents a violation of the principle of preserving the heritage in its original context. This principle stresses the need for proper maintenance, conservation and management. It also asserts the principle that the archaeological heritage should not be exposed by excavation or left exposed after excavation if provision for its proper maintenance and management after excavation cannot be guaranteed.

Local commitment and participation should be actively sought and encouraged as a means of promoting the maintenance of the archaeological heritage. This principle is especially important when dealing with the heritage of indigenous peoples or local cultural groups. In some cases it may be appropriate to entrust responsibility for the protection and management of sites and monuments to indigenous peoples.

Owing to the inevitable limitations of available resources, active maintenance will have to be carried out on a selective basis. It should therefore be applied to a sample of the diversity of sites and monuments, based upon a scientific assessment of their significance and representative character, and not confined to the more notable and visually attractive monuments.

The relevant principles of the 1956 UNESCO Recommendations should be applied in respect of the maintenance and conservation of the archaeological heritage.

#### *ARTICLE 7. PRESENTATION, INFORMATION, RECONSTRUCTION*

The presentation of the archaeological heritage to the general public is an essential method of promoting an understanding of the origins and development of modern societies. At the same time it is the most important means of promoting an understanding of the need for its protection.

Presentation and information should be conceived as a popular interpretation of the current state of knowledge, and it must therefore be revised frequently. It should take account of the multifaceted approaches to an understanding of the past.

Reconstructions serve two important functions: experimental research and interpretation. They should, however, be carried out with great caution, so as to avoid disturbing any surviving archaeological evidence, and they should take account of evidence from all sources in order to achieve authenticity. Where possible and appropriate, reconstructions should not be built immediately on the archaeological remains, and should be identifiable as such.

#### *ARTICLE 8. PROFESSIONAL QUALIFICATIONS*

High academic standards in many different disciplines are essential in the management of the archaeological heritage. The training of an adequate number of qualified professionals in the relevant fields of expertise should therefore be an important objective for the educational policies in every country. The need to develop expertise in certain highly specialized fields calls for international cooperation. Standards of professional training and professional conduct should be established and maintained.

The objective of academic archaeological training should take account of the shift in conservation policies from excavation to in situ preservation. It should also take into account the fact that the study of the history of indigenous peoples is as important in preserving and understanding the archaeological heritage as the study of outstanding monuments and sites.

The protection of the archaeological heritage is a process of continuous dynamic development. Time should therefore be made available to professionals working in this field to enable them to update their knowledge. Postgraduate training programmes should be developed with special emphasis on the protection and management of the archaeological heritage.

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*ARTICLE 9. INTERNATIONAL COOPERATION*

The archaeological heritage is the common heritage of all humanity. International cooperation is therefore essential in developing and maintaining standards in its management.

There is an urgent need to create international mechanisms for the exchange of information and experience among professionals dealing with archaeological heritage management. This requires the organization of conferences, seminars, workshops, etc. at global as well as regional levels, and the establishment of regional centres for postgraduate studies. ICOMOS, through its specialized groups, should promote this aspect in its medium- and long-term planning.

International exchanges of professional staff should also be developed as a means of raising standards of archaeological heritage management.

Technical assistance programmes in the field of archaeological heritage management should be developed under the auspices of ICOMOS.

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This Charter, written by the International Committee on Archaeological Heritage Management (ICAHM), a specialized committee of ICOMOS, was approved by the ICOMOS General Assembly, meeting in Lausanne, Switzerland, in October 1990.



# Underwater Cultural Heritage

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## Charter on the Protection and Management of Underwater Cultural Heritage (1996)

(ratified by the 11th ICOMOS General Assembly, held in Sofia, Bulgaria, from 5-9 October 1996)

### INTRODUCTION

This Charter is intended to encourage the protection and management of underwater cultural heritage in inland and inshore waters, in shallow seas and in the deep oceans. It focuses on the specific attributes and circumstances of cultural heritage under water and should be understood as a supplement to the ICOMOS Charter for the Protection and Management of Archaeological Heritage, 1990. The 1990 Charter defines the "archaeological heritage" as that part of the material heritage in respect of which archaeological methods provide primary information, comprising all vestiges of human existence and consisting of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds, together with all the portable cultural material associated with them. For the purposes of this Charter underwater cultural heritage is understood to mean the archaeological heritage which is in, or has been removed from, an underwater environment. It includes submerged sites and structures, wreck-sites and wreckage and their archaeological and natural context.

By its very character the underwater cultural heritage is an international resource. A large part of the underwater cultural heritage is located in an international setting and derives from international trade and communication in which ships and their contents are lost at a distance from their origin or destination.

Archaeology is concerned with environmental conservation; in the language of resource management, underwater cultural heritage is both finite and non-renewable. If underwater cultural heritage is to contribute to our appreciation of the environment in the future, then we have to take individual and collective responsibility in the present for ensuring its continued survival.

Archaeology is a public activity; everybody is entitled to draw upon the past in informing their own lives, and every effort to curtail knowledge of the past is an infringement of personal autonomy. Underwater cultural heritage contributes to the formation of identity and can be important to people's sense of community. If managed sensitively, underwater cultural heritage can play a positive role in the promotion of recreation and tourism.

Archaeology is driven by research, it adds to knowledge of the diversity of human culture through the ages and it provides new and challenging ideas about life in the past. Such knowledge and ideas contribute to understanding life today and, thereby, to anticipating future challenges.

Many marine activities, which are themselves beneficial and desirable, can have unfortunate consequences for underwater cultural heritage if their effects are not foreseen.

Underwater cultural heritage may be threatened by construction work that alters the shore and seabed or alters the flow of current, sediment and pollutants. Underwater cultural heritage may also be threatened by insensitive exploitation of living and non-living resources. Furthermore, inappropriate forms of access and the incremental impact of removing "souvenirs" can have a deleterious effect.

Many of these threats can be removed or substantially reduced by early consultation with archaeologists

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and by implementing mitigatory projects. This Charter is intended to assist in bringing a high standard of archaeological expertise to bear on such threats to underwater cultural heritage in a prompt and efficient manner.

Underwater cultural heritage is also threatened by activities that are wholly undesirable because they are intended to profit few at the expense of many. Commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the heritage. This Charter is intended to ensure that all investigations are explicit in their aims, methodology and anticipated results so that the intention of each project is transparent to all.

## **Article 1 - Fundamental Principles**

The preservation of underwater cultural heritage in situ should be considered as a first option.

Public access should be encouraged.

Non-destructive techniques, non-intrusive survey and sampling should be encouraged in preference to excavation.

Investigation must not adversely impact the underwater cultural heritage more than is necessary for the mitigatory or research objectives of the project.

Investigation must avoid unnecessary disturbance of human remains or venerated sites.

Investigation must be accompanied by adequate documentation.

## **Article 2 - Project Design**

Prior to investigation a project must be prepared, taking into account :

- the mitigatory or research objectives of the project;
- the methodology to be used and the techniques to be employed;
- anticipated funding;
- the time-table for completing the project;
- the composition, qualifications, responsibility and experience of the investigating team;
- material conservation;
- site management and maintenance;
- arrangements for collaboration with museums and other institutions;
- documentation;
- health and safety;
- report preparation;
- deposition of archives, including underwater cultural heritage removed during investigation;
- dissemination, including public participation.

The project design should be revised and amended as necessary.

Investigation must be carried out in accordance with the project design. The project design should be made available to the archaeological community.

## **Article 3 - Funding**

Adequate funds must be assured in advance of investigation to complete all stages of the project design including conservation, report preparation and dissemination. The project design should include contingency plans that will ensure conservation of underwater cultural heritage and supporting

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documentation in the event of any interruption in anticipated funding.

Project funding must not require the sale of underwater cultural heritage or the use of any strategy that will cause underwater cultural heritage and supporting documentation to be irretrievably dispersed.

#### **Article 4 - Time-table**

Adequate time must be assured in advance of investigation to complete all stages of the project design including conservation, report preparation and dissemination. The project design should include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption in anticipated timings.

#### **Article 5- Research objectives, methodology and techniques**

Research objectives and the details of the methodology and techniques to be employed must be set down in the project design. The methodology should accord with the research objectives of the investigation and the techniques employed must be as unintrusive as possible.

Post-fieldwork analysis of artefacts and documentation is integral to all investigation; adequate provision for this analysis must be made in the project design.

#### **Article 6 - Qualifications, responsibility and experience**

All persons on the investigating team must be suitably qualified and experienced for their project roles. They must be fully briefed and understand the work required.

All intrusive investigations of underwater cultural heritage will only be undertaken under the direction and control of a named underwater archaeologist with recognised qualifications and experience appropriate to the investigation.

#### **Article 7 - Preliminary investigation**

All intrusive investigations of underwater cultural heritage must be preceded and informed by a site assessment that evaluates the vulnerability, significance and potential of the site.

The site assessment must encompass background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site and the consequences of the intrusion for the long term stability of the area affected by investigations.

#### **Article 8 - Documentation**

All investigation must be thoroughly documented in accordance with current professional standards of archaeological documentation.

Documentation must provide a comprehensive record of the site, which includes the provenance of underwater cultural heritage moved or removed in the course of investigation, field notes, plans and drawings, photographs and records in other media.

#### **Article 9 - Material conservation**

The material conservation programme must provide for treatment of archaeological remains during investigation, in transit and in the long term.

Material conservation must be carried out in accordance with current professional standards.

### **Article 10 - Site management and maintenance**

A programme of site management must be prepared, detailing measures for protecting and managing in situ underwater cultural heritage in the course of an upon termination of fieldwork. The programme should include public information, reasonable provision for site stabilisation, monitoring and protection against interference. Public access to in situ underwater cultural heritage should be promoted, except where access is incompatible with protection and management.

### **Article 11 - Health and safety**

The health and safety of the investigating team and third parties is paramount. All persons on the investigating team must work according to a safety policy that satisfies relevant statutory and professional requirements and is set out in the project design.

### **Article 12 - Reporting**

Interim reports should be made available according to a time-table set out in the project design, and deposited in relevant public records.

Reports should include :

- an account of the objectives;
- an account of the methodology and techniques employed;
- an account of the results achieved;
- recommendations concerning future research, site management and curation of underwater cultural heritage removed during the investigation.

### **Article 13 - Curation**

The project archive, which includes underwater cultural heritage removed during investigation and a copy of all supporting documentation, must be deposited in an institution that can provide for public access and permanent curation of the archive. Arrangements for deposition of the archive should be agreed before investigation commences, and should be set out in the project design. The archive should be prepared in accordance with current professional standards.

The scientific integrity of the project archive must be assured; deposition in a number of institutions must not preclude reassembly to allow further research. Underwater cultural heritage is not to be traded as items of commercial value.

### **Article 14 - Dissemination**

Public awareness of the results of investigations and the significance of underwater cultural heritage should be promoted through popular presentation in a range of media. Access to such presentations by a wide audience should not be prejudiced by high charges.

Co-operation with local communities and groups is to be encouraged, as is co-operation with communities and groups that are particularly associated with the underwater cultural heritage concerned. It is desirable that investigations proceed with the consent and endorsement of such communities and groups.

The investigation team will seek to involve communities and interest groups in investigations to the extent that such involvement is compatible with protection and management. Where practical, the

investigation team should provide opportunities for the public to develop archaeological skills through training and education.

Collaboration with museums and other institutions is to be encouraged. Provision for visits, research and reports by collaborating institutions should be made in advance of investigation.

A final synthesis of the investigation must be made available as soon as possible, having regard to the complexity of the research, and deposited in relevant public records.

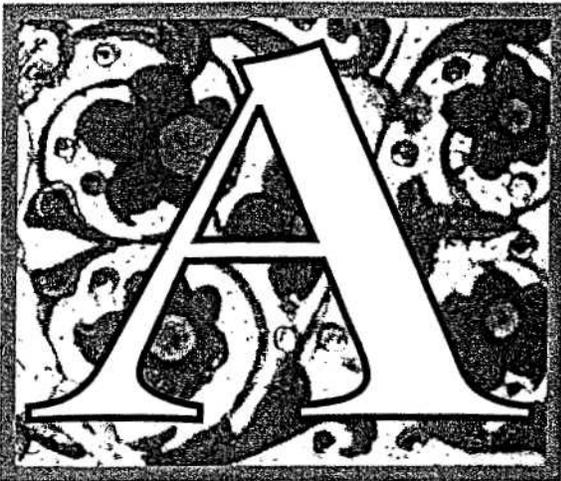
### **Article 15 - International co-operation**

International co-operation is essential for protection and management of underwater cultural heritage and should be promoted in the interests of high standards of investigation and research. International co-operation should be encouraged in order to make effective use of archaeologists and other professionals who are specialised in investigations of underwater cultural heritage. Programmes for exchange of professionals should be considered as a means of disseminating best practice.

# The Paper Chase

Wherein a plucky Princeton art history professor, exasperated and incited by the "victimless crimes" of manuscript theft, ferrets out the rightful owners.

BY BENJAMIN IVRY



couple of years ago, when an Akron-based dealer in illuminated manuscripts had suspicions about some works a collector wanted to sell him, he sought out the person most likely to untangle the mystery: James Marrow, a professor of art history at Princeton University who has carved out a unique reputation in the art world as a manuscript sleuth. In a single evening of research, Marrow identified the leaves as having been cut out of the Vatican Library's copy of a priceless manuscript once owned by Petrarch. Soon the media were



*Right: Professor James Marrow holds copies of pages taken from a 14th-century volume once belonging to Petrarch. OPPOSITE—At the Grolier Club in New York, Marrow discovered that this page and others from a 15th-century Florentine Book of Hours were missing.*

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△ An effective security measure instituted at the British Library: Before and after it's consulted by a researcher, each manuscript is precisely weighed.

bruiting Marrow's find: A 1995 issue of *People* announcing Paula Abdul's "binge and purge" struggles on its cover featured a detailed article on Marrow's work at foiling manuscript thievery.

"Jim is such a busy scholar, always traveling and retaining everything he sees and hears, so he's really an invaluable conduit for information," says Constance Lowenthal, director of the New York-based International Foundation for Art Research (IFAR), which tracks stolen art. "He's energetic beyond belief," she adds, "and he has so much information in his head that it doesn't take much to make him go tilt!"

Marrow couldn't go tilt at a better time. The world of manuscripts has been rocked by major thefts by people who are typically the most trusted. In 1991, David James, a leading authority on Islamic manuscripts and a curator at Chester Beatty Library in Dublin, pleaded guilty on 36 counts of stealing ancient Islamic manuscripts and pages from Korans worth a total of half a million dollars; he wound up serving almost two years in prison. Last year, an Ohio State University art history professor emeritus, Anthony Melnikas, pleaded guilty on eight federal charges stemming from the theft and attempted sale of six old manuscript pages from the Vatican Library and two cathedral libraries in Spain; Melnikas is currently serving a 14-month sentence. Until his death this year, Father Redmond Ambrose Burke was the chief librarian at De Paul University in Chicago and at the Catholic University of America in Washington, D.C. A known bibliophile, he bought the most important surviving Sherlock Holmes manuscript, *The Sign of the Four*, for \$519,500 at auction in New York last year. But Burke's collection turned out to contain leaves cut out of books from New York's Grolier Club, where he had been a member for



*Above: The Grolier Club's main library, from which the trusted bibliophile Father Redmond Burke stole several pages (one shown at top) from a Book of Hours.*

over 20 years, and others sliced from books in Chicago's Newberry Library.

How can such "distinguished" thieves be stopped? Lowenthal points to an effective security measure now in effect at the British Library, London: Each manuscript is precisely weighed before and after it is consulted by a researcher, so a thief would have to replace whatever was removed with a page of exactly the same weight, which would be unlikely in the extreme. The Grolier Club, says its acting director, Eric Holzenberg, will continue to rely on old-fashioned methods like observing all the scholars who use materials, never leaving them alone with the objects (as directors of the club mistakenly did decades ago with Father Burke). The Morgan Library's manuscript curator, Roger Wieck, supports this tactic. "The Vatican did something

we don't do at the Morgan—we never give non-staffers free rein of the stacks," he says. "Also, a large library like the Bibliothèque Nationale, in Paris, with 50 readers' tables, is very difficult to supervise from 100 feet away. We have only three readers' tables, and supervisors are 10 or 15 feet away. Someone who wanted to steal manuscripts would not come to the Morgan, because it's too difficult." In the wake of the Melnikas theft, the Vatican Library reportedly changed its policy of granting special privileges to a few scholars.

Still, more than 90 percent of art thefts go unsolved. One such case involved the Beck Collection of illuminated manuscripts, which belong an elderly Stuttgart collector whose house was burgled during renovations. The disappearance of a dozen of these texts—each with an estimated value of half a million dollars—so depressed the owner that he decided to sell the rest. (They were auctioned for more than \$18 million in London this past June.)

If there is hope for the recovery of such lost masterpieces, it is partly due to such dedicated sleuths as James Marrow. "As a scholar, Jim pays lots of



*Former art history professor Anthony Melnikas (above, tan jacket) stole six pages from the Vatican Library. OPPOSITE—one of the purloined pages.*

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De cepullis.



*After noticing part of his collection was missing, a dependent German book lover sold the rest at auction. The 15th-century Blandford Hours (left) brought \$1,442,950.*

attention to the provenance of materials," says Paul Needham, a rare book and manuscript authority, "and that's where you find clues about possible strayed items. Jim has been to an immense number of libraries, handling original objects instead of being satisfied with reproductions."

Marrow's first splashy headlines as an art sleuth came in 1979, when he identified a Haggadah, one of the most important Hebrew manuscripts in America, as having been stolen from the collection of James Armand de Rothschild during World War II and subsequently sold to a well-intentioned American collector who donated it to the Yale University Library. Marrow happened to have catalogued the Rothschild private manuscript collection and noted a telltale penciled number on the Haggadah that corresponded to a list that had been given to him by the Rothschilds. This inside-track information led to identification of the book's proper owners, and the Rothschild family was offered the Haggadah; they preferred to transfer it to the Hebrew University, in Jerusalem, where it is currently housed.

As news reports about the return of war booty like the Quedlinburg treasure shake the art world, it is natural that Marrow's sleuthing is focusing on such displaced masterpieces. Among pending cases is one involving a 13th-

century manuscript—a stunning work containing 665 miniature paintings and worth about \$3 million—that a Scandinavian diplomat brought to an art dealer friend of Marrow's with the intention of selling it; his father, he said, had "bought it in Paris after the war." Marrow learned from a colleague that the manuscript had actually belonged to the library of Wrocław, Poland, and notified IFAR. The manuscript has not yet been returned to Poland, but Lowenthal has notified the Wrocław authorities and sent a letter to all major book and manuscript dealers, thus making it unlikely that the diplomat will ever be able to sell his treasure.

Marrow adheres to an anti-thievery maxim: "Always notify," he says. "The minute you learn something is stolen from a collection, you must tell that collection about it. Of course, you have to have valid evidence, not just a suspicion." Lowenthal suggests how collectors might better avoid buying stolen war booty: "If you really want to be sure, you must know the ownership history from 1937 to 1957," she says. "Don't just believe what the seller tells you—kick the tires! Anyone, in any business, who relies entirely on what a

seller says should choose the sellers very carefully." Lowenthal agrees with Marrow's policy of notification. "If you determine it's a stolen item, you should call the authorities and get it the hell out of your hands. If the sale was international, call U.S. Customs. If it was interstate, call the FBI."

In the past, thieves were aided by the "discretion" of the rare book and manuscript world. An article in a recent issue of *Harvard Magazine* points out that curators and librarians, fearing bad publicity, preferred to keep thefts a secret. So as not to scare away clients (including those who owned stolen goods), gallery and book dealers frequently did the same. Today, art world professionals who are not quick to report suspected stolen goods come under increasing scrutiny and criticism. T former director of the Museum of Fine



*This Flemish Book of Hours (ca. 1480), seized from a French collector by the Nazis, was found just this past February at a New York gallery.*

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"You must know the ownership history from 1937 to 1957," warns one art-theft expert. "Don't just believe what the seller tells you—kick the tires!"

Arts, Boston, Alan Shestack (now deputy director of the National Gallery, Washington), was criticized in *The Art Newspaper* this year in a story accusingly headlined, WHY DID LEADING U.S. MUSEUM DIRECTOR KEEP MUM OVER PAINTINGS STOLEN FROM KASSEL? In 1989, Shestack discovered that seven 16th-century Flemish and German miniatures in the shop of a Boston rug merchant, Thomas Chatalbash, were World War II booty, but didn't report it to the authorities. The *Boston Globe* also reproached Shestack, quoting former colleagues like the art historian Barbara Butts, who said, "When it became complicated, Mr. Shestack decided he did not want me or the Museum [of Fine Arts] involved."

In the eight years since then, the art world has developed sharper reflexes about reporting stolen goods. "[Shestack's] slowness surprised me," says Wieck. "The Morgan staff would not hesitate. We and our colleagues take a much quicker approach." Marrow (although not pleased to see Shestack, a colleague he respects, racked by the media) feels that press coverage is essential for increasing the art world's awareness of the problem. "Journalists can shame some art world professionals, although it doesn't always work when big bucks are involved," he says. "Every museum director should be responsible for notifying the authorities about thefts, but they're not all doing it yet. The same is true for some galleries and book dealers."

This past February, Marrow was asked by the London book dealer Sam Fogg to study and describe a manuscript he was considering buying from the collection of the prominent New York dealer Wildenstein & Co.: a Flemish Book of Hours, with 64 miniatures and

24 calendar illustrations, what Marrow calls "a dazzling manuscript." Worth well over a million dollars, the manuscript sale had a hitch: Wildenstein & Co. declined to guarantee its provenance by furnishing a prior bill of sale. The new sale was therefore off, but not before Marrow had taken color slides of the book that he circulated to colleagues, not mentioning suspicions that

want to profit from it." The inspiration for Marrow's intense scholarship becomes clear as he explains the personal motivation for his art sleuthing: "Part of my life is based on a profound respect for the past," he says. "All art world professionals share a common responsibility for preserving those works that have survived. It is an offense to future generations if we don't preserve them."

He takes exception to the characterization of manuscript thieves as collectors whose passions get out of control and who deserve sympathy for what are sometimes called victimless crimes: "If you study rare books, manuscripts, precious objects of the past, it's because they are part of human culture," Marrow says. "Any time someone mutilates these things it's a grave offense—not just against ownership, but

against history. The arrogance and egotism of someone who destroys what belongs to the historical record, because he thinks he'll appreciate it more than the present owners do, is indefensible."

As for the future of manuscript thievery, Marrow believes it will become increasingly difficult, thanks to better public awareness, increased reporting of stolen goods, and more knowledgeable buyers. Many manuscript collections, like the Morgan Library, now routinely microfilm all their manuscripts, which means that stolen leaves can be identified more easily. The growing number of manuscript reproductions makes the works better known and easier to identify. And so the nasty little secrets of thievery become more difficult to hide. Few people have contributed more in recent years to these encouraging developments than has the intrepid Professor Marrow. □



Top: a leaf from a 15th-century Lombard Book of Hours, swiped from the Grolier. Above: Stolen during World War II, this Haggadah re-emerged at Yale and has been donated to Hebrew University, Jerusalem.

it might be stolen. Information came back that the work was certainly stolen—from the collection of an eminent French Jew, Alphonse Kann, whose vast array of artworks was seized by the Nazis when they marched into Paris in 1940. Kann died during the war, and although the book was returned to Paris, it was turned over, for reasons that are unclear, to the Wildensteins instead of to Kann's heirs.

Marrow is particularly sensitive about the question of World War II booty. "I'm Jewish," he says, "and I see it as a double offense, after people were exiled or killed and their property seized, that even today other people still



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# Archaeological protection, historic preservation and trust responsibility on Indian reservations in the northwest plains

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## Abstract

As defined by federal laws, the United States government has an obligation to ensure archaeological and historic resources on Indian trust lands are given appropriate consideration during planning processes. Treaties and court decisions also define the trust responsibilities of the U.S. government to Indian people. These federal and trust responsibilities can create contentious situations for the Bureau of Indian Affairs as it initiates or approves actions on Indian trust lands. Three case studies illustrate the difficulty in reconciling complex Indian land issues with historic preservation.

*Keywords:* Archaeological resources; Historic resources; Historic preservation

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## 1. Introduction

Historic preservation on Indian reservations is not a new or unique concept, and the issues associated with this topic have been discussed by others (Suagee, 1994, Downer and Klesert, 1990). This paper examines historic preservation on America's Indian reservations as it relates to the U.S. government's federal and trust responsibilities carried out by the Bureau of Indian Affairs (BIA). It also explores some of the unique problems presented by complex land ownership on reservations. The discussion is based on a perspective gained from work on Indian reservations located on the northwestern plains of the United States, a broad area that includes portions of the states of Montana, Wyoming, North Dakota and South Dakota. Examples are drawn from three reservations located in Montana (See Fig. 1). However,

readers should recognize that with nearly 300 Indian reservations, communities and rancherias in the United States, the landownership problems and the directions that tribes have taken in addressing historic preservation vary tremendously across the country.

## 2. Indian lands

To those unfamiliar with Indian reservations in the United States it is important to know that land ownership on many reservations does not necessarily rest solely with a particular tribe. Ownership of lands located on reservations in the northwestern plains can be particularly complex. Before proceeding, several terms need to be defined.

Indian Country — As defined by Congress in the

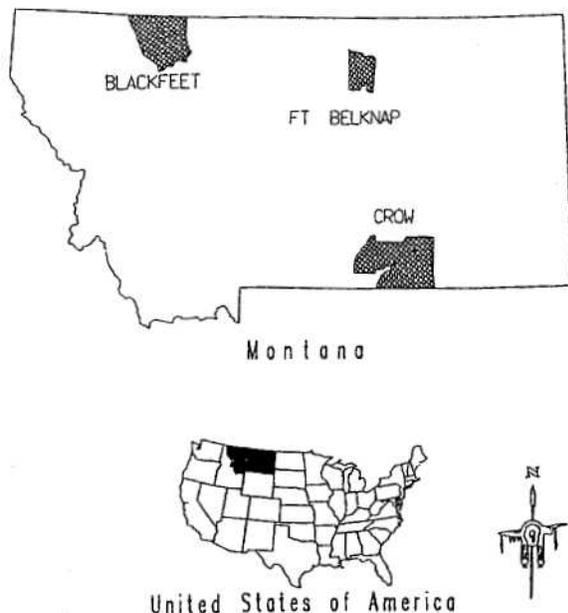


Fig. 1. Location of Reservations Discussed in the text.

Indian Crimes Act, Title 18 United States Code (USC), Section 1151<sup>1</sup> the term "Indian Country" is used to refer to all land, regardless of ownership, within the limits of any Indian reservation under the jurisdiction of the United States. This term is largely used for purposes of criminal codes and in defining the geographic limits of the jurisdiction of tribal laws (Cohen, 1982 p. 27). It does not imply tribal ownership of all lands within the reservation boundaries, nor does it imply federal control of these lands.

**Trust Lands** — This is a general term that refers to those lands whose title is held by the U.S. government for an Indian tribe or individual Indians. The federal government holds the title, but the tribe or individual Indian is the beneficial landowner, who is entitled to all royalties, payments or "benefits"

<sup>1</sup> All federal laws in this paper are referenced by their short titles and followed by the appropriate citation as published in the United States Code (USC). The USC is divided into 50 titles or areas. These titles are further subdivided into sections, which include the contents of specific laws. A reference to 18 USC 1151 directs the reader to a law found under the general heading of Title 18: "Codes and Criminal Procedure", with the specific language found in Section 1151.

realized from the land (Canby, 1988 p. 268). The federal government is legally obligated to protect trust lands for the beneficial interest of the Indian landowner. Restrictions on the use of trust lands prevent their alienation or encumbrance without the approval of the federal government (ie. BIA). Also trust lands are exempt from state and local taxes.

**Tribal Lands** — Tribal lands are lands that belong to a tribe as a whole, either through treaty or purchase. Most tribal lands are held in trust by the U.S. government. Tribal lands are held for the benefit of the tribe and therefore decisions about the land are made by the tribal government, but may also require the approval of the BIA, which serves as the U.S. government's trustee of the land.

**Allotted Lands** — When reservations were initially established, all lands within the reservation boundaries belonged to the tribes. The 1887 Allotment Act, commonly known as the Dawes Act, 25 USC 331 et seq., resulted in a drastic change in tribal land ownership. This act, and subsequent allotment acts, represented a wide-spread attempt by the U.S. government to assimilate the Indian in American society. These laws subdivided tribal lands into 40-160 acres (16-64 ha) parcels and allotted them to individual Indians. Any surplus tribal lands were then opened for white settlement. The allotment acts not only reduced tribal landholdings, but also undermined tribal cohesiveness by implanting the concept of private ownership in tribal members (Gibson, 1988 p. 226).

At the time of allotments, lands were initially allotted to each adult tribal member; in some instances every living member was allotted lands regardless of age. The allotment acts did not account for the heirship problems that would occur as this land was handed down through the generations, resulting in multiple land owners on a single tract of land. Tracking allotments and their changing ownerships are among most time consuming and complex functions of the BIA, which is now responsible for overseeing the interests of each of the multiple landowners.

The United States Congress recognized the mistake of allotments and with the passage of the Indian Reorganization Act of 1934, 25 USC 461, officially ceased granting further allotments. However, by this time the damage had already been done and allot-

ment acts reduced tribal lands from 148 million acres (59.2 million hectares) in 1887 to 48 million acres (19.2 million hectares) in 1934 (Canby, 1988 p. 21).

Allotments are more common on reservations located on the northwestern plains than on other reservations in the United States. Cohen, 1982 pp. 128–138 provides a more detailed discussion of the allotment act and the disastrous effects of this legislation.

The critical result of allotments is that tribes lost considerable control of their lands. Land use decisions on allotted lands remain with the individual Indian landowners, and not the tribal governments.

**Private Lands** — Both Indians and non-Indians can own land outright on reservations. Some tribal members have chosen to get a fee patent for their allotments, which is a legal document giving them full and unencumbered ownership. Many non-Indians have also acquired land within the reservation by acquiring excess tribal lands through the allotment acts, inheriting from an Indian relative or through direct purchase from Indian landowners. Indian land sales are still quite common on some reservations.

While tribal laws may still have some applicability to private lands on reservations, the U.S. government no longer has a trust responsibility to these lands, because it no longer holds the title. It also means that these landowners are responsible for all state real estate taxes, which normally do not apply when the land is in trust status.

### 2.1. Summary of landownership

So within any reservation (Indian Country), landownership can be a complex distribution of tribal, allotted and privately owned lands. On the northwestern plains reservations, landownership problems are particularly acute. As an example, the Crow Indian Reservation in Montana, covers approximately 2.2 million acres (880 000 ha). Of these acres, only 575 000 acres (230 000 ha) (26%) are tribal trust, 843 000 acres (337 200 ha) (38%) are allotted trust and the remaining 782 000 acres (312 800 ha) (35%) are privately owned (Bureau of Indian Affairs, 1995a). This means the Crow Tribal government has management control of slightly over one quarter of the land base of the reservation. The U.S. government still has some trust responsibility for the re-

maining allotted acres, but neither the Crow Tribe nor the U.S. government has authority over management decisions on the private lands, which compose over a third of the land on the reservation. Consistent land management on the reservation therefore is very difficult.

Not only does the variety of lands on reservations present management problems, but the heirship of a single allotted parcel can make the issues more complex. A parcel that was allotted to one individual in the 1890's can have several hundred owners in the 1990's as the allotment was subdivided among the heirs of each subsequent generation. For example, on the Crow Reservation there are over 4300 allotments that average over 12 owners per tract (Bureau of Indian Affairs, 1995a). One allotment of 40 acres (16 ha) has over 290 owners, and the fractional ownership of some individuals on this allotment is less than 0.005% (Bureau of Indian Affairs, 1995a). The United States government has a responsibility to each of these landowners, not only to ensure that their rights are protected, but also to ensure that they each receive adequate compensation for the use of the land.

Allotted lands will continue to become more perplexing as heirships expand after each generation. To date, efforts to rectify this situation by tribal councils, and even the United States Congress, have been unsuccessful.

### 3. Federal responsibilities

Federal responsibility for historic preservation in Indian Country is clearly defined by federal law. This authority is usually limited to actions the federal government undertakes or approves on trust lands. It is not the intent of this paper to analyze historic preservation law, but before discussing any historic preservation issues it is important to provide a brief overview of pertinent federal laws and their applicability in Indian Country.

#### 3.1. 1906 Antiquities Act, 16 USC 431–433.4

This law was the first piece of federal archaeological protection legislation. It was passed in an effort

to keep people from vandalizing and looting archaeological sites on federal lands. It gave the Secretaries of Interior, Agriculture and War the authority to grant permits for excavation of archeological sites and gathering of "objects of antiquity" on federal lands. The law provided for fines of \$500 and/or imprisonment of not more than 90 days.

The effectiveness of this law was severely eroded in the 1973 *Dias* case, *United States versus Dias*, 368 F. Supp. 856 (D. Ariz., 1973)<sup>2</sup>, a court case that involved the removal of religious objects found in a cave on the San Carlos Indian Reservation. In an appeal, the 9th Circuit Court overturned a conviction and found the law was so vague as to violate the due process law of the Fifth Amendment (Hutt et al., 1992 p. 24). This decision was critical since it meant the law would be difficult to enforce in areas under the jurisdiction of the Ninth Circuit, which includes the state of Montana.

### 3.2. 1979 Archaeological Resources Protection Act (ARPA), 16 USC 470aa et seq.

Congress filled the void created by the *Dias* case by passing ARPA. This new law did several things to bolster the 1906 law: it strictly defined "archaeological resources"; it applied to "public" and "Indian" lands; it expanded the application to the excavation, removal, damaging, sale, purchase, exchange, or transport of any archaeological resource from federal or Indian land without a valid permit; and most importantly the law gave greater flexibility in allowing either criminal or civil penalties. It also significantly raised the penalties for a felony conviction to allow for fines up to \$500 000 and two years in prison. A significant change from \$500 and 90 days.

<sup>2</sup> All court cases are referenced in an accepted legal format. The case name is presented first, followed by the volume, the abbreviation of the appropriate legal recording system and page location. Abbreviations for the court and year follow in parentheses. A reference to 368 F.Supp. 856 (D. Ariz. 1973) directs the reader to volume 368 of the Federal Supplement, page 856, which is a decision made in the District Court of Arizona in 1973. If a case has gone through several phases, these may appear in separate parentheses (ie. *Mitchell I* and *Mitchell II*).

### 3.3. 1978 American Indian Religious Freedom Act (AIRFA), 42 USC 1996.

AIRFA is a joint resolution passed by Congress to address problems some Native Americans were having in practicing their traditional religions. This act made it a policy of the United States to protect Indian religious freedom and it ordered all federal agencies and bureaus to evaluate their policies to determine what changes were necessary to protect religious and cultural practices. The evaluation was completed in 1979 (Andrus, 1979).

### 3.4. 1990 Native American Graves Protection and Repatriation Act. (NAGPRA), 25 USC 3001–3013.

NAGPRA was passed to provide protection of unmarked Native American graves and to recognize the value Native Americans placed on graves. The law does several important things: (1) it broadly defines "cultural items" to be protected; (2) it defines priority of ownership by first the lineal descendants, then the tribe on whose land it is located, or finally the tribe with the closest cultural affiliation; (3) it establishes a burial board to resolve disputes about ownership; (4) it prohibits intentional removal of burials without an ARPA permit or tribal permit; (5) it prohibits the sale, purchase, or transportation of human remains; (6) it addresses inadvertent discoveries; and (7) it has provisions for museums to inventory collections and repatriate materials.

### 3.5. 1966 Historic Preservation Act (NHPA), 16 USC 470 et seq.

NHPA was the first broad based federal law to address all forms of historic resources. This law did several basic things: it authorized the Secretary of Interior to expand and maintain the National Register of Historic Places; it established the Advisory Council on Historic Preservation; it designated the State Historic Preservation Officer and state programs; and it also established provisions for tribal programs.

One of the most significant parts of this legislation is Section 106, which requires federal agencies to give the Advisory Council a reasonable opportunity to comment on undertakings that may affect historic resources. This Section 106 consultation and

its implementing regulations, which appear in Title 36 Code of Federal Regulations (CFR) Part 800<sup>3</sup>, have created a bureaucratic structure for all agencies to follow when considering the effects of their actions on historic properties. Federal agencies must follow three basic steps: (1) make a “reasonable and good faith effort” to identify and evaluate historic properties; (2) determine how these historic properties will be affected; and (3) explore ways to avoid or reduce adverse effects to these properties. It is important to note that this law is procedural and requires federal agencies to follow a process of considering the effects of their actions on historic properties by consulting with the State Historic Preservation Officer and the Advisory Council on Historic Preservation. It does not require or guarantee preservation of historic properties. If a federal agency demonstrates that it has made a good faith effort to identify and address the effects to historic properties, and that there simply are no viable ways to mitigate damages, it can still proceed with an undertaking after following the process.

### 3.6. Summary of federal responsibilities

The federal responsibility of the BIA with respect to historic preservation on reservations, therefore, is fairly well defined under federal law and regulations. Under the Antiquities Act, to a certain extent under NAGPRA, and more importantly under ARPA, if no tribal law exists, the BIA has a responsibility to ensure that only legitimate archaeological investigations are undertaken on Indian lands, and that these do not conflict with the values Indians place on the resources. The BIA has the authority to pursue individuals who illegally excavate archaeological sites and remove archaeological resources or cultural items without a permit.

<sup>3</sup> Federal regulations are cited as published in the Code of Federal Regulations (CFR). The CFR is divided into the same 50 titles as the USC; each title is divided into chapters; and each chapter is further divided into parts and sections covering specific regulatory areas. A reference to 36 CFR 800 directs the reader to a regulation located under the general Title 36: “Parks, Forests and Public Property”, with the specific language found in Part 800: “Protection of Historic Properties”. The chapter number is generally omitted in the reference.

Under NHPA, the BIA, like all federal agencies, has a responsibility to ensure that any federal actions are completed in compliance with Section 106 of NHPA. Actions must be directly initiated or require some sort of permission or approval by a federal agency in order for them to be considered undertakings under NHPA. Tribes and individual Indians are not subject to this act, unless their actions require approval of the BIA or another federal agency, and then it is only the agency who must comply before approving an action. This distinction is crucial for understanding BIA responsibilities on lands where it may only have limited approval authority.

Federal historic preservation laws were passed because the United States government believed that archaeological and historic sites should be protected for the benefit of the general public. However, the laws were intended to apply only to federal lands or to actions undertaken by the federal government. In the United States, private property rights are of primary importance. Historic preservation laws have no effect on what a private landowner chooses to do with his land, unless he needs some type of approval from the federal government or is using federal money. In these cases it is only the federal agencies that must comply with the laws, not the landowner. The applicability of these federal laws in Indian Country, therefore, hinges on two critical questions; whose land is it and does the United States government have any authority over or responsibility for the actions taking place?

## 4. Trust responsibilities

In addition to the federal responsibilities for historic preservation, the U.S. government has a broader obligation to Indian people, which is commonly referred to as the Federal Indian Trust Responsibility. The term is thrown about freely these days in Indian Country. Unfortunately, the term is poorly understood and often misused.

### 4.1. Legal parameters

There are no federal laws or regulations that give specific direction as to how federal agencies fulfill

their Indian trust responsibility. The limitations of this responsibility are subject to interpretation, and indeed it is the federal courts who have defined these limits. The concept continues to evolve judicially, and over time it has developed into a vastly more complex and evasive notion.

The term "trust" arose in the Middle Ages in England as a legal device to control ownership of land, where one person was given the responsibility to manage the land for the benefit of another (Hall, 1981 p. 1). The responsibility of the U.S. government for Indian trust property is sometimes referred to as "fiduciary" which means that the government must "...act always in the best interest of Indians with the utmost good faith towards them." (Hall, 1981 p. 2)

The basic obligations of the U.S. government were established in the many treaties signed with Indian tribes. Although the word "trust" is not present in the treaties, the word "protect" appears prominently. This treaty language forms the cornerstone of the trust responsibility of the U.S. government to protect not only the land, but also the rights of Indians (Hall, 1981 pp. 73–82).

Courts have also turned to the Commerce Clause of the United States Constitution as the basis to justify trust responsibility (Cohen, 1982 p. 207). Although no direct reference to trust is mentioned, this clause gives Congress the power to regulate commerce with Indian tribes. The authority of Congress to regulate trade and to approve the sale of Indian lands was further confirmed through a series of Trade and Intercourse Acts passed between 1790 and 1894 (Cohen, 1982 pp. 190–115).

It would be beyond the scope of this paper to discuss how all court decisions have affected the concept of Indian trust, but a few cases deserve mention because of their implications on the trust responsibility of the United States on Indian lands and the assets on these lands.

The concept of trust responsibility to Indians was first affirmed in an 1831 Supreme Court decision in the *Cherokee Nation versus Georgia*, 30 U.S. (5 Pet) 1. This was an action filed by the Cherokee Tribe to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. The court decided it lacked jurisdiction because tribes were political entities that were neither states of the United States nor foreign

states. In this decision the court characterized tribes as "domestic dependent nations" and referred to their relationship with the United States as "that of a ward to his guardian". These terms have served as foundation of Indian trust responsibility and have been applied in further court actions in establishing the authority of the United States government to protect the rights of Indian tribes and individuals (Cohen, 1982 p. 220).

The *Joint Tribal Council of Passamaquoddy Tribe versus Morton*, 538 F.2d 370 (1st Cir. 1975), is a case that illustrates the critical involvement of the U.S. government in decisions regarding the preservation of tribal lands. In this case the Passamaquoddy Tribe contended that lands were improperly ceded to the state of Maine in 1794 because the treaty for ceding the lands had been completed without the participation of the U.S. government. The Tribe sued the federal government to require it to bring action against the state of Maine. The court determined that the United States had a trust responsibility protect the Indians' rights to these lands and ordered the U.S. government to file suit on behalf of the Tribe (Canby, 1988 pp. 40–41).

In another case, Indian allottees brought a lawsuit against the United States for damages because of the mismanagement of forest resources on their lands. In the first decision, *United States versus Mitchell*, 445 U.S. 535 (1980) (Mitchell I), the court determined that the General Allotment Act created only a limited trust relationship and did not impose any duty on the government to manage the timber resources. However, in a second decision, the *United States versus Mitchell*, 463 U.S. 206 (1983) (Mitchell II), the court held that because there were numerous statutes and regulations for managing forests on Indian lands, proper forest management was a trust duty and the federal government could be held accountable (Canby, 1988 pp. 38–39). This decision was critical because it confirmed that the trust responsibility of the federal government includes the resources and assets on Indian trust lands.

As these cases illustrate, the United States has a clear trust responsibility to protect Indian lands and the resources contained on these lands. However, this is not static and as more cases are brought to court the extent of these responsibilities will be further refined.

#### 4.2. Summary of trust responsibility

Trust responsibility is much broader than the historic preservation responsibilities defined by federal laws. Certainly if historic properties can be considered assets of trust lands, then the United States has a trust responsibility to manage and protect these assets for the beneficial landowner. The guidance given by the federal historic preservation statutes can provide the direction for how the United States can meet its trust responsibilities for historic properties on Indian lands. However, trust and historic preservation responsibilities can be in conflict if the tribal or individual Indian landowner plans to use his lands in ways that may affect historic resources on these lands. The United States may be responsible for protecting these resources, but it also has an overall responsibility to the beneficial landowner to help him realize a return on his property. Historic preservation regulations may define procedures for a federal agency to follow in considering historic properties in the decision making process, but they do not supersede the overall rights of a tribe or individual Indian to use their lands.

Trust responsibilities have also become more complicated as a result of the various allotment acts. Prior to the allotting of tribal lands, the primary trust responsibility of the United States was through the tribal governments. Treaties recognized tribal sovereignty and defined a clear government-to-government relationship between the United States and the Indian tribes. However, when tribal lands were allotted to individual Indians, the trust relationship broadened. While the government-to-government relationship is still the basis for all interactions with Indian tribes, the federal government must also recognize the legal rights of individual Indian allottees that may extend beyond the jurisdiction of their own tribal governments. Inevitable conflicts occur when tribal governments and Indian allottees disagree on the use of their land and the federal government is forced to weigh up whether its trust responsibility is to protect the rights of the Indian landowner or the rights of the tribe.

It is debatable how far the U.S. government can take its trust responsibility on historic properties located on Indian trust lands. Certainly if a permit or approval is required, the BIA has a federal responsi-

bility to comply with NHPA, but this only requires the BIA to follow procedural steps in considering effects on historic resources. It does not give the BIA any authority to restrict how an Indian beneficial landowner may use his land. The following cases illustrate some of the inherent problems of historic preservation in Indian country.

### 5. Case studies

#### 5.1. Little Big Horn Battlefield versus an Indian Allottee

The Little Big Horn National Monument, formerly known as the Custer Battlefield, is unique because it is located entirely within the boundaries of the Crow Reservation and it is surrounded by tribal, allotted and privately owned land. Not all adjacent landowners, nor all members of the Crow Tribe, share an interest and concern for the Little Big Horn Battlefield, and the complex landownership surrounding the battlefield makes management of this historic resource a difficult task for the National Park Service.

In the spring of 1995 an Indian allottee sought to develop his property which lies adjacent to a portion of the battlefield. His intent was to construct a small building to sell Indian arts and crafts. To the chagrin of the Park Service a structure in this area would be a visual intrusion into the battle site and may ruin the setting and overall feeling of at least a portion of the site. A more vocal private battlefield association felt even stronger about this action and started a letter writing campaign to Congressional Representatives. Because the land was allotted, and held in trust by the U.S. government, questions were raised about the BIA's historic preservation responsibilities under federal law (Meyer, 1995).

The reader should recall that under the NHPA, if a federal agency approves or licenses an action, then it becomes a federal undertaking and the agency must comply with Section 106 of the act. In this particular case, because the allottee was the sole landowner and because his actions did not constitute an alienation or encumbrance to the land, no approval from the BIA was required for the actions he was intending. The BIA did not need to comply with NHPA, because it had no undertaking.

Internal discussions were held within the management of the BIA to determine whether any other federal laws had been violated. Since the battlefield could be considered an archaeological site, questions were raised as whether ARPA applied to these actions. Because it is illegal to excavate, damage or destroy an archaeological resource on Indian lands without a permit, it could be argued that a violation of ARPA had occurred, if it could be demonstrated that "archaeological resources" were damaged as a result of construction. Although construction may be a visual intrusion in the area, subsequent investigations did not demonstrate that any artifacts were damaged by this action (Keller, 1995). No violation of ARPA had occurred.

If no federal laws were violated, then what about the trust responsibility? The real question is whether the Battlefield is a trust resource and whether the BIA has a greater responsibility to protect the Battlefield for the benefit of the nation or the benefit of Indian people? Because an individual Indian was attempting to develop the land for his best use, the BIA has a trust responsibility to protect this right, as long as it does not violate any Federal laws. After discussions with the field solicitor, it was concluded that while some trust responsibility may exist for the resource, the limits of this responsibility are largely defined by federal law. Because NHPA did not apply and ARPA was not violated, BIA had met its federal historic preservation responsibility, and the BIA concluded that it had an overriding trust responsibility to protect the possessory rights of the land owner (Bureau of Indian Affairs, 1995b).

The historic preservation issues arose again when the allottee sought to receive a fee patent for a portion of his land. A fee patent would give him complete private ownership of the land and essentially remove it from trust status. Because the processing of a fee patent constitutes an alienation of the land, it requires the approval of the U.S. government (i.e. the BIA). This approval meant that a federal undertaking now existed and the BIA must comply with NHPA and identify, assess and consult to protect any historic properties that may be affected by this action. But what is the action? It is a simple paper transfer of title from the United States to an individual. The BIA argued that no impacts to any historic properties would occur as a direct result

of title transfer (Keller, 1995 p. 6). The State Historic Preservation Office and the Advisory Council on Historic Preservation disagreed with this opinion and further consultation was initiated to resolve the disagreement. In the meantime the Indian landowner was becoming increasingly impatient with this bureaucratic consultation process and questioned whether this federal process was interfering with his rights and the government's trust responsibility to him (Vogel, 1995).

The issuance of fee patents presents a couple of interesting dilemmas for the BIA. When transferring land out of federal ownership other federal agencies can impose measures to protect historic properties on those lands by either placing protective covenants on the land, by omitting specific parcels containing historic properties or by halting the transaction altogether. However, under some fairly stringent regulations, 25 CFR 152.5, the BIA has limited authority in approving fee patents to individual Indians. In fact, under these regulations a fee patent can be denied only if the individual is found incompetent to handle his affairs. Although the title to allotted land is held by the U.S. government, the allotment acts have given individuals rights to those lands. Federal solicitors have cautioned that the BIA cannot deny a fee patent request in order to protect a historic property, and any attempt to restrict or condition a fee patent could be construed as taking away the property right of the individual (Aldrich, 1993).

If issuing fee patents is considered a federal undertaking, and if these undertakings are considered to have an effect on historic properties, then what options are available for the BIA to meet its federal obligations under NHPA and still meet its trust obligations to the individual Indians? Since permanent protection is not possible, the BIA could excavate every important archaeological site on fee patented land in order to recover scientific information. This would result in a tremendous cost to the government and further delays to the individuals. The other option is to negotiate with the Indian landowner to find a voluntary means of protecting the site. In the case of the Little Big Horn Battlefield, such a compromise was reached when the individual agreed to let the National Park Service conduct a metal detector survey of his lands. This would allow the recovery of important scientific data about the battle,

but it would not necessarily protect the patented land from further disturbance. Although this option may not satisfy all concerns, compliance with NHPA was achieved and the trust obligation to the individual was met.

The other fee patent dilemma has to do with the U.S. government's overall trust responsibilities to tribes and individual Indians. As discussed previously, the U.S. government has a trust responsibility to protect Indian lands. However, as the allotment acts subdivided tribal lands among individual Indians, they also gave the government responsibility to protect the land rights of those individuals, even if they choose to exercise their right to acquire the land in total private ownership and eventually sell that land. This can put the BIA in conflict with tribal governments who often view the private ownership and potential sale of these lands to non-Indians as a further erosion of the Indian land base. A land base that previous treaties obligated the U.S. government to protect.

Under the same regulations which govern the issuing of fee patents (25 CFR 152.2), the BIA is also required to allow a reasonable opportunity for tribes or other Indians to acquire the land before a fee patent is approved. Therefore, in theory, if tribes are concerned about allotted lands leaving trust status they can acquire the land before the action occurs. However, in reality, tribes in the northwest plains simply do not have enough funds available to purchase all lands that are leaving trust status. The BIA is forced to walk a fine line in approving a fee patent application; it must insure that the "reasonable opportunity" it allows for the tribe to acquire the land does not interfere with the individual's rights over his land.

This sometimes conflicting trust role created by the allotment acts may not be easily resolved. The most appropriate way to correct this problem would be for the U.S. Congress to allocate specific funds for tribes to acquire these lands. However, with the present political and fiscal climate in Washington, D.C., this is an unlikely prospect.

### 5.2. *Scientific values versus cultural values*

Complying with historic preservation laws requires assessing the values of historic sites. Some

archaeological and historic sites can have conflicting values. The most obvious examples are human burials. Certainly NAGPRA was passed to try to rectify a long history of cultural bias, where the scientific value of human remains often overrode the cultural value that many Indian people attach to these remains. As a result of this legislation, for prehistoric human burials it is no longer solely the scientific information they retain which is taken into consideration, but the cultural values they have for Indian people must also be considered.

Other archaeological sites also have values to Indian people that go beyond their historical and scientific values. In a recent case on a BIA road project on the Fort Belknap Reservation in Montana a conflict arose when an archaeological site was located on a road project. Under NHPA the BIA needed to consider the effect that road construction would have on a several thousand year old prehistoric camp site. Because archaeological sites are normally considered important for their scientific values, controlled archaeological excavations are an effective way of recovering the scientific information and for mitigating the impacts. However, some members of the Tribe objected to any disturbance to this site, whether it be by road construction or archaeological investigations and there was considerable disagreement about how this site should be handled (Deaver, 1991). Although no human burials occurred on the site, some people felt both archaeological excavations and road construction over the site would be disrespectful to the people who once lived on the site. The BIA sought to alleviate these concerns by making the archaeological excavations an educational experience through the local tribal college. The archaeological investigations not only concentrated on salvaging the site information, but also instructing tribal members (Brumley, 1993). The approach was accepted by the State Historic Preservation Office, the Tribal Council and the Advisory Council on Historic Preservation, but it still did not sit well with some tribal members who felt the site was still being violated.

This road project also illustrates some basic internal tribal conflicts. The U.S. government has a trust responsibility to provide adequate transportation on Indian reservations. Road construction is undertaken by the BIA only with tribal approval. In fact, tribal

governing bodies set the road-building priorities on each reservation. Road construction is important not only because it eases transportation problems, but also because it creates jobs. When questions arose about the archaeological values and the potential delay to road construction, the Tribal Council and members of the Tribe were divided. The road project proceeded, because the majority of the Tribe and Tribal Community Council favored road construction.

The issue was further complicated because a portion of the archaeological site was located on allotted lands, and the allottee did not want the site damaged, nor did he want the road constructed on his land. He was concerned that this project would violate his rights. Minor road realignment effectively avoided his property, but could not avoid the archaeological site.

Archaeological investigations were completed to mitigate the damages to anything of scientific value, but because the road could not be moved away from the site, nothing could be done to mitigate damages to the cultural values that some tribal members associated with the site.

In this case, the BIA complied with NHPA because it had followed the procedures defined in 36 CFR 800, and had tried to find ways of addressing the effects to the archaeological site. After final analysis, only the scientific value of the site could be adequately addressed, but a reasonable and good faith effort had been made to address all concerns. Although not all tribal members were pleased with the outcome of this project, the BIA had met both its trust and federal historic preservation responsibilities on this project.

In a case like this, a tribal historic preservation ordinance may have alleviated some of the concerns. An ordinance that clearly defines what is important to the tribe and outlines a mechanism for protecting tribally important sites would help resolve future confusing situations. Without such an ordinance the BIA and any other federal agency working on Indian trust lands must turn to the guidance given by NHPA, a federal law that was not written from an Indian perspective. As others have suggested, archaeologists and Indians do not view the past in the same way (Zimmerman, 1995). As the above case illustrates, the recovery of scientific information from an ar-

chaeological site may be an irrelevant exercise from certain Indian perspectives. A properly crafted tribal historic preservation ordinance could bridge this gap.

### 5.3. *Fossils: scientific values versus commercial values*

The removal of fossils from federal and Indian lands is becoming a serious problem in the western United States. Paleontologists argue that fossils should be protected for their scientific value (Bryant, 1995; Horner, 1990). However, the costs some public and private institutions are willing to pay for complete and properly prepared dinosaur specimens have resulted in a run for certain species. Two cases illustrate this problem.

The Blackfeet Reservation in Montana contains some of the more remarkable dinosaur specimens in the country, and several reputable paleontologists have conducted research there (Horner, 1990 pp. 1–2). However, when the Blackfeet Tribe learned of the potential financial return of these remains they entered into a consignment agreement with a commercial firm to excavate fossils on the reservation. In return the Tribe received a commission on any fossils sold (Blackfeet Tribe, 1990). The Tribe also asserted tribal jurisdiction of fossils on all lands contained within the exterior boundaries (Blackfeet Tribe, 1993).

Initially the BIA challenged this agreement, arguing that fossils were a limited resource and the 1906 Antiquities Act protected fossils for their scientific interest (Keller, 1990). However, after receiving opinions from the Office of the Department of Interior's legal counsel, the BIA modified its position, largely because the Antiquities Act was too weak for the United States government to assert legal authority (Bureau of Indian Affairs, 1991a).

In informal discussions, the Blackfeet tribal representatives argued that they have a right to realize a commercial profit from their resources. Fossil beds, they reasoned were no different than gas and oil deposits, and they should be allowed to exploit these for the benefit of the Tribe. As a sovereign nation they argued that they also had the right to assert ownership of all fossils within the reservation boundaries, whether they occurred on tribal, allotted or private lands.

This agreement and the assertion of tribal ownership has created an interesting dilemma. Because of the weaknesses in federal law and the lack of any regulations governing the removal of fossils, the BIA has no federal responsibility over fossil removal. However, the BIA has a trust responsibility to ensure that the rights of all Indian landowners are protected. While no one would argue against the tribal ownership of fossils on tribal lands, the right of the tribe to claim ownership to fossils on individual allotted or private lands is questionable. The BIA and Blackfoot Tribe are sure to lock horns on the issue of tribal sovereignty versus the individual Indian allottee's rights. At the present time, the issue is not settled, but like most questions about trust responsibility, it may be settled in a court of law.

In a recent South Dakota case, the issue of fossil ownership did go to court. In this instance an individual Indian on the Cheyenne River Sioux Reservation entered into a contract to allow the removal of a *Tyrannosaurus Rex* specimen from his allotted land. He entered into this agreement without the knowledge or approval of the BIA. When he learned the prepared specimen was worth much more than the \$5000 he received for its removal, he requested BIA assistance in recovering the fossil. Federal marshals eventually seized the fossil and the case went to court. Arguments in court centered around the issue of whether the fossils on Indian lands were trust assets. Court decisions, which were upheld through appeals, concluded that the fossil was an interest in the land and that because the land was still held in trust it could not be removed without the approval of the U.S. government. Because the agreement reached between the allottee and the institution removing the fossil had not been approved by the BIA, the courts concluded the agreement was null and void and the fossils still remained the property of the United States to be held for the beneficial Indian landowner.<sup>4</sup>

<sup>4</sup> For a full discussion of the South Dakota court cases refer to: *Black Hills Inst. versus Dept. of Justice*, 967 F.2d 1237 (8th Cir. 1992) (Black Hills I); *Black Hills Inst. versus Dept. of Justice*, 978 F.2d 1043 (8th Cir. 1992) (Black Hills II); *Black Hills Inst. versus S.D. School of Mine & Tech.*, 12 F.3d 737 (8th Cir. 1993); and *Black Hills Inst. versus Dept. of Justice*, 812 F. Supp. 1015 (DSD 1993).

These two cases illustrate that preservation of historic resources and the preservation of fossils are two quite different things. Recent federal historic preservation and archaeological protection laws do not protect fossils. The only federal law used to protect fossils is the 1906 Antiquities Act, which refers to "items of scientific interest". The weaknesses of this law have already been alluded to. Other federal land holding agencies of the United States have found it easiest to protect and control the removal of fossils by simply asserting federal ownership of the fossils and permitting removal through their general land management laws which allow the consideration of scientific values (Bureau of Land Management, 1994).

Fossils located on Indian trust lands are resources that belong to the Indian surface landowners, who have the option of deciding what to do with the fossils. As trustee, the BIA has a responsibility to approve any transactions, but in the absence of federal law, the BIA has no authority to argue the protection of fossils for scientific purposes over commercial. Fossils are for all practical purposes a commodity.

## 6. Conclusions

The above examples illustrate the problems the United States government faces when trying reconcile its federal responsibilities to comply with historic preservation laws with its trust responsibilities on reservations. Archeological protection and historic preservation on reservations are, for the most part, limited by the provisions of federal laws. However, because of the trust status of most Indian lands, federal historic preservation is more pervasive on Indian Reservations than on most private lands, where the presence of the federal government is not part of daily operations.

If they can cast off the past feelings of distrust, Indian tribes and the BIA are in the unique position of being able to form a partnership to work together to craft tribal ordinances that meet federal mandates and yet satisfy the local tribal preservation priorities. Both NHPA and ARPA have provisions to recognize tribal ordinances that can complement and even replace these federal statutes. Because of their

sovereign authority in Indian Country, tribes can enact preservation laws that apply to all lands within the reservation: they can define what is important and why it is important; they can mandate the preservation of certain types of historic properties or areas; and they can zone areas for protection in ways that could limit or even eliminate development. Such ordinances could give historic properties a greater measure of protection than is presently afforded by federal law. While tribes can enact more restrictive ordinances, they must also be cognizant of the property rights of other landowners living on the reservation. By working together, the BIA and the tribes can ensure that historic preservation objectives are met, without conflicting with the federal government's trust responsibilities to other Indian landowners.

However, only two of the seven reservations in Montana have enacted such ordinances. The Northern Cheyenne Tribe enacted a historic preservation ordinance in 1983 (Northern Cheyenne Tribe, 1983) which closely models both NHPA and ARPA, but the sufficient funds have never been available to staff the positions required by the ordinance and the law has never been enforced. The Salish and Kootenai Tribes on the Flathead Reservation recently completed an ordinance and are just beginning to implement it (Confederated Salish and Kootenai Tribes, 1995).

The logical question is why the tribes have not enacted more historic preservation ordinances. It is usually a matter of priorities: a priority of objectives and a priority of funding. Tribal governments experience the same pressures as all local, state and federal governments. However, with unemployment rates of over 57% (Bureau of Indian Affairs, 1991b), economic development on most reservations is more critical than in other areas of the nation. While few people would argue against the importance of historic and cultural preservation, tribal councils must struggle with overriding unemployment and other social problems, and historic preservation often takes a back seat.

Priorities of objectives and funding are tied closely together. Neither the BIA nor the Indian tribes have ever received sufficient funding to mount adequate historic preservation programs. With the present climate in the United States Congress, it is unlikely that, at least in the near future, historic preservation

will receive the funding it needs. A partnership between the BIA and the tribes, which is complemented by a fully enacted tribal ordinance, may be the only effective way of ensuring that the federal government adequately addresses historic resources in a way that meets the needs and expectations of the tribes.

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## LEGAL AUTHORITIES WITHIN THE UNITED STATES

### I. LAWS RELATING TO HERITAGE RESOURCE MANAGEMENT

- A. National Historic Preservation Act of 1966,  
16 U.S.C. §§ 470, et seq.
- B. National Environment Policy Act of 1969,  
42 U.S.C. §§ 4321, et seq.
- C. Coastal Zone Management Act,  
16 U.S.C. §§ 1451, et seq.
- D. Federal Land Policy Management Act of 1976,  
43 U.S.C. §§ 1701, et seq.
- E. Section 4(f) of the Department of Transportation Act of 1966,  
49 U.S.C. § 303
- F. Archeological and Historic Preservation Act of 1974,  
16 U.S.C. §§ 469, et seq.
- G. National Marine Sanctuaries Act,  
16 U.S.C. §§ 1431, et seq.
- H. Historic Sites Act of 1935,  
49 U.S.C. § 303
- I. Antiquities Act of 1906,  
16 U.S.C. § 433 (permitting provision)
- J. Archaeological Resources Protection Act of 1979,  
16 U.S.C. § 470cc (permitting provision)
- K. Abandoned Shipwreck Act of 1987,  
43 U.S.C. §§ 2101, et seq.

**II. LAWS PROHIBITING DAMAGE TO HERITAGE RESOURCES**

**A. Criminal Enforcement Laws Specifically Prohibiting Damage to Heritage Resources**

1. Antiquities Act of 1906, 16 U.S.C. § 431
2. Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee
3. Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170
4. Historic Sites Act, 49 U.S.C. § 303
5. Code of Federal Regulations

**Protection of Archeological Resources**

43	CFR part 7	Interior
36	CFR part 296	Forest Service
32	CFR part 229	DOD
18	CFR part 1312	TVA
36	CFR part 79	Interior (Curation)

**B. General Criminal Enforcement Laws which May Be Used to Prosecute Those Who Injure, Destroy or Take Heritage Resources**

1. Theft of Government Property, 18 U.S.C. § 641
2. Destruction of Government Property, 18 U.S.C. § 1361
3. Theft of Indian Property, 18 U.S.C. § 1163
4. National Stolen Property Act, 18 U.S.C. §§ 2314-2315

- B.
5. **Museum Theft, 18 U.S.C. § 668**
  6. **Aid & Abet, 18 U.S.C. § 2**
  7. **Accessory After the Fact, 18 U.S.C. § 3**
  8. **Conspiracy, 18 U.S.C. § 371**
  9. **Destruction of Property to prevent Seizure,  
18 U.S.C. § 2232**
  10. **Smuggling, 18 U.S.C. §§ 541 - 546**
  11. **Cultural Property Implementation Act,  
19 U.S.C. §§ 2601-2613**
  12. **Assimilated Crimes Act, 18 U.S.C. § 13**
  13. **Offenses Committed Within Indian Country,  
18 U.S.C. § §1151-53**
  14. **Code of Federal Regulations**

**Resource Protection**

- |    |                  |                                |
|----|------------------|--------------------------------|
| 36 | CFR part 2       | Interior                       |
| 36 | CFR part 327     | Corp of Engineer - DOD.        |
| 36 | CFR part 261     | Forest Service                 |
| 43 | CFR 8360.0       | BLM                            |
| 50 | CFR 27           | Fish & Wildlife                |
| 25 | CFR 261          | BIA - Heritage<br>Preservation |
|    | Forfeiture gg(b) | ARPA                           |

**C. Civil Enforcement Laws Specifically Prohibiting  
Damage to Heritage Resources**

1. **Archaeological Resources Protection Act of 1979,  
16 U.S.C. § 470ff**
2. **National Marine Sanctuaries Act, 16 U.S.C. 1443**
3. **Native American Graves Protection and  
Repatriation Act, 25 U.S.C. § 3007**

**D. General Civil Common Law Doctrines Which May Be  
Used to Prosecute Those Who Injure, Destroy or Take Heritage  
Resources**

1. **Trespass**
2. **Replevin**
3. **Conversion**

**III. THRESHOLD DETERMINATION OF WHO OWNS AND  
CONTROLS THE LAND IN OR ON WHICH THE  
HERITAGE RESOURCES ARE LOCATED OFTEN  
DICTATES WHICH LAWS APPLY**

**IV. FEDERAL LAW MANAGEMENT AGENCIES**

- A. **Bureau of Land Management**
- B. **National Park System**
- C. **National Forest Service**
- D. **National Oceanic Atmospheric Administration**
- E. **Bureau of Indian Affairs**
- F. **Department of Defense**
- G. **Customs Service**
- H. **Department of Energy**

IV. I. Tennessee Valley Authority

V. FEDERAL AGENCIES WITH PROSECUTORIAL AND INVESTIGATIVE AUTHORITY

A. United States Department of Justice

1. Criminal Division
2. Environment & National Resources Division
3. Federal Bureau of Investigation
4. INTERPOL

B. United States Department of Treasury

1. Internal Revenue Service
2. Customs Service

C. United States Department of State (United States Information Agency)

D. United States Department of the Interior

1. National Park Service
2. Bureau of Land Management
3. Fish & Wildlife Service
4. Bureau of Indian Affairs

E. United States Department of Agriculture (National Forest Service)

F. United States Department of Defense

G. United States Department of Energy

H. Tennessee Valley Authority

I. United States Department of Commerce (National Oceanic and Atmospheric Administration)

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V. J. **United States Department of Transportation (United States Coast Guard)**

K. **United States Postal Services**

The  
Archeological Resources  
Protection Act

- \*Preparation
- \*Investigation
- \*Case Strategy

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I. Preparation

A. Visit Parks

B. Know Boundaries/Venue

C. Check:

- \* Signs
- \* Postings
- \* Handouts

D. Identify Team Leader

E. Identify Archeologist

F. Identify AUSA

G. Permits

- \* Authority to issue
- \* Procedure
- \* Format

H. Crime Scene Kits

- \* Video cameras/cameras
- \* Film
- \* Note pads/pencils/pens
- \* String
- \* Stakes/pegs
- \* Tape/crime scene tape
- \* Ground corers
- \* Print equipment
- \* Water
- \* Dental stone
- \* Evidence logs
- \* Evidence bags
- \* Trash bags (orange/white)

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### III. Arrest vs. Detention

#### A. Flight Risk or Danger

- \* Out of state or local resident
- \* Prior or clean record
- \* Threat to officer safety
- \* Threat to community
- \* Threat to crime scene preservation
- \* Threat to evidence

#### B. Speedy Trial Clock (30 days)

- \* Time to prepare archeologist report
- \* Expert analysis of

fingerprint  
tools  
soil  
artifacts

#### C. Manpower

- \* Arrest, process, transport for Rule 5
- \* Detain, process, crime scene preservation

#### D. Processing

- \* Photos
- \* Full case prints

#### E. Interviews

- \* Pre-arrest, be aggressive, detailed
- \* Lock-in stories
- \* Separate defendants immediately before interviews

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II. Call And Response

- A. Identify Prohibited Act(s)
- B. Establish Jurisdiction/Venue
- D. Check For Permit
- E. Crime Scene Preservation/Investigation
- F. Immediate Preservation or Curation Needs
- G. Native American Interest
- H. Archeologist Response
- I. Agency Commitment

002566

IV. Seizure vs. Non-Seizure

A. What To Seize:

- \* Artifacts
- \* Tools
- \* Vehicles
- \* Clothing/boots
- \* Maps
- \* Receipts
- \* Brochures
- \* Diaries

B. Preserve Evidence

- \* curation, stabilization
- \* Other expert exams

fingerprints  
tool mark expert

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V. Charging Decisions

A. Jurisdiction

- \* Exclusive
- \* Concurrent
- \* Proprietary

B. Federal vs. State

- \* Cost
- \* Manpower

C. Felony vs. Misdemeanor

- \* Rookie vs pro looter
- \* Cooperation
- \* Damage

D. Criminal vs. Civil

E. Forfeitures and Restitution

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VI. When To Charge

- A. Cooperation By Defendant
- B. Intelligence Referral
- C. Interagency Assistance, e.g. Joint Investigation
- D. Search Warrants
  - \* House
  - \* Warehouse
- E. Seizure Warrants
- F. Subpoenas
  - \* Trade shows
  - \* Hotels
  - \* Tax
  - \* Bank
- G. Mail Covers
- H. Trash Dumps
- I. Evidence Collection
  - \* Experts
  - \* Congressionals
- J. Media Coordination
- K. Speedy Trial Problems
  - \* Reports and analysis
- L. Grady v. Corbin, 110 US 2084 (1990); Double Jeopardy
- M. Flight Risk or Danger
- N. Manpower
- O. Male/Female
- P. Adult/Juvenile
- Q. Detention Facilities
  - \*Location

VI. When to Charge (Cont'd)

R. Departmental Policies

\* USAM

S. Permits

\* In or out of scope

T. Value

U. Previous damage

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## VII. Trial Strategy

### A. Jury Selection

- \* Voir Dire

### B. Define Theory of Case (Public Interest)

- \* See vol. 1 p. 3 on 16 U.S.C. §470]  
cc ARPA purpose:

"secure, for present and future benefit of the American people, protection of archeological resources and sites on public lands and Indian lands..."

### C. Control Case Agent

- \* Obtain reports from witnesses early
- \* Send exhibits for analysis ASAP
- \* Have agent review everything for discrepancies
- \* Label and mark exhibits with a purpose - group each experts exhibits
- \* Spend time with case agent and archeologist

### D. Archeologist Report

- \* Archeological damage plus costs of restoration and repair
- \* Commercial value plus cost of restoration and repair
- \* Get all three values:

archeological  
commercial  
restoration and repair

- \* Be conservative, reliable, reasonable

### E. Use of experts

- \* Bury dull/stipulations
- \* End with clincher

### F. Terminology

- \* 16 USC §470 bb (statute)
- \* 43 C.F.R. Part 7 (regs)
- \* Be consistent with technical words in drafting and in testimony

VII. Trial Strategy (Cont'd)

- \* Looter-defendant vs. pot-hunter, dirt bag

G. Permits

- \* 43 CFR §7, 8
- \* Available with/for professionals

H. Closing

- \* Multi-agency interest, approach, e.g. experts
- \* Analogize - strip-mining back yard  
or burglary of heirloom from bedroom
- \* Develop violated interests

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## **IS AMERICA ALLOWING ITS PAST TO BE STOLEN?**

*by Robert K. Landers*

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In recent decades, the looting and mining of American Indian artifacts have become serious problems. Archaeologists fear that irreplaceable knowledge about America's historic and prehistoric past is being lost. The federal government has taken steps to try to deal with the problem on federal lands, but commercial looting continues — as does the legal mining of artifacts and destruction of valuable sites on private lands. The major underlying question is: Who owns the past?

When they entered the hidden cave in the Cherokee National Forest in Tennessee last March, Forest Archaeologist Quentin Bass and his co-workers had to crawl over a carpet of skulls and other human remains. They also found pottery and other artifacts that had been placed there by Cherokee Indians about 400 years ago. They soon realized that the remote cave and its contents represented an extremely unusual find, because the Cherokee usually buried their dead in or near their villages.

Unfortunately, Bass and his co-workers weren't the first modern-day persons to discover the cave: Grave robbers had been there first and had extensively damaged the site. But as it turns out, they didn't get away with it. After a stakeout, three men were caught inside the cave, and that led to the arrest of six others. All but one ultimately pleaded guilty to various charges — and that one person was convicted by a jury on Oct. 18 and sentenced on several charges to 22 years in prison. This was one of only two times that an

individual had been tried and convicted on a felony charge under the Archaeological Resources Protection Act of 1979 (ARPA). But such convictions could become more common in the years ahead.<sup>1</sup>

"There's a network of these people around who deal in artifacts, and it's a real growing problem," Bass says. "It's not just Boy Scouts on the weekend, piddling around and doing haphazard vandalism. These people know what they're doing and they go after it. And there's a real market for [the artifacts]." Just this past year, Bass says, a Southwestern polychrome Indian pot was sold in Paris for a quarter of a million dollars, a Mississippi monolithic ax went in New Orleans for \$150,000, and an arrowhead was sold for a record \$20,000. "We're not talking inconsequential amounts," Bass observes.

The lure of such sums has helped turn the looting and mining of historic and prehistoric artifacts into a serious problem in the United States. Although the problem is often thought to be largely confined to the Southwest, where the most visually spectacular and easily appreciated archaeological sites are located, it's actually a nationwide problem, as the Cherokee National Forest case suggests.

"[W]hat's now the [entire] United States was occupied by prehistoric peoples from at least 12,000 years ago," says Francis P. McManamon, chief of the National Park Service's Archeological Assistance Division. "So there are archaeological sites from coast to coast . . . from the prehistoric period and also from the historic period."

Extensive looting of Indian artifacts has occurred even in New England. Metichawon, an area in New Milford, Conn., that was important to the Weantinnock Indians for centuries, has been looted "on a scale that's really quite staggering," says Russell G. Handsman, director of research at the American Indian Archaeological Institute in Washington, Conn. Although the looters may not have found anything "real glamorous," they've taken away pieces of bowls, potsherds (pieces of broken pottery), whole pots, stone tools and other artifacts. "Lovers Leap [as the area is popularly known] is about as extensively and intensively looted a site as I think probably most people could find anywhere in the United States," Handsman says.

To archaeologists, such looting can mean the loss of irreplaceable knowledge. While collectors may value artifacts for their beauty or commercial worth, archaeologists value them primarily for the information they can provide about the past. If objects are thoughtlessly removed from a site, their archaeological value can sharply diminish. "[If] you just dig [an object] up and divorce it from where it came from, you lose any ability to really [tell] much of anything from it," says archaeologist Keith Kintigh of Arizona State University.

Persons bent on profit are not the only culprits responsible for the loss of that information. There are also so-called "casual looters" and mindless vandals.

The federal government in recent years has taken steps to crack down on commercial looting on federal lands and, by educating the public, to reduce casual looting and vandalism.

But the problem is not just a simple matter of good guys (archaeologists) vs. bad guys (looters). For one thing, the bad guys are not always so bad. Often they're just innocent hikers or campers who, as Utah State Archaeologist David B. Madsen has explained, "stumble upon a site and . . . scratch around, pick up a potsherd or a flake or two, and take it home as a souvenir."<sup>2</sup> For another thing, the good guys have not always been so good. In fact, for many decades Native Americans often regarded archaeologists and physical anthropologists (who study human remains and what they can reveal about human origins) as little better than looters. "Archaeologists and anthropologists have been looking at us [and our possessions] as their property . . . throughout the history of their professions," says Suzan Shown Harjo, president and executive director of the Morning Star Foundation and, from 1984-89, executive director of the National Congress of American Indians.

The public image of archaeologists is based in part on the popular "Indiana Jones" movies. Those movies, Kintigh says, "very graphically portrayed people's romantic image of what an archaeologist is. [But it] has nothing to do with what [modern] archaeologists actually do at all. And it in fact portrays exactly what the looters are doing: Basically, you're after some particular, wonderful object, and you go and you snatch it away, because of its inherent value."

Indiana Jones seldom pauses to study the context in which the object is found and never questions his right to snatch the object away. Yet if the movie archaeologist behaves more like a looter than a modern archaeologist, his cavalier attitude is not entirely untrue to that evidenced by many archaeologists in the past. Until recent decades, many archaeologists and physical anthropologists often failed to consult Indian tribes before digging up the burial sites of their ancestors. Even today, some archaeologists still fail to do that.

But Indians in recent years have become both more concerned about such excavations and more assertive about expressing their concern. And so attitudes have been changing. Archaeologists have been "finding that they need to be sensitive to the descendants of the people whom they are digging up," says Arizona Superior Court Judge Sherry Hutt, who handled many prosecutions under the Archaeological Resources Protection Act when she was an assistant U.S. attorney in Phoenix. And Indians, she says, have become more aware that archaeologists can help them to reclaim some of their own history.

Indians and archaeologists today share many of the same concerns, says Henry J. Sockbeson, an attorney with the Native American Rights Fund. "Indians don't want their ancestors dug up in any kind of

uncontrolled fashion. Archaeologists don't want pot hunters going in and digging up Indian graveyards in the dead of night because it destroys archaeological information. So, from a preservation standpoint, clearly archaeologists and tribes have much the same interests. But where it gets touchy is when you talk about existing collections and returning existing collections [to tribes]."

A new law, the Native American Graves Protection and Repatriation Act, deals with that touchy subject. Signed by President Bush in November, it requires

*"Indians don't want their ancestors dug up in any kind of uncontrolled fashion. Archaeologists don't want pot hunters digging up Indian graveyards in the dead of night. So, from a preservation standpoint, clearly archaeologists and tribes have much the same interests," says Henry J. Sockbeson, an attorney with the Native American Rights Fund.*

museums and federal agencies to inventory their collections of Native American human remains and associated funerary objects, and then, where a close connection to living Indians or extant tribes can be shown, to return the items to them. Certain sacred and other important objects also will have to be turned over to tribes where a cultural affiliation with them can be shown. The law also states that Native American remains and funerary objects and certain other cultural objects newly excavated on federal or tribal lands belong to the tribes involved, and that archaeologists must "consult" the appropriate tribes before digging on federal lands. (They'd already been required to get the tribes' consent to dig on tribal lands.)

Native Americans regard the legislation as a big

step forward, and the final version of the bill had the backing of the Society for American Archaeology and the American Association of Museums. It "probably is the best compromise that we could have crafted," says archaeologist Lynne Goldstein of the University of Wisconsin-Milwaukee. It's "not the law that I would have written, it's not the law that most Indians, I think, would have written, but it's a law that all of us can live with."

The new legislation is complicated, and its implementing regulations have yet to be drawn up. While many archaeologists and museum officials are content with the legislation and hopeful that it will work tolerably well, others are not so sanguine. Clement Meighan, a professor of anthropology at the University of California in Los Angeles, for instance, says that "the aim [of the measure] is to kill off archaeology, to plow it under as a field. Fifty years from now, people — including the Indians — will look back and say, 'How could you be so stupid?'"<sup>3</sup>

James Reid, president of the Antique Tribal Art Dealers Association, which strongly opposed the legislation, says the new law fails to assume the legitimacy of museums' mission. "If the museums have no legitimate right to these pieces, then the next assumption might be that private persons have even less right." And, indeed, the private collecting of Indian artifacts has begun to come under fire. Many archaeologists and others, while supporting the mission of public museums, would like to see the private collecting of Indian artifacts become an activity that society regards with utter contempt. Until that happens, they say, the looting and mining of such artifacts are bound to continue — and with them, the theft of knowledge about America's past.

### *Rising interest in Indian art prompts increased looting*

The 1971 sale of a private collection at Parke-Bernet, a leading auction house in New York, signaled a sharp increase in interest in American Indian art and artifacts. The collection had been started by Col. George Green, a Civil War surgeon and businessman, and later expanded by his family. Before the sale, Parke-Bernet had estimated that the 310 items in the collection would fetch between \$40,000 and \$67,000. As it turned out, however, the proceeds came to more than \$161,000.

A Navajo blanket that had sold at Parke-Bernet for \$100 in 1963 brought \$1,000. A tomahawk nearly three feet long brought \$1,400. An Indian ceremonial hide shirt went for \$4,500. Five baskets by Dat-so-la-Lee, the most famous basket maker of the Washo tribe of Nevada, were sold for prices ranging from \$2,800 to \$6,100, with three of the baskets going to

private bidders and the other two going to the Museum of the American Indian, Heye Foundation, in New York. The headline in *The New York Times* the next day summed up the story: "For Indian Artifacts, Price Trend Is Up."<sup>4</sup> In the years since, strong interest in Indian artifacts has been manifested not only in the United States but in Japan, Germany and elsewhere.

The result of all this increased demand for Indian artifacts has been the increased mining of archaeological sites for profit. Among the pieces most in demand are beautiful Mimbres pottery, named for the valley in New Mexico in which it was first found. Almost all the major Mimbres sites, including those on federal or state-owned land, have been ravaged by pot hunters in recent decades. Most of the Mimbres sites were on private lands, however, so as long as the mining was done by the landowner or with his consent, it was legal. "In the United States, which is not true of other countries, if you own a site, you can go out with dynamite and blow it to kingdom-come, you can go out there with a backhoe, you can do whatever you want, pretty much," archaeologist Keith Kintigh points out.

The looting of Indian artifacts on federal or tribal lands is a crime — and there's no question it's being committed. Some of the commercially looted items turn up on the open market. Among the items sold at one auction last summer, Kintigh says, were prehistoric Hopi pots of a sort found almost exclusively on federal or Indian lands. "It's virtually certain that that stuff was looted illegally," he says.

The reported incidents of looting on federal land rose steadily in the years for which statistics are available — from 430 incidents in fiscal 1985 to 627 the next year and 657 in fiscal 1987. The apparent increase may just reflect better reporting. But as the National Park Service's Archeological Assistance Division pointed out last year, the reported incidents "are only the tip of the iceberg. Many archaeological sites are in remote areas, many are unknown even to the federal agencies that are charged with managing them, and federal agencies have limited resources to systematically monitor the condition of sites that they do know exist."<sup>5</sup> The Bureau of Indian Affairs estimated that between 1980 and 1987, 560 archaeological sites on Indian lands in the Four Corners area\* were vandalized or looted. On the Navajo Reservation alone, there was a 900 percent increase in the number of sites annually vandalized or looted — from 10 in 1980 to 100 in 1987.<sup>6</sup>

Although solid information on its true extent is very hard to obtain, many people believe that commercial looting has been on the increase. Profit-minded diggers have been reported active in the Southeast and the Pacific Northwest as well as in the Southwest. In

the past few years, reports Francis McManamon of the Archeological Assistance Division, there may have been a reduction in commercial looting on federal lands — and increases in it elsewhere. The commercial looters, he says, "may have [been] pushed off onto private lands or onto state lands or other kinds of public lands, and we may be [having] an increase in those areas."

While "an awful lot of damage" has been done in the Southeast, notes Thomas F. King, an independent consulting archaeologist from Maryland who is conducting research into the general subject, the destructive digging of prehistoric sites is probably being done primarily in the West, where most of the federal lands are. The Four Corners states of Arizona, Colorado, New Mexico and Utah contain a wealth of archaeological resources — and of commercially valuable artifacts.

Since the late 19th century, Kintigh observes, the Southwest "has captured people's imagination" with such visually spectacular sights as the famous Cliff Palace in Mesa Verde. Nestled in the cliffs beneath the overhanging brow of a Colorado mesa, the elaborate stone structure, which once housed more than 400 people, was built by the Anasazi (a Navajo word meaning "Ancient Ones") some 900 years ago.<sup>7</sup> The ancestors of the modern Pueblo Indian culture — the Hopi, Zuni, and others — the Anasazi produced stunning pottery and woven baskets with intricate designs. The prehistoric Mogollon and Hohokam peoples also produced beautiful pottery. The finer and better-preserved pottery and baskets from these ancient cultures of the Southwest have high commercial value in the art market. Just a few years ago, an Anasazi basket fetched \$152,000 at an auction at Sotheby's in London.<sup>8</sup>

"[M]any, many pieces of historic and prehistoric American Indian art have brought six figures in the past several years," says art dealer James Reid. But that, he adds, "doesn't make the one that your uncle brought back from the fair worth anything like that. It [has to be] something of extreme importance and a really exceptional piece within the context of the culture from which it came." An unbroken Anasazi mug or bowl that wasn't very well painted or very well made might bring \$150-\$200, Reid says. A bowl that was "pretty good" might be worth \$500-\$800, and one "that was really very finely made, beautifully painted, in excellent condition, might bring a couple of thousand [dollars] or more."

The sums obtained from unearthing Indian artifacts may often fail to match the dreams that inspire the digging, but they clearly are enough in many cases to keep the dreams alive. And the artifacts have an attraction all their own. "[P]eople have been interested in these things and collecting them for years and years, [even] before they really took off in terms of becoming identified as art," Reid observes.

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\*Arizona, Colorado, New Mexico, and Utah are called the Four Corners states because their boundaries meet at one point.

## Controversy Over Indian Remains and Artifacts . . .

In the spring of 1986, a group of Northern Cheyenne chiefs visited Washington, D.C. During their visit, they decided to examine the Smithsonian Institution's Cheyenne collection at the National Museum of Natural History. "As we were walking out," a Northern Cheyenne woman who worked on Capitol Hill later recalled, "we saw [the] huge ceilings in the room, with row upon row of drawers. Someone remarked that there must be a lot of Indian stuff in those drawers. Quite casually, a curator with us said, 'Oh, this is where we keep the skeletal remains,' and he told us how many — 18,500. Everyone was shocked."<sup>1</sup> The discovery helped lead to federal legislation that required museums and federal agencies to return some human remains and sacred artifacts to Native Americans.

Museums and federal agencies acquired the human remains of Native Americans in various ways, some of them quite unsavory to late 20th-century Americans. In the years after the Civil War, for instance, the Army Medical Museum eagerly sought out Indian remains, and an 1868 order by the U.S. surgeon general to all Army medical officers directed them to procure as many Indian crania as possible for the museum. These were collected from battlefields and from Indian graves and dispatched to the museum.

The reason given by the Army Medical Museum for wanting Indians' remains was so they could be used in a "comparative racial study." According to Robert E. Bieder of Indiana University's American Indian Studies Research Institute, the museum "sought to demonstrate racial characteristics. After his examination of 'osteological peculiarities,' Dr. George A. Otis of the Army Medical Museum announced in 1870 that data indicated that American Indians 'must be assigned a lower position in the human scale than has been believed heretofore.'"<sup>2</sup>

It was simple racism that was behind the collecting of Native American remains, according to Indian activists such as Suzan Shown Harjo, president and executive director of the Morning Star Foundation. "[T]here certainly was not a federally funded, federally directed, federally mandated white people's crania study. . . . It was the *Indian crania study*," she notes.

Another Indian activist, Walter Echo-Hawk, who is an attorney with the Native American Rights Fund, told the Senate Select Committee on Indian Affairs last May that "The hundreds of thousands of dead Native Americans that have been dug up from their graves and now lie in the nation's museums, universities, government agencies, and tourist attractions provide mute testimony that the laws in all 50 states and the District of Columbia which so strongly protect the sanctity of the dead for other citizens and guarantee a decent burial for all citizens have never been extended to include Native Americans."<sup>3</sup>

In fact, however, it is not just Native Americans whose remains are in museum collections. In the case of the Smithsonian, for instance, Smithsonian Secretary Robert McCormick Adams testified in 1987 that the institution's collections included "something on the order of 15,000 skeletons that represent blacks and Orientals and Europeans and people from other parts of the world."<sup>4</sup> And of the more than 18,000 North American Indian skeletons, only 3,500 were from periods after Columbus first came to the New World — and of

those, only about 800 came from the last 150 years.

Archaeologist Keith Kintigh rejects the Indian activists' contention "that this is an entirely racist enterprise. I think that that's really false. People in England . . . go out and dig up prehistoric or 200- and 500- and 1,000-year-old, 10,000-year-old British cemeteries all the time, and those *are* in fact their ancestors. . . . There is more interest in Native Americans in the United States simply because . . . prior to 1540 there wasn't anybody else [here] and there's no historical records."

It's true, Kintigh says, that archaeologists and anthropologists too often failed to consult Indian tribes about excavations. On the other hand, he says, "I think Indian values on all of this have changed." He cites an instance from around 1920 in which an archaeologist was excavating many graves at a Zuni prehistoric and early historic site and had Zuni workmen helping him. "There's an interesting place in the field notes . . . where it says that some of the workmen had excavated a particular grave, and the objects and so forth associated with the grave led them to conclude that this [was] the grave of . . . a very important religious office, and they asked that that person be reburied, and [the archaeologist] said, yes, that was OK, and so they did that." Later, after four or five years of having done excavations, the archaeologist was forced to leave Zuni land as the result of a tribal dispute over his photographing a religious ceremony. "And so he got thrown out of town not for digging up the burials but for photographing the ceremonies. . . . So I think Indian values about excavating prehistoric cemeteries have changed substantially. . . . I think in the past, they objected less than in some cases people do today."

Harjo disagrees. She claims that "our people have been asking for [the] return [of the Indian remains and related objects] for as long as they've been held [by museums], as long as they've had knowledge that they were held. . . . It's just that it has only been in recent times that any of us were in positions to be able to have someone pay attention to us, and to have assistance in that regard from non-Indian people, who also disdained the practices of their own past."

The human remains in museums' possession do have genuine scientific value, according to Adams and others. "Scholars arrive continually to study the documentation and collect data to pursue a wide range of problems ranging from the history of disease among American Indians to prehistoric culture . . .," Adams says. "Any hope of moving beyond oral history and ethnographic analogy in the reconstruction of the [prehistoric] past rests with archaeological approaches. . . . Our ability to assess all biological factors and many biocultural aspects completely depends upon our recovery, curation, and analysis of well-documented human remains."<sup>5</sup>

Harjo, however, questions the scientific value of Indian remains that can't even be linked to particular tribes, and she contends that "human decency requires that they be reburied. . . . That's the rule throughout the world. Everyone gets the right to be buried and stay buried. And the rules change when it comes to Indian country." Harjo, who is Cheyenne and Creek and a citizen of the Cheyenne and Arapaho tribes of Oklahoma, was asked whether she saw any difference between excavating the grave of someone

## ... Leads to New Law Requiring Repatriation

buried a year ago and excavating the grave of someone buried hundreds or thousands of years ago. "If they're Cheyenne, I don't. . . I see zero difference."

But that doesn't make archaeology impossible, she says. "If there are things that science wishes to learn and that can benefit the Indian people concerned . . . then, if it's presented in a good way and discussed in a respectful way and if the consent of the affected Indians is obtained, I think that serves the interest of science. All sorts of terms can be worked out, and [this takes place] with great regularity."

Many archaeologists are sensitive to the Indians' concerns. "I don't know of a single archaeologist anywhere who would argue that, if you know that this is [someone's] uncle, that person should not have the right to decide what happens," says Lynne Goldstein, an archaeologist and an officer in the Society for American Archaeology. Furthermore, she adds, if "we can reasonably identify a set of human remains as belonging to a tribe . . . then I think [the tribe] should be given the option to decide what happens to them."

Not all tribes, as it happens, want the remains back. For instance, Kintigh notes that the Zuni tribal council in New Mexico "has so far taken the position that while in retrospect [it] was inappropriate for the remains to [have been] excavated, they do not seek the repatriation, because you essentially can't undo the damage that's been done. . . . Other [Indian] people feel that [repatriation is] appropriate, given that the excavations were done in the first place; that the best thing to do is to rebury them close to where they were found."

In the summer of 1989, the Smithsonian reached agreement with the Native American Rights Fund and the National Congress of American Indians about disposition of the remains in the institution's possession. The agreement was made part of the law creating the National Museum of the American Indian, which is to be located next to the National Air and Space Museum on the Mall in Washington. According to the law, the Smithsonian is to inventory the Indian remains and funerary objects it has and, "using the best available scientific and historical documentation," identify their origins. If the tribal origin is established, any affected Indian tribe is to be notified. "If any Indian human remains are identified by a preponderance of the evidence as those of a particular individual or as those of an individual culturally affiliated with a particular Indian tribe," then, at the request of the individual's descendants or of the tribe, the remains and any associated funerary objects are to be "expeditiously" returned to them.

The Smithsonian was exempted from the Native American Graves Protection and Repatriation Act signed into law last fall (the current Congress is expected to consider additional legislation that would cover the Smithsonian). In the controversy leading up to the enactment of that measure, Henry Sockbeson of the Native American Rights Fund says, "The remains weren't the major issue. All the controversy seemed to be driven by [concerns about] the sacred objects and the objects of cultural patrimony." The definitions of those terms were narrowed considerably in the final version that became law. Under the act, museums are obliged to turn over such objects to the tribes if they can demonstrate a "cultural affiliation" with them.

Such repatriation by museums actually has been going on for some time, even without the legislation. The idea behind repatriation, says Kintigh, who chairs the Society for Ameri-

can Archaeology's task force on reburial and repatriation, "is that there is a special claim that people who are in some way more closely tied to an object have over it." In the case of the new law, the claim that "a culturally affiliated Indian tribe would have over human remains, funerary objects, [or] sacred objects that were generated by their ancestors or by their culture . . . essentially supersedes the public value that those things have, the value to science or to people who want to look at [the objects]."

In doing that, the law takes a middle position on repatriation, Kintigh says, and it should be viewed as "a line-drawing exercise. I don't think it's an absolute thing, where one could say, 'Yes, everything ought to be repatriated,' because at some point you have to ask the question of how far do you go."

The Antique Tribal Art Dealers Association thinks the new law goes too far. Although art dealers aren't directly affected by the law, they fought it vigorously. The value of objects in private collections to some extent derives from public collections, which generally are better researched, notes dealer James Reid. The new law, he says, embodies "an anti-institutional and an anti-scientific attitude that may seriously threaten collections" that are important to "the public's understanding, as well [as] that of Native Americans, of our collective past."

The legislation, Reid contends, failed to "assume the legitimacy of the museum structure, [or] that any of the sacred objects ever got there . . . except by duplicity or theft. . . . It's very easy to make a case for the wrongs that were done to the Indians, . . . but it was more complex than our contemporary romantic view would have it. There was a great deal of trade and back and forth going on, and a lot of these objects were literally taken off the scrap heap of history and wouldn't exist except for somebody going out and collecting them."

The new law applies specifically to remains and artifacts of Native Americans. "This had to be done so as not to create a legal precedent that could then be applied to all museum collections," says Edward H. Able Jr., executive director of the American Association of Museums. As a result, the law contains a paragraph about the "unique relationship" between the federal government and the Indian tribes, and about how the law shouldn't be construed "to establish a precedent with respect to any other individual, organization or foreign government." Nevertheless, as Smithsonian Secretary Adams wrote recently, "[T]he issues that have now arisen with American Indians obviously have wider, international applications."<sup>6</sup>

Indeed, museums' concerns go far beyond their collections of Native American objects. "[W]hat about all the other culturally affiliated objects or religious affiliated objects in collections?" notes Able. "What are you going to do when the Catholic Church wants all of its artistic patrimony returned on the grounds that it could not be alienated from the church — whether you're talking about chalices or paintings or icons or whatever? What are you going to do about African cultures, or Asian cultures, who say, 'Well, these objects are the cultural patrimony of my culture and therefore they should be returned as well. Where does it stop?'"

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### *Efforts to protect archaeological resources*

Archaeologists have long been interested in preserving and protecting important archaeological sites. During the late 19th and early 20th centuries, a federal report has noted, "concern for American antiquities grew in both private and governmental sectors. Reports and warnings from individuals and professional organizations, such as the American Association for the Advancement of Science, the Anthropological Society of Washington, and the Archaeological Institute of America, increased public awareness of the destruction of archaeological sites." The result was the Antiquities Act of 1906, which made the federal government responsible for protecting archaeological sites on federal lands and prohibited looting and vandalism at them.<sup>9</sup>

Seventy-three years later, as a result of fresh concern about the increased threat to America's archaeological resources on federal and Indian lands, the Archaeological Resources Protection Act of 1979 was enacted.\* It provided stiffer penalties for damaging or destroying those resources, and also prohibited trade in artifacts stolen from federal or Indian property. The maximum criminal penalty for repeated violations of the law was five years in prison and a \$100,000 fine.

ARPA, however, proved to be a difficult weapon to use against individuals who looted or vandalized archaeological sites. Before the law was strengthened in 1988 (see below), there had been only one ARPA felony conviction by a jury. In that case, prosecuted by the U.S. attorney for Arizona in November 1987, the defendant was found guilty of attempting to sell the mummified remains of an Anasazi infant.<sup>10</sup>

One of the big difficulties with ARPA was that for a violation to be a felony instead of just a misdemeanor, the value of the stolen artifact or of the amount of damage to the site had to be more than \$5,000. Attorney Kristine Olson Rogers, who had served for 10 years in the Portland, Ore., U.S. attorney's office, explained the problem to a congressional subcommittee in October 1987. Typically, she said, "A case is indicted accompanied by headlines touting massive damage estimates

and then the jury convicts of a misdemeanor, utterly disregarding the experts' staggering damage totals. And any time there is a defense expert, the jury will opt for the lowest bidder's price."<sup>11</sup> Because it was so hard to get a felony conviction under ARPA, prosecutors often simply hung their cases against accused looters on other statutes, such as that prohibiting theft of government property, under which it was easier to get a conviction.

Another difficulty with ARPA was that it didn't prohibit the mere "attempt" to dig up artifacts from federal lands. As attorneys in Arizona told the U.S. General Accounting Office (GAO), this meant that law enforcement agents had to document that such attempts were successful before they could make any arrests. In short, the officers sometimes would find themselves "having to sit and watch looters damage a site before apprehending them. Then, when these cases have come to trial, the defense and jury have questioned whether the archaeological resources are really important and valuable, since agents were apparently willing to let them be destroyed."<sup>12</sup>

Enforcement of ARPA not only frequently failed to result in felony convictions, but sometimes backfired completely. The best-known example was what came to be called "The Great Pottery Raid of 1986." This operation, conducted by the U.S. attorney for Utah, with the assistance of the Forest Service and the Bureau of Land Management, was aimed at recovering Anasazi artifacts believed to have been stolen from federal lands. On the basis of information from a lone informant who himself had admitted to illegally digging up artifacts, federal agents searched 16 homes and businesses in the Four Corners area and seized more than 300 artifacts. Most were later returned, however, and the one man indicted and charged with aiding and abetting the sale and purchase of archaeological resources in violation of ARPA was acquitted by a jury.<sup>13</sup>

As Brent D. Ward, the U.S. attorney involved, later told a congressional subcommittee, the effort to enforce ARPA "does not seem to help in winning the hearts and minds of some people in southeastern Utah. By aggressively enforcing federal laws protecting archaeological resources we have aroused the antagonism of some citizens in San Juan and Grand counties. . . . This may stem in part from a tradition of pot-hunting spanning many years."<sup>14</sup>

Public attitudes have indeed been a major barrier to effective enforcement of ARPA. As the GAO reported, "[M]uch of the public in the Four Corners states condones the looting of archaeological sites on federal lands, both as a means of supplementing personal income and as a personal hobby." Two Arizona attorneys told the GAO "that before presenting the specific facts of a looting case they must often first convince the judge and jury that looting is indeed a crime and that the provisions of ARPA should be enforced." In a case of archaeological looting, the

\*On tribal lands, if there are any tribal laws regulating the excavation or removal of archaeological resources, those laws, not ARPA, govern tribal members. The Bureau of Indian Affairs' jurisdiction in ARPA cases on lands with such tribal laws is limited to non-Indians. "What this means for the [Bureau of Indian Affairs]," Sidney L. Mills, director of the bureau's Albuquerque, N.M., area office, told a congressional subcommittee in 1987, "is that in many cases involving looting or destruction of sites by Indians, there are no enforcement actions that we can take. We can only help tribes to strengthen what laws they have governing archaeological resources and their means of enforcing them."

## State Archaeological Protection Laws

More than two-thirds of the states have laws protecting archaeological resources on state-owned property, according to a survey done by the State Historical Society of Iowa in 1989 for the National Conference of State Historic Preservation Officers. Many of the state laws are modeled after the federal Archaeological Resources Protection Act of 1979. Most states also have laws against the desecration of burial sites. Some states treat this offense as a misdemeanor, others as a felony.



Source: State Historical Society of Iowa.

public often perceives it as having "no identifiable victim, and many do not believe it warrants strong (if any) punishment."<sup>16</sup>

Congress sought to bring about a change in such perceptions and to overcome some of the other obstacles in the way of effective archaeological protection, by amending ARPA in 1988. The amendments lowered the felony threshold from \$5,000 to \$500, and added a prohibition against any unauthorized attempt "to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands." And federal land managers were directed to set up programs "to increase public awareness of the significance of the archaeological resources, located on public lands and Indian lands and the need to protect such resources."

"Many of the federal agencies are now taking very seriously their mandates to do public education," says archaeologist Kathleen Reinburg, who is the Society for American Archaeology's assistant Washington rep-

resentative. The Forest Service, for example, has a "Passport in Time" program in which the public is invited to visit archaeological sites that are being excavated or interpreted by archaeologists in national forests. Volunteers who want to participate in archaeological investigations and excavations are given training in basic field methods and allowed to take part. "The Passport in Time program has been going on for two years, and the response from the public has been overwhelming," Reinburg says. "There are thousands of people who have written the Forest Service wanting information and wanting to know where the sites are going to be open next year, can they come visit, can they participate."

Some states also have archaeological education programs. Arizona, for instance, has a Site Steward Program in which volunteers assist government agencies in monitoring the condition of selected archaeological sites. Boy Scouts or other groups, Reinburg explains, "go out and 'adopt' a site, and [then] whenever

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## Most Archaeological Resources Have Yet To Be Surveyed

Nobody really knows the extent to which the nation's archaeological resources are being lost as a result of looting and vandalism. That's in large part because so little is known about the nature and extent of those resources. "There is such a small percentage of this country that has been inventoried, because we just don't have the time and staff to inventory all that, that we just don't really have any idea of what's being lost," says Ruthann Knudson, an archaeologist with the National Park Service's Archeological Assistance Division.

Federal agencies manage nearly 947 million acres of land — and more than 90 percent of these holdings haven't been surveyed.† In the Four Corners states alone (Arizona, Colorado, New Mexico, and Utah), officials estimate there may be almost 2 million archaeological sites — but only about 136,000 have been identified and recorded. Of these, a third or more are thought to have been looted.††

Most archaeological sites on federal lands have been identified

through surveys conducted mainly in response to proposed development projects. Some of the unrecorded sites may actually be of greater archaeological significance than the ones that have been identified and recorded.

A 1988 amendment to the Archaeological Resources Protection Act of 1979 directed the Secretaries of the Interior, Agriculture and Defense, as well as the chairman of the board of the Tennessee Valley Authority, "to develop plans for surveying the lands under their control to determine the nature and extent of archaeological resources on those lands."

But a comprehensive survey of all the archaeological resources on federal lands is not going to be completed any time soon, according to Francis P. McManamon, chief of the National Park Service's Archeological Assistance Division. It is technically possible "to get a comprehensive view of all of the resources and then to evaluate them and then to focus attention on protecting the ones that are most important," he

says. "But it's a very time-consuming and expensive undertaking, and it's certainly not funded at the level that it [would need to be] to accomplish that in the short term."

Most of the archaeological surveys that have been done, he says, have been in the Southwest, where "it's relatively easy to locate an archaeological site. Basically, you just have to walk around and you can see them on the ground. . . . [But in] other parts of the country . . . you can't just go out and walk around and find an archaeological site, for the most part, [because the sites are] buried underneath the soil and hidden beneath vegetation." While the federal government has put some money into uncovering the sites, he says, "it's at a very low level of effort. That idea of having a comprehensive view nationwide is something that's way out there in the future."

† National Park Service, U.S. Department of the Interior, *Federal Archeology: The Current Program 1989*.

†† U.S. General Accounting Office, *Cultural Resources: Problems Protecting and Preserving Federal Archeological Resources*, December 1987.

they're out hiking, they stop by and make sure the site hasn't been vandalized or looted. I think the more people you get out there on the ground, the better the sites will be protected."

### Problems persist despite educational efforts and prosecutions

The various educational efforts by federal, state, local and tribal agencies, as well as by the Society for American Archaeology and other groups, appear to be having some effect. Utah State Archaeologist David Madsen says that archaeologists working in the Four Corners area sense that the vandalism and casual looting of sites has substantially decreased. "I think that

the innocent kind of thing [done by] the 'boy scout' [type of] vandal has gone down," he says.

If so, that's a significant victory for those seeking to preserve archaeological resources: While campers, hikers and other casual visitors to an archaeological site do little damage individually, taken all together they can do a lot of damage. "If you get a hundred or a thousand people at a site each taking a potsherd, pretty soon the site is gone," Madsen has observed.<sup>16</sup> The damage that's done by all the repeated diggings by casual visitors and avocational collectors usually is just on the surface or the upper deposits of a site, while the lower deposits are left undisturbed. But that doesn't mean the damage is insignificant. Far from it. What's lost, Madsen says, is "the later part of the record. That's as important, if not more important, than the earlier part of the record." In seeking to understand the past, he explains, archaeologists must "relate

modern groups — how they build houses, how they live — to prehistoric groups, and you sort of push that back through time. So if you miss that one major link between historically known people and the earlier people, it makes it almost impossible to describe what happened with the earlier record even if you have it. You need those connections all the way through.”

But while the increased efforts at public education may already have had an effect on the casual looting and vandalism, it will take much longer for them to have any substantial impact on the commercial looting. Nevertheless, it's apparent that the amendments that beefed up ARPA have resulted in more vigorous enforcement of the law. “[I]t's made it a lot easier for the U.S. attorneys' offices to prosecute people who violate the statute by excavating illegally, or [who try] to traffic in artifacts across state borders, if they're obtained . . . in violation of state law,” says Francis McManamon. “Almost immediately after those amendments were passed . . . there was an incident at Big South Fork National Recreation Area in the Southeastern part of the country. Some people were apprehended digging in a rock shelter on Park Service land and they were apprehended and successful prosecutions were made, because it was easier, based on the amendments, for the prosecuting attorney to demonstrate a violation of the statute. So that's been one immediate effect.”

Judge Sherry Hutt says that in the past year there's been “a dramatic increase in the number of prosecutions” in the country. These have involved not only destruction at prehistoric sites but also destruction at historic ones, such as Civil War battlefields, which attract artifact-hunters armed with metal detectors. “[N]ot only is there an increasing use of the law,” Hutt says, “but . . . it spreads over a broader spectrum of the country. You can have an archaeological case being filed tomorrow in Florida or in Virginia or Washington as likely as you would in the Four Corners states.”

Tougher law enforcement, however, sometimes has an unintended consequence: It drives up the prices of the artifacts that are available for sale and so increases the incentive for people to go out and loot more of them. That's what happened in the Cherokee National Forest case in Tennessee. “The net effect of all this,” says Forest Archaeologist Quentin Bass, “is that it's inflated the price of artifacts around here now and put even more pressure on it, in a weird sort of way. . . . Just like cocaine on the streets. You make a big bust and street prices go up . . . and propel them to do more.” Still, Bass says, the enforcement certainly “scared the bunch we have got up there; we seem to have cooled them for a while.”

The biggest obstacles to effective protection of archaeological resources on federal lands were not changed by the amendments to ARPA and will not be easily removed. The first is the vastness of the federal lands. In the Four Corners states alone, the

Bureau of Land Management, the Forest Service, and the National Park Service manage about 104 million acres of land. But according to a 1987 General Accounting Office report, the agencies have surveyed less than 6 million of those acres to identify archaeological sites and provide physical protection to only a small proportion of the known sites. (See story, p. 42.)

“The agencies are making efforts to protect their known archaeological resources,” the GAO said, “but these efforts are limited by the vastness of their lands and archaeological resources, as well as funding and staffing constraints.”<sup>17</sup> There's been some improvement since that GAO report, but the situation still remains essentially the same. “[W]hile there has been an increase in the funding for archaeological

*“The problem with looting is not here in the Four Corners area. It is in the drawing rooms of Washington, D.C., on the mantles of Boston fireplaces, and on the walls of Los Angeles condominiums,” says Utah State Archaeologist David B. Madsen.*

resource protection at the field level — they have a better ability than they had a year or two ago to hire part-time staff, to buy electronic monitoring equipment — it still is not [all that the federal agencies] say they need,” McManamon says.

The other hard-to-remove obstacle in the way of effective protection of archaeological resources on federal lands is the fact that mining artifacts continues to be legal on private lands. That means that once a looter makes it off federal property, he can simply claim that the artifacts in his possession came from private land. “Once an artifact is removed from the soil, it becomes very difficult, if not impossible, to prove whether it was removed from public or private lands,” noted Stephen M. McNamee, then the U.S. attorney for the District of Arizona. “Without such proof, prosecution . . . is not a viable option.”<sup>18</sup>

Furthermore, the mining of artifacts on private

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lands, even though legal, is a major problem in itself from an archaeological point of view. Indeed, McManamon says that it may even be "a bigger problem at this point than the situation on the federal land." At least with the federal lands, he says, "we are beginning to get that under control . . . and federal agencies are beginning to take the steps that they need to take to prevent [looting] from happening and to prosecute those who continue to do it. . . . There is not a similar kind of protection on private land."

That was made dramatically evident in late 1987 when 10 pot hunters paid the new owner of a farm in western Kentucky \$10,000 for the right to dig up the land, which overlooks the Ohio River. Archaeologists had long known that the site "was a large, relatively undisturbed Late Mississippian\* settlement," archaeologist Brian Fagan recounts. "Judging from surface artifacts, the site dated to sometime between A.D. 1450 and 1650. The farm was of special importance, for it straddled the vital centuries of first European contact with the New World." Other sites along the river from the period had long since been ravaged by pot hunters. But the Slack family, which for many years owned the farm, had permitted no digging for artifacts, and so the property "had, remarkably, remained nearly intact, a unique archive of information about Late Mississippian lifeways."<sup>19</sup> But then, with the change in ownership, came the pot hunters.

"They rented a tractor and began bulldozing their way through the village midden [refuse heap] to reach graves," Fagan relates. "They pushed heaps of bones aside, and dug through dwellings and the potsherds, hearths and stone tools associated with them. Along the way, they left detritus of their own — empty pop-top beer and soda cans — scattered on the ground alongside Late Mississippian pottery fragments. Today, Slack Farm looks like a battlefield — a morass of crude shovel holes and gaping trenches. Broken human bones litter the ground, and fractured artifacts crunch under foot."<sup>20</sup> A *National Geographic* writer said the field "looked for all the world as if a low-flying squadron of bombers had just swooped over on a practice run. More than 450 small craters, each edged by a mound of raw earth, pocked the surface of the unplanted field."<sup>21</sup> In response to the destruction, the Kentucky legislature made the desecration of graves a felony. Other states also have adopted laws to protect burial sites, even on private lands. (*In addition, many states have adopted laws to protect archaeological resources on state lands. See map, p. 41.*)

But the problem with respect to private lands still, by and large, remains. "I think the United States should have a system as in Great Britain, that the past in all

heritage sites belongs to the country, to the crown, and if it happens to be on your private land then you're responsible as a steward of the past," says Kathleen Reinburg. "You cannot go out and dig that site unless you have permission of the government." But while that system may work in Great Britain, it might well not work in the United States, where the Constitution's Fifth Amendment\* protects people's right to do with their property pretty much as they will and where most people have no cultural or emotional link with America's prehistoric past.

"[M]ost Americans of non-Indian descent," Fagan observes, "tend to think of prehistoric Indian sites in impersonal, remote ways. Most would protest vigorously at the destruction of an important, privately owned, historic site from pioneer days, or shudder at the very thought of someone looting their neighbor's great-grandmother's grave. But a long-abandoned prehistoric Indian village and the graves of the people who once lived there are a different matter."<sup>22</sup>

Most of the Indian artifacts illegally looted from federal or tribal lands apparently wind up in the hands of private collectors. Museums are now extremely careful about buying American Indian artifacts purportedly unearthed on private lands. Most art dealers are, too, according to Reid. "As a businessperson, I have a responsibility to use due diligence in trying to ascertain that what I buy is legal," he says. However, the only way a dealer can be certain that he never handles any artifacts illegally taken from federal or tribal lands is not to deal in such artifacts at all. Some dealers are doing just that. Archaeologist Thomas King says he has been told that a lot of dealers are going out of the Indian artifacts business because of ARPA and laws limiting international traffic.

Even if that's so, however, it doesn't necessarily mean that the destruction of archaeological resources is decreasing, King says. He's been told that "a lot of the real big collectors, the folks with the major money in the game, don't work through dealers per se but work through private agents, or individuals who don't deal on the open market but simply have two or three major clients that keep them going." Legitimate dealers "may be withdrawing from the market because of the impact of the laws. But . . . their place [may well be] being taken by the guys who, because they're not operating shops and not operating galleries . . . are less threatened by the laws."

Private collecting is a legitimate activity in a capitalist society, Reid points out. "There's something really wonderful about being able to own a significant item and being able to handle it and show it to your friends and buy, sell and trade it," he says. "It's neat.

*Continued on p. 46*

\*Mississippian culture. Fagan relates in *The Great Journey: The Peopling of Ancient America* (1987), began to emerge around 700 A.D. along the central Mississippi River and the major flood-plain corridors formed by its tributaries, into the Ohio, Tennessee, Arkansas, and Red rivers, and their branches. The Mississippian people grew maize, beans and squash, and also relied heavily on hunting and gathering.

\*The Fifth Amendment, which also protects against self-incrimination, states that "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Continued from p. 44

[And it's] common all over the world, where any kind of wealth exists."

But many archaeologists and others dream of a day when private collecting of archaeological resources will be socially unacceptable. "The problem with looting is not here in the Four Corners area," Utah State Archaeologist Madsen told a congressional subcommittee. "It is in the drawing rooms of Washington, D.C., on the mantles of Boston fireplaces, and on the walls of Los Angeles condominiums. . . . Until the reaction to the private display of such artifacts is one of scorn rather than approval, those artifacts will continue to find a market."<sup>23</sup> So long as they do, it appears that the nation's finite and irreplaceable archaeological resources will continue to be lost.

## NOTES (Text)

<sup>1</sup> The defendant, Newell Charlton, 63, of Elizabethton, Tenn., was sentenced to two years in prison for the felony violation of the Archaeological Resources Protection Act, fined \$499 and ordered to pay \$2,500 in restitution. He also was given 10 years in prison for theft of federal government property, and 10 years for depredation of federal government property. The other defendants in the case received lesser sentences. For more details on the case, contact the U.S. Forest Service public affairs office at the Cherokee National Forest, 2800 Ocoee St., Cleveland, Tenn. 37312, (615) 476-9700.

<sup>2</sup> Testimony before the House Interior and Insular Affairs Committee's Subcommittee on General Oversight and Investigations at a hearing held in Cortez, Colo., Oct. 19, 1987.

<sup>3</sup> Quoted by Ann Gibbons in "New Law Requires Return of Indian Remains," *Science*, Nov. 9, 1990, p. 750.

<sup>4</sup> "For Indian Artifacts, Price Trend Is Up," *The New York Times*, Nov. 20, 1971; Karl E. Meyer, *The Plundered Past* (1973), pp. 8-10.

<sup>5</sup> *Archeological Looting, a Summary*, Archeological Assistance Division, National Park Service, U.S. Department of the Interior, briefing statement, Jan. 31, 1990.

<sup>6</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *The Destruction of America's Archeological Heritage: Looting and Vandalism of Indian Archeological Sites in the Four Corners States of the Southwest*, February 1988, p. 9.

<sup>7</sup> Brian M. Fagan, *The Great Journey: The Peopling of Ancient America* (1987), p. 256.

<sup>8</sup> Jim Robbins, "Violating History," *National Parks*, July-August 1987, p. 29.

<sup>9</sup> National Park Service, U.S. Department of the Interior, *Federal Archeology: The Current Program*, 1989, p. 8.

<sup>10</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *The Destruction of America's Archeological Heritage*, *op. cit.*, pp. 13-14.

<sup>11</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *Theft of Indian Artifacts from Archeological Sites*, Oct. 19, 1987, p. 149. The hearing was held in Cortez, Colo.

<sup>12</sup> U.S. General Accounting Office, *Cultural Resources: Problems Protecting and Preserving Federal Archeological Resources*, December 1987, p. 63.

<sup>13</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *The Destruction of America's Archeological Heritage*, *op. cit.*, pp. 43-47.

<sup>14</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *Theft of Indian Artifacts from Archeological Sites*, *op. cit.*, pp. 122-123.

<sup>15</sup> U.S. General Accounting Office, *op. cit.*, p. 61.

<sup>16</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *Theft of Indian Artifacts from Archeological Sites*, *op. cit.*, p. 32. Madsen's other quoted comments are from an interview.

<sup>17</sup> U.S. General Accounting Office, *op. cit.*, pp. 37, 49.

<sup>18</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *Theft of Indian Artifacts from Archeological Sites*, *op. cit.*, p. 136.

<sup>19</sup> Brian Fagan, "Black Day at Slack Farm," *Archaeology*, July-August 1988, p. 15.

<sup>20</sup> *Idem.*

<sup>21</sup> Harvey Arden, "Who Owns Our Past?" *National Geographic*, March 1989, p. 378.

<sup>22</sup> Fagan, *op. cit.*, p. 16.

<sup>23</sup> Subcommittee on General Oversight and Investigations, House Committee on Interior and Insular Affairs, *Theft of Indian Artifacts from Archeological Sites*, *op. cit.*, p. 34.

## NOTES (pp. 38-39)

<sup>1</sup> Quoted by Douglas J. Preston, who gives an account of the Northern Cheyenne chiefs' visit to Washington in "Skeletons in Our Museums' Closets," *Harper's*, February 1989, p. 68.

<sup>2</sup> Robert E. Bieder, "A Brief Historical Survey of the Expropriation of American Indian Remains," April 1990, in Senate Select Committee on Indian Affairs, *Native American Grave and Burial Protection Act (Repatriation): Native American Repatriation of Cultural Patrimony Act and Heard Museum Report*, May 14, 1990, pp. 322-323.

<sup>3</sup> *Ibid.*, p. 51.

<sup>4</sup> Senate Select Committee on Indian Affairs, *Native American Cultural Preservation Act*, Feb. 20, 1987, pp. 65-66, 203-204.

<sup>5</sup> *Ibid.*, p. 189.

<sup>6</sup> Robert McCormick Adams, "Smithsonian Horizons," *Smithsonian*, October 1990, p. 10.

Julia G. Longenecker and Jeff VanPelt

# Training for Law Enforcement

## A Tribal Perspective

**T**he Pacific Northwest now has an Archaeological Resources Protection Act (ARPA) training course taught from a tribal perspective, which complements an existing ARPA training program taught by the Federal Law Enforcement Training Center (FLETC). The course was developed by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in cooperation with other local tribes and agencies. It is taught each October and by special arrangement.

The training is held in the heart of Indian country, in Richland, Washington, in order to involve local tribal elders and to take advantage of the U.S. Department of Energy's HAMMER Center.\* The HAMMER Cultural Resources Test-Bed and Training Center is a 7-acre surface and subsurface test-bed designed to provide a training ground for non-destructive archeological methods that can be used to teach others about site protection, and to encourage and enhance non-invasive archaeological methods, namely geophysical techniques.

The first annual HAMMER Archaeological Resources Protection (ARPA) Training for Law Enforcement was held October 29 and 30, 1998. The two days included a series of classroom presentations and an in-field ARPA crime scene investigation at the HAMMER Test-Bed. The 28 people taking the class included law enforcement officials, park rangers, county coroners, and tribal cultural resource technicians from various locations in Washington and Oregon. The Washington State Criminal Justice Training Commission approved 16 hours training credit for law enforcement officers taking the class.

The course is unique in that it is taught from a tribal perspective. We developed and organized the course after we completed a five-day

ARPA training conducted by FLETC. The FLETC class, while excellent, was not designed to provide a tribal perspective on the impact of looting.

A tribal perspective is important because disturbing cultural resources is not a victimless crime—such destruction has many social impacts on the lifestyles of Indian people. By providing a forum for Native Americans to speak about the impact of looting, students begin to understand and appreciate the seriousness of the crime. Other in-class training includes lectures and discussion on the laws, education efforts, and archeology.

Another unique quality of the class is its focus on crime scene investigations and techniques for proper prosecution, conviction, and restoration. The crime scene consists of a permanent simulated archeological site constructed specifically for the ARPA training. The site included buried features such as an earth oven used to heat treat lithic materials, a fire pit, a house pit with several caches, a human burial, and a multi-component archeological site. Out of respect for real archeological sites, all the "artifacts" and features for the simulated sites were made by Umatilla tribal members. For example, stone tools were replicated in 1998, and ash and firecracked rock were brought in from tribal sweat lodges to simulate earth ovens. After the features were constructed and buried, the site was left to rest for a few days, encountering a wind storm and thunderstorm. A day before the class, we intentionally looted the site with shovels and screens. The looting activity was stabilized and looter's evidence was planted for the site investigation.

The students were divided into five teams, each assigned to one of the features. Each team investigated the looted feature, looking for the types of evidence discussed during classroom lectures. In addition, actors playing looters were detained on-site by a law enforcement officer and were available for interviews.

The teams then returned to the classroom at the main HAMMER training facility and began presenting their cases to a county deputy prosecuting attorney, John Jensen of Benton County, and to a U. S. assistant prosecuting attorney, Timothy Simmons, of Portland. The prosecutors then decided whether or not they would take the case, based upon the information provided by the teams. The pitfalls and successes of each team were discussed.

\* Hazardous Materials Management and Emergency Response Volpentest Training and Education Center

In all, 15 instructors from across the Pacific Northwest contributed to the training. Whether Native American or not, all instructors shared the vision that to be effective in cultural resource management, Native Americans must take an active leadership role and be involved in all phases of the work. In the recent Plymouth Island ARPA convention in Washington, for example, a prosecutor stated, "If the tribes had not been involved in this case, we wouldn't have been successful in the prosecution."

The ARPA training at HAMMER represents one more step initiated by tribes in the Mid-Columbia to protect cultural resources. For decades, tribes such as the Umatilla, Nez Perce, Wanapum, Yakama, and Warm Springs have been crying out to local, state, and federal agencies to protect burial sites, archeological sites, and traditional use areas. When protection efforts failed to meet expectations, tribes took matters into their own hands. Several tribes started cultural resource programs during the 1980s to protect resources important to them.

The Umatilla, for example, began its Cultural Resources Protection Program in 1987 and began a vigorous campaign to improve the way CRM was conducted throughout its ceded lands. One aspect of this campaign was participation in regional and national archeological conferences, calling on the CRM profession to expand its definitions to include all tribal cultural resources, improve its methods, and involve tribes. The CTUIR were equally aggressive in calling on agencies to live up to their responsibilities in surveying lands, reporting ARPA violations, and increasing patrols to stop future ARPA violations. (A volume of the papers presented by the CTUIR from 1988 to 1998 with over 40 published papers is currently in publication and will be available in fall 1999.)

In the early 1990s, the Wanapum, in cooperation with the Grant County Public Utility District, began sponsoring ARPA training workshops for the region. Then, beginning in the mid-1990s, the tribes throughout the Columbia River system began working together to influence the development of federal agency cultural resources protection. These efforts led the Bonneville Power Administration, U.S. Corps of Engineers, and the U.S. Bureau of Reclamation to commit \$65 million dollars over a 15-year period to strengthen CRM protection. Fourteen working groups composed of tribes and federal agencies oversee the work being conducted in different parts of the Columbia River system (see McKinney, *CRM* Vol. 21, No. 9, for more description).

An example is the Wanapa Koot Koot working group, which oversees the activities in the Bonneville and John Day reservoirs. Since the funding began in 1997, accomplishments have included surveys of the reservoir shorelines to document sites and ARPA violations, development of long-term monitoring procedures so that changes in site condition can be identified, and hiring of a full-time ARPA law enforcement person. Funding from the agencies has enabled the introduction of new technologies such as digital photography, laser mapping, and videography. The approach to CRM in the Mid-Columbia has changed dramatically since incorporation of tribal values has started.

Another example of tribal influence is found in the cooperative efforts at the Hanford Site, a 560-square mile site managed by the U.S. Department of Energy, Richland Operations. Contained within the Hanford Site are many places important to the tribes. Of particular interest is the Hanford Reach, the last 55 miles of undammed Columbia River. Since 1994, the Nez Perce, Umatilla, Wanapum and Yakama tribes have been working cooperatively with the DOE to improve the management of cultural resources. One benefit achieved from this relationship was the development of the HAMMER Cultural Resources Test Bed and Training Center, where the Umatilla ARPA training was held in October 1998.

The future of CRM is bright in the Mid-Columbia Region. More work is being done than ever before. Tribal involvement continues to increase. ARPA convictions are on the rise. Public education is more prevalent than ever. And most importantly, more groups and agencies are getting involved such as local cities, law enforcement agencies, and public groups. An indication of this success is in Benton County, where Hanford is located. In May, the Benton County prosecuting attorney's office and sheriff's department were awarded the Washington SHPO award for Stewardship. In making this award, Allyson Brooks, the new Washington SHPO stated: "The successful prosecution of looters by Benton County sends a strong message across the state that vandalizing and looting will not be tolerated."

If efforts such as these can continue, ARPA violations in the Mid-Columbia will surely become a thing of the past.

*Julia G. Longenecker and Jeff VanPelt are with the Cultural Resources Protection Program, Department of Natural Resources, Confederated Tribes of the Umatilla Indian Reservation.*

A QUICK REFERENCE

**WHEN?**

- Notify** Prior to issuing an ARPA permit for work that may harm any religious or cultural site
- After completing NAGPRA-required inventories of Native American human remains and associated funerary objects
- Summarizing unassociated funerary objects, sacred objects, and objects of cultural patrimony
- Consult With** Prior to removing Native American human remains or cultural items from federal lands
- Prior to completing inventories of human remains and associated funerary objects in an agency's possession
- Determining the cultural affiliation of unassociated funerary objects, sacred objects, and objects of cultural patrimony
- Determining where and in what manner to return cultural items or human remains
- Clarifying an agency's responsibilities under section 106 of the National Historic Preservation Act
- An agency's preservation work may have a bearing on tribal concerns
- Deciding how to deal with adverse effects on historic properties
- Dealing with matters that significantly affect tribal communities
- Before taking actions that will affect tribal governments
- Dealing with access, use, and protection of sacred sites
- Obtain Consent From** Before issuing an ARPA permit on Indian lands
- Exchanging or determining the ultimate disposition of archeological items removed from Indian lands
- Before removing Native American human remains or cultural items from tribal lands

**WHO?**

- Indian tribes that may consider a site to have religious or cultural importance
- Affected Indian tribes or Native Hawaiian organizations
- Appropriate Indian tribe or Native Hawaiian organization
- Tribal government, Native Hawaiian officials, or traditional religious leaders
- Lineal descendant, Indian tribe, or Native Hawaiian organization
- Any Indian tribe or Native Hawaiian organization that attaches religious or cultural significance to places that may be eligible for inclusion in the National Register
- Indian tribes or Native Hawaiian organizations that perform preservation activities
- Indian tribes, Native Hawaiian organizations, and the interested public
- Tribal governments
- Federally recognized governments
- Appropriate Indian tribes and religious representatives
- Indian tribe or individual that owns or has jurisdiction over the land in question
- Appropriate Indian tribe or Native Hawaiian organization

**REQUIRED BY**

- 16 U.S.C. 470cc (c) [ARPA]
- 25 U.S.C. 3003 (d) [NAGPRA]
- 25 U.S.C. 3004 (a) [NAGPRA]
- 25 U.S.C. 3002 (c)(2) [NAGPRA]
- 25 U.S.C. 3003 (b)(1)(A) [NAGPRA]
- 25 U.S.C. 3004 (b)(1)(B) [NAGPRA]
- 25 U.S.C. 3005 (a)(3) [NAGPRA]
- 16 U.S.C. 470a (d)(6)(B) [NHPA]
- 16 U.S.C. 470h-2 (a)(2)(D) [NHPA]
- 16 U.S.C. 470h-2 (a)(2)(E)(ii) [NHPA]
- Executive Order 12875, October 26, 1993
- Executive Memorandum, April 29, 1994
- Executive Order 13007, May 24, 1996
- 16 U.S.C. 470cc (g)(2) [ARPA]
- 16 U.S.C. 470dd (2) [ARPA]
- 25 U.S.C. 3002 (c)(2) [NAGPRA]