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## A History and Analysis of Laws Protecting Native American Cultures

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# A HISTORY AND ANALYSIS OF LAWS PROTECTING NATIVE AMERICAN CULTURES

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## I. INTRODUCTION

A justice once reflected, the “greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community” nor should it be sanctioned by the courts.<sup>1</sup> There has long been concern among the Indian tribes in the United States that courts and Congress have had a callous disregard for their history, religion, property, and culture. They have pointed to a lack of interest in protecting their religious practices and have referred to instances where their cultural properties were confiscated and others wherein individuals, as well as the government, have interfered with their spiritual exercises.<sup>2</sup> For example, during the early part of the 19<sup>th</sup> century, the “digging and removing [of] contents of Native American graves for reasons of profit or

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1. *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 297 (7th Cir. 1990) (Cudahy, J., concurring).

2. H.R. Rpt. 101-877 at 13 (Nov. 16, 1990) (reprinted in 1990 U.S.C.C.A.N. 4367, 4372).

curiosity [became a] common practice."<sup>3</sup> Countless Indian burial sites were desecrated, and thousands of Native American human remains and funerary objects were sold or transferred and then housed in U.S. museums.<sup>4</sup> Federal laws and policies have conflicted with Indian religious beliefs in three general areas<sup>5</sup>:

1. Sites sacred to Native Americans that were used in their religious ceremonies have been designated as national parks belonging to the American public. As a result, Native Americans no longer have access to a number of these sites.<sup>6</sup>
2. Federal laws restrict the use of items sacred to Native Americans. For example, the Bald and Golden Eagle Protection Act (BGEPA)<sup>7</sup> prevents Indians from hunting eagles and from having eagle parts in their possession (except through a permit system that currently permits their very limited possession for use in religious ceremonies).<sup>8</sup> Further, except for members of the Native American Church, Native Americans originally could not use peyote in their religious ceremonies.<sup>9</sup>
3. Sometimes overzealous federal officials interfere in sacred ceremonies of Indian tribes, and, at least in the past, no laws prohibited this.<sup>10</sup>

While congressional interest in protecting and preserving Indian sites and ruins originated at the turn of the 20<sup>th</sup> century as part of an impetus to protect historical sites and monuments generally within the United States,<sup>11</sup> there was continuing insensitivity to Indian cultures throughout most of this century. During the 20<sup>th</sup> century, Indian tribes persistently lobbied Congress for recognition of their rights, particularly for a

3. *Id.* at 10.

4. *Id.* These activities were at their peak during the 19<sup>th</sup> century and the early part of the 20<sup>th</sup> century.

In 1868, the [U.S.] Surgeon General issued an order to all Army field offices to send him Indian skeletons . . . This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands of Native American human remains and funerary objects being sold or housed in museums and educational institutions around the country.

For many years, Indian tribes have attempted to have the remains and funerary objects . . . returned to them. This effort has touched off an often heated debate on the rights of the Indian[s] versus the importance to museums of the retention of their collections and the scientific value of the items.

*Id.*

5. See e.g. Bowen Blair, Student Author, *Indian Rights: Native Americans Versus American Museums—A Battle For Artifacts*, 7 Am. Indian L. Rev. 125 (1979).

6. *Id.*

7. 16 U.S.C. § 668 (2006).

8. For a discussion of the Department of the Interior's eagle permit system available to members of federally recognized Indian tribes, see *infra* nn. 70–87 and accompanying text.

The [Department of the Interior] has preliminarily determined that under certain circumstances it [would permit] the Hopi Tribe to collect golden eaglets within Wupatki National Monument, a unit of the National Park System, for religious ceremonial purposes. This rule [authorized] this activity upon terms and conditions sufficient to protect park resources against impairment, and consistent with the [BGEPA].

66 Fed. Reg. 6516 (Jan. 22, 2001).

9. See e.g. *U.S. v. Warner*, 595 F. Supp. 595, 597 (D.N.D. 1984); *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 637 (N.D. Tex. 1983). There was an exception for Indian members of the Native American Church because the use of peyote was central to, and the cornerstone of, religious practices of the Native American Church. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court ruled that a state could deny unemployment benefits to an Indian who was fired for using peyote as part of his traditional worship service. *Id.* at 890. The American Indian Religious Freedom Act, 42 U.S.C. § 1996a(b)(1) (2006), discussed *infra* pt. III(C), was amended in 1994 to permit Indians to use peyote in their religious ceremonies.

10. See e.g. *Havasupai Tribe v. U.S.*, 752 F. Supp. 1471 (D. Ariz. 1990).

11. For a discussion of the Antiquities Act of 1906, see *infra* pt. III(A).

congressional mandate that museums repatriate Native American human remains, funerary objects, and cultural artifacts in museum collections. Finally, in 1990, the hard work of the various tribes was rewarded when Congress officially acknowledged a need for the protection of Native American cultures and the repatriation of Native American human remains and cultural objects by enacting the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>12</sup> This Act, which became effective in 1991, provided some of the recognition and protection of Indian cultures Native Americans had long sought.

This article is a summary and history of the legislative acts and judicial decisions that considered and finally brought official recognition of a separate and distinct way of life for Native Americans and a protection of their cultural heritage. The article also compares NAGPRA with the international convention, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,<sup>13</sup> which, as part of its call for the international repatriation of cultural property generally, endorses the repatriation of sacred or communally important cultural objects that belong to, and are used by, tribal or indigenous communities.<sup>14</sup>

## II. A TRUST RELATIONSHIP BETWEEN NATIVE AMERICANS AND THE FEDERAL GOVERNMENT

Article 1, Section 8, of the U.S. Constitution gives Congress the power to regulate commerce “with foreign nations and among the several states, and with the Indian tribes.” Thus, Indian tribes have recognized sovereignty along with state and foreign governments. The Indian Reorganization Act of 1934 (IRA)<sup>15</sup> authorizes the Secretary of the Interior to take land in trust for individual Indians and for federally recognized Indian tribes.<sup>16</sup> Congress may preempt the operation of state law with respect to this Indian trust land.<sup>17</sup> In *Shivwits Band of Paiute Indians v. Utah State Department of Transportation*,<sup>18</sup> the court balanced federal, tribal, and state interests against one another and concluded that permitting a state to exercise control over Indian land would “threaten Congress’ overriding objective of encouraging tribal self-government and economic development.”<sup>19</sup>

In the very recent case of *Carcieri v. Salazar*,<sup>20</sup> the Supreme Court reversed a decision of the First Circuit, *Carcieri v. Kempthorne*,<sup>21</sup> wherein the First Circuit had

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12. 25 U.S.C. §§ 3001–3013 (2006).

13. UNIDROIT, *Convention on Stolen or Illegally Exported Cultural Objects*, <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> (June 24, 1995).

14. *Id.* at art. 1(b).

15. 25 U.S.C. § 465 (2006).

16. Section 465 states: “[t]itle to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired . . .” *Id.*

17. *See N.M. v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

18. 428 F.3d 966 (10th Cir. 2005).

19. *Id.* at 983 (citation omitted). An Indian tribe leased land it had placed in trust with the federal government to an advertising enterprise for construction of outdoor billboards. The State of Utah opposed construction of the billboard. The court denied the state the right to prevent the construction. *Id.* at 969, 983.

20. 129 S.Ct. 1058 (2009).

21. 497 F.3d 15 (1st Cir. 2007).

affirmed summary judgment for the Department of Interior when the state of Rhode Island petitioned the court for review of a decision of the Department to accept a 31-acre parcel of land into trust for the benefit of the Narragansetts. The Narragansetts were not recognized as a tribe until 1983.<sup>22</sup> The Supreme Court ruled that the Secretary of the Interior's authority under the IRA to take land into trust for Indians is limited to Indian tribes that were under federal jurisdiction when the IRA was enacted.<sup>23</sup>

In *Black Hills Institute of Geological Research v. South Dakota School of Mines & Technology*,<sup>24</sup> a Native American sold rights to excavate on his land to the Black Hills Institute of Geological Research. The land, located within the boundaries of the Cheyenne River Sioux Indian Reservation, was held by the federal government in trust for the Native American. During excavation, researchers from the Institute uncovered mammoth remains and ten tons of 65 million year old bones from a *Tyrannosaurus Rex*.<sup>25</sup> The fossil was the largest and most complete *Tyrannosaurus Rex* skeleton known to man. The Institute paid the Native American \$5,000 for the fossil and moved it to the Black Hills Museum of Natural History for public display and research.<sup>26</sup> Later, upon order of the U.S. Attorney for South Dakota, federal officers seized the fossil based on the researchers having allegedly violated the Antiquities Act,<sup>27</sup> which bans the removal of antiquities from federal lands.<sup>28</sup> The IRA prohibits the sale of Indian land unless the sale is approved by the Secretary of the Interior.<sup>29</sup> The court nullified the sale of the fossil and ordered transfer of the bones to the Native American.<sup>30</sup>

In *Black Hills Institute of Geological Research v. Williams*,<sup>31</sup> the court imposed a due diligence requirement on a purchaser of Indian artifacts. It held that a party who has knowledge of facts that would cast doubt upon the transferability of title to such artifacts has a duty to investigate the title. It ruled "that a lack of caution and diligence . . .

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22. The Narragansett Tribe's ongoing efforts to gain recognition from the United States government finally succeeded in 1983. In granting formal recognition, the Bureau of Indian Affairs (BIA) determined "that the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." 48 Fed. Reg. 6177, 6178. The BIA indicated that "[t]he tribe ha[d] a documented history dating from 1614." *Id.*

23. *Salazar*, 129 S.Ct. at 1068.

24. 12 F.3d 737 (8th Cir. 1993); see also *Black Hills Inst. v. Dept. of Just.*, 967 F.2d 1237, 1238-1239 (8th Cir. 1992); *Black Hills Inst. v. U.S. Dept. of Just.*, 978 F.2d 1043 (8th Cir. 1992).

25. *Black Hills Inst.*, 967 F.2d at 1238.

26. See *S.D. Sch. of Mines & Tech.*, 12 F.3d at 739 (8th Cir. 1993); *Black Hills Inst.*, 967 F.2d at 1239.

27. For a discussion of the Antiquities Act of 1906, see *infra* pt. III(A).

28. The Black Hill Institute filed suit against the federal government contending that it had title to the fossil. *Black Hills Inst.*, 978 F.2d at 1044. The federal government asserted that it had ownership of the fossil as trustee for the Native American. The federal government insisted that the Native American could not sell land held in trust for him unless he obtained prior approval from the Secretary of the Interior. The government also claimed that the fossil is an ingredient of the land and, as such, is land. As land, the court ruled that the federal government held the fossil in trust for the Native American. *S.D. Sch. of Mines & Tech.*, 12 F.3d at 741-743. The Black Hills Institute and the Black Hills Museum of Natural History Foundation, Inc. filed a complaint in the nature of a quiet title action to assert permanent ownership of the fossil. *Black Hills Inst.*, 978 F.2d at 1044.

29. 25 U.S.C. § 465.

30. *S.D. Sch. of Mines & Tech.*, 12 F.3d at 740. The Institute originally filed suit against the Department of Justice contending that, after seizure of the bones, the federal government stored this priceless treasure under inadequate circumstances. *Black Hills Inst.* 967 F.2d at 1238. The court ordered the South Dakota School of Mines and Technology to serve as custodian of the fossil until ownership could be determined. *Black Hills Inst.*, 978 F.2d at 1043.

31. 88 F.3d 614 (8th Cir. 1996).

amounts to bad faith.”<sup>32</sup> The court then held that “[Black Hills] Institute’s failure to diligently investigate whether the fossil [found on the Indian reservation] could be alienated absent governmental approval . . . [prevented the Institute from being] a good faith, bona fide purchaser.”<sup>33</sup>

### III. FEDERAL ACTS IMPACTING AND/OR PROTECTING NATIVE AMERICAN CULTURES

#### A. *Antiquities Act of 1906*

Congress’s first attempt to save historic treasures within the United States was its enactment of the Antiquities Act of 1906.<sup>34</sup> This Act provides penalties for destroying or damaging any historic ruins on public lands.<sup>35</sup> It prohibits the appropriation, injury, or destruction of any historic or prehistoric ruin or monument, or any object of antiquity on lands owned or controlled by the federal government.<sup>36</sup> Congress enacted the Act in response to vandalism that occurred at the Casa Grande ruins in Arizona and to preserve Mount Vernon in Virginia.<sup>37</sup> Still, because Indian lands are controlled by the federal government, the Antiquities Act also prohibits the destruction or appropriation of Indian ruins and antiquities.<sup>38</sup> However, the Act is limited in its protection of Indian artifacts in that it subjects a person to penalties for the appropriation of any “ruin,” “monument,” or “object of antiquity,”<sup>39</sup> and the definition of these terms is not clear.

In *U.S. v. Diaz*,<sup>40</sup> a 1974 case, the court refused to affirm the conviction of a person who took a facemask from an Indian reservation that had been placed there by the Indian tribe after using it in religious practices.<sup>41</sup> The Ninth Circuit Court of Appeals

32. *Id.* at 616 (citation omitted).

33. *Id.*

34. 16 U.S.C. § 433 (2006).

35. *Id.* Under the act, permits are required to excavate upon federal property. These permits are granted by the Secretaries of the Interior, Agriculture, and Army and are issued only to reputable institutions for scientific or historic preservation purposes. *Id.* at § 432. The fine for appropriating historic or prehistoric ruins on monuments is only \$500. A violator also can be imprisoned up to ninety days. *Id.* at § 433.

36. The Act does not refer specifically to Indian lands. It pertains to “lands owned or controlled by the Government of the United States.” *Id.* at § 433. Because Indian lands were, and are, controlled by the federal government, the Act covers excavation on Indian lands.

37. The Act authorizes the President to set aside historic places, landmarks, and structures, as well as other lands of scientific value, as national monuments. 16 U.S.C. § 431 (2006).

38. *Id.* at § 433.

39. *Id.*

40. 499 F.2d 113 (9th Cir. 1974).

41. In *Diaz*, Diaz “appropriated . . . face masks found in a cave on the San Carlos Indian Reservation.” *Id.* at 114. These masks later “were identified by a San Carlos medicine man as having been made [recently] by another medicine man . . .” *Id.* The masks “were used by the Apache Indians in religious ceremonies and that after the conclusion of [the] ceremonies the artifacts traditionally were deposited in remote places on the reservation for religious reasons . . . [and were] never allowed off the reservation.” *Id.* Diaz was convicted in a federal district court under the Antiquities Act for appropriating objects of antiquity from government land. According to a professor of anthropology who testified in the case, an “‘object of antiquity’ [can] include something that was made just yesterday if [it] relate[s] to religious or social traditions of long standing.” *Id.* Diaz appealed his conviction, contending that the term “object of antiquity” is unclear in its meaning and that the Antiquities Act is void due to vagueness. The appellate court declared the Antiquities Act to be unconstitutionally vague and reversed the decision of the federal district court. *Diaz*, 499 F.2d at 115. The court noted that the word “antiquity” can refer not only to the age of an object but also to the use for which the object was made and to which it was put, subjects which, the court decided, likely would not be of common knowledge. *Id.* at 114–115.

ruled unconstitutional the Antiquities Act, which was the only federal statute at that time providing for criminal penalties for taking Indian artifacts. The Act subjects a person to penalties for the appropriation of an object of antiquity. Despite testimony from a professor of anthropology that an “ ‘object of antiquity’ [can] include [an object] that was made just yesterday if it relate[s] to religious or social traditions of long standing[,]” the court ruled in *Diaz* that a person must know with reasonable certainty those objects he or she may not take.<sup>42</sup>

The Antiquities Act has not been repealed, even though it was declared unconstitutional in *Diaz*. In a 1979 case, *U.S. v. Smyer*,<sup>43</sup> the Tenth Circuit Court of Appeals upheld the conviction of an individual who excavated a prehistoric Mimbres ruin at an archaeological site that was believed to be inhabited about A.D. 1000–1250. The individual, Smyer, appealed his conviction, contending the Antiquities Act is vague and, thus, unconstitutional.<sup>44</sup> The Tenth Circuit distinguished *Diaz*, noting that the *Diaz* case involved newly created artifacts. According to the court in *Smyer*, a person of ordinary intelligence should know that one may not excavate a prehistoric Indian burial ground and appropriate artifacts that are 800–900 years old. The court ruled that, as applied to the prosecution of the defendants for taking artifacts from ancient sites for commercial motives, the Act was not unconstitutionally vague.<sup>45</sup>

#### B. National Historic Preservation Act of 1966

Congress declared in 1966 that “the spirit and direction of the Nation are founded upon and reflected in its historic heritage” and that “preservation of this irreplaceable heritage is in the public interest so that its vital legacy . . . will be maintained and enriched for future generations of Americans.”<sup>46</sup> It enacted in that year the National Historic Preservation Act (NHPA),<sup>47</sup> which authorized the Secretary of the Interior to “maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.”<sup>48</sup> Amendments to the NHPA in 1980, 1992, and 1994 included provisions requiring the Secretary to “establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties.”<sup>49</sup> The NHPA now mandates the Secretary of the Interior to “foster communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests in such properties are given due consideration.”<sup>50</sup> “A tribe may assume all or any part of the functions of a State Historic Preservation Officer . . . with respect to tribal lands . . . if the tribe’s chief governing

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42. *Id.* at 114.

43. 596 F.2d 939 (10th Cir. 1979).

44. *Id.* at 940.

45. *Id.* at 941.

46. 16 U.S.C. § 470(b)(1) (2006); *Id.* at 470(b)(4).

47. *Id.* at § 470.

48. *Id.* at § 470a(a)(1)(A).

49. *Id.* at § 470a(d)(1)(A) (2006); *see also* 16 U.S.C. § 470–471.

50. *Id.* at § 470a(d)(1)(A).

authority so requests [and] the tribe designates a tribal preservation official to administer the tribal historic preservation program, through appointment by the tribe's chief governing authority."<sup>51</sup> "Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."<sup>52</sup>

The NHPA has provided Indian tribes additional benefits in that the NHPA is interrelated with the National Environmental Protection Act (NEPA),<sup>53</sup> and thus has brought required tribal input into major federal projects. The NEPA mandates a federal agency to take a hard look at the environmental consequences of a major federal action before taking any action.<sup>54</sup> It requires the federal government to use all practicable means "to improve and coordinate federal plans, functions, programs, and resources to the end that the Nation may . . . preserve important historic, cultural, and natural aspects of our national heritage . . . ."<sup>55</sup> Federal agencies must analyze, to the fullest extent possible, the potential impact on environmental and cultural values of those "major Federal actions significantly affecting the quality of the human environment . . . ."<sup>56</sup> To meet this prerequisite, NEPA requires federal agencies to prepare an environmental impact statement (EIS) before undertaking any major federal actions that may affect significantly the quality of the human environment. Both NEPA and the NHPA must be complied with in preparing the EIS when historic buildings are affected.<sup>57</sup> The Ninth Circuit Court of Appeals<sup>58</sup> has stated that both acts are designed to insure that a federal agency "stop, look, and listen before moving ahead."<sup>59</sup> A federal project that involves possible demolition of a building listed or eligible for listing, in the National Register may be viewed as a major federal action. Under § 106 of NHPA, the Advisory Council on Historic Preservation (ACHP), a federal agency created by Congress, must be given a reasonable opportunity to comment on the effect of federally assisted projects on historic properties. This would include properties of traditional religious and cultural tribal importance.<sup>60</sup> Thus, pursuant to NEPA and the NHPA, parties to a major federal project must invite the participation of affected federal, state, and local agencies, but also any affected Indian tribe, in federal projects that affect historical properties or cultures.<sup>61</sup>

### C. *American Indian Religious Freedom Act of 1978*

A concern among Native American tribes that Congress and the general public did

51. *Id.* at § 470a(d)(2).

52. *Id.* at § 470a(d)(6)(A).

53. 42 U.S.C. §§ 4331 et seq. (2006). The NEPA was enacted in 1969.

54. *Id.* at § 4332(c).

55. *Id.* at § 4331(b)(4).

56. *Id.* at § 4332(c).

57. *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982).

58. *Id.*

59. *Id.*

60. *See* 42 U.S.C. § 4332(c); 16 U.S.C. § 470–471.

61. *See* 42 U.S.C. § 4332(c); 16 U.S.C. § 470–471. Tribes are concerned about the recent Ninth Circuit's decision in *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2763 (2009). The Ninth Circuit Court of Appeals ruled that the government-approved use of artificial snow for skiing on a portion of a public mountain sacred in the religion of at least thirteen tribes does not violate NEPA or the NHPA. *Id.* at 1080.



not respect their religious practices and freedoms as well as the apparent ineffectiveness of the Antiquities Act to protect Indian artifacts and ruins, led tribes to lobby Congress to recognize their special cultures and religious practices. Congress responded to these pressure groups seventy-two years after it had enacted the 1906 Antiquities Act; in 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA)<sup>62</sup> to protect and preserve the traditional religious rights of American Indians.<sup>63</sup> Still, while AIRFA led to a change in some governmental policies, it did not provide the protections Native Americans demanded. For example, Native Americans were not successful in citing the AIRFA as authority for their right to retain their native cultural resources.<sup>64</sup> Although Native Americans contended that the Act authorized them to obtain the return of Indian religious artifacts and human remains that were a part of museum collections, the courts have ruled that the Act only has application to federal agencies and does not call for the return of Native American objects and human remains.<sup>65</sup> Further, courts held that the Act is merely a statement of the federal government's policy that it will recognize the religious beliefs of Native Americans as well as of others.<sup>66</sup>

In 1994, amendments to AIRFA did provide more recognition of Indian cultures in that the amendments made it legal to use peyote in religious ceremonies in connection with the practice of traditional American Indian religion.<sup>67</sup> Further, the amendments were applied in a 1999 case, *Bear Lodge Multiple Use Association v. Babbitt*,<sup>68</sup> to prevent rock climbers from challenging the Secretary of the Interior's approval of a plan that would prevent rock climbing on Devil's tower during the month of June when Indians engage in their Sun Dance and other religious ceremonies.

Many tribes point to the Bald and Golden Eagle Protection Act (BGEPA),<sup>69</sup> which was enacted in 1940, as a federal act that interferes with their religious practices and thus violates AIRFA. The Act provides that the bald eagle, commonly known as the American eagle, or any golden eagle, may not be taken, possessed, sold, purchased, transported, exported, or imported at any time or in any manner. The Act's prohibitions extend to any part of an eagle, including its nest or eggs, and apply whether the eagle is dead or alive. The bald or golden eagle may be taken or possessed "for the scientific or

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62. 42 U.S.C. § 1996 (2006).

63. The Act "protect[s] and preserve[s] . . . [the] inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996.

64. In addition, the Act did not include a provision that museums return religious artifacts belonging to Native American tribes.

65. Pursuant to the Act, the Zuni had earlier negotiated unsuccessfully with the Smithsonian Institution to return certain of their artifacts that they alleged were stolen from their reservation at the turn of the century. Some Native Americans thought the Smithsonian had an obligation to return such artifacts inasmuch as the Smithsonian is completely federally subsidized. Some contended museums partially financed by the federal government and those with tax-exempt status also should return Indian artifacts.

66. See e.g. *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir 1983), *cert. denied*, 464 U.S. 956 (1983); *U.S. v. Top Sky*, 547 F.2d 483 (9th Cir. 1976); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd* 706 F.2d 856 (8th Cir. 1983). The Supreme Court ruled in *Lyng* that AIRFA does not provide a private right of action or any judicially enforceable individual rights. *Lyng*, 485 U.S. at 448-551.

67. See 42 U.S.C. § 1996a(b).

68. 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000).

69. 16 U.S.C. § 668.

exhibition purposes of public museums, scientific societies, and zoological parks[.]” but a permit must be obtained from the Secretary of the Interior.<sup>70</sup>

In *U.S. v. Abeyta*,<sup>71</sup> a resident and member of the Isleta Pueblo and a member of the Katsina Society (a religious society that engages in traditional ceremonial practices deeply rooted in ancient Pueblo religion), took parts of a golden eagle to procure its feathers for use in a religious ceremony of the Katsina Society. It is a tradition and lore of the Katsina Society to require ceremonial use of eagle feathers and parts. According to members of the Katsina Society, the eagle is a primary messenger to the spirit world and the ceremonial use of its feathers permits the living to communicate with the spirit world beyond.<sup>72</sup> There is a procedure established by the Secretary of the Interior to obtain such feathers and eagle parts from a depository established by Fish and Wildlife Service, which originally was established at Pocatello, Idaho.<sup>73</sup> However, the individual did not avail himself of the procedure. When the Department of Interior filed a violation notice charging the individual with knowing possession of parts of a golden eagle without a permit, he asserted his right to take parts of the eagle under the Treaty of Guadalupe Hidalgo and the First Amendment.<sup>74</sup> Although the federal district court in *Abeyta* ruled that such a taking was a lawful and protected expression of religious liberty secured by the Treaty of Guadalupe Hidalgo and by the First Amendment, the Supreme Court held in *U.S. v. Dion*<sup>75</sup> that the BGEPA is read as abrogating the rights of Native Americans to take bald and golden eagles pursuant to treaties with the United States.<sup>76</sup> The Court ruled that Congress specifically intended to prohibit Native Americans from hunting bald or golden eagles except pursuant to a permit. Thus, according to the Supreme Court, any treaty rights of the Native Americans were abrogated.<sup>77</sup>

The United States Department of the Interior, through its Fish and Wildlife Service, currently will issue permits to take and possess eagle parts for religious

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70. 16 U.S.C. § 668a. An employee of the Department of the Interior who is authorized to enforce the act may arrest any person in possession of any part of the bald or golden eagle without a permit. In *U.S. v. Smith*, 29 F.3d 270 (7th Cir. 1994), the court ruled that scienter is not required for a criminal conviction and affirmed the conviction of an individual who received eagle feathers in the mail from a friend in Canada. *Id.* at 273–274. The feathers were discovered by U.S. Customs. The court ruled “[f]ederal agents are not restricted by Fourth Amendment [restrictions on search and seizures] when they conduct such routine searches.” *Id.* at 273 (citation omitted).

71. 632 F. Supp. 1301 (D.N.M. 1986).

72. *Id.* at 1303.

73. *Id.* The court acknowledged the importance of protecting and preserving the golden eagle (even though it was not listed as an endangered species), but held that the “administrative apparatus established to accommodate [the Native Americans’] religious needs” (the depository at Pocatello, Idaho) was offensive and ineffectual. *Id.* at 1304. Dead eagle parts and feathers currently are sent to the national Eagle Repository in Commerce City, Colorado. “The Repository receives eagles and eagle parts and distributes them to permit holders on a first-come first-served basis. Demand [generally] exceeds supply, however, and, [often] . . . applicants [must] wait three years for an eagle carcass and six to nine months for loose feathers.” *U.S. v. Hardman*, 297 F.3d 1116, 1123 (10th Cir. 2002) (footnote omitted).

74. *Abeyta*, 632 F. Supp. at 1302.

75. 476 U.S. 734 (1986).

76. *Id.* at 744–745.

77. *Id.* at 746. See also *U.S. v. Thirty Eight Golden Eagles or Eagle Parts*, 649 F. Supp. 269 (D. Nev. 1986), wherein the government sought the forfeiture of eagles and eagle parts obtained from a member of the Red Lake Band of Chippewa Indians for allegedly violating the Eagle Protection Act. The court ruled that the act did not violate the tribe members’ free exercise rights or the AIRFA. *Id.* at 280. It further held that the tribe member failed to establish a violation of a treaty between Red Lake Band of Chippewa Indians and the United States. *Id.* at 281.

purposes but only to members of federally recognized Indian tribes that are eligible to receive services from the United States Bureau of Indian Affairs (BIA).<sup>78</sup> In *U.S. v. Hardman*,<sup>79</sup> the court ruled that excluding sincere practitioners of Native American religions who were not members of federally recognized tribes from applying for a permit for possession of eagle feathers would violate the Religious Freedom Restoration Act (RFRA)<sup>80</sup> unless the government can show that limiting permits for eagle feathers to members of federally-recognized tribes is the least restrictive means of advancing the government's interests in preserving eagle populations and protecting Native American culture. Under RFRA, the government cannot substantially burden a person's exercise of religion unless the government demonstrates that the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest.<sup>81</sup>

In two recent cases, *U.S. v. Friday*<sup>82</sup> and *U.S. v. Vasquez-Ramos*,<sup>83</sup> two federal appellate courts upheld the BGEPA against challenges that the Act violated RFRA.<sup>84</sup> In *Friday*, a member of the Northern Arapaho Tribe of Wyoming was charged with violating the BGEPA after he shot a bald eagle without a permit for use in a Sun Dance. The Tenth Circuit Court of Appeals decided that the government has tried to accommodate Native American religions while still achieving its compelling interests.<sup>85</sup> The Tenth Circuit commented "[t]hat accommodation may be more burdensome than the Northern Arapaho would prefer, and may sometimes subordinate their interests to other policies not of their choosing. Law accommodates religion; it cannot wholly exempt religion from the reach of the law."<sup>86</sup> In *Vasquez-Ramos*, two Native Americans who were not members of federally-recognized Indian tribes, were indicted for possessing feathers and talons of bald and golden eagles without a permit, in violation of BGEPA. The Ninth Circuit Court of Appeals also ruled in *Vasquez-Ramos* that BGEPA does not violate RFRA.<sup>87</sup> The Ninth Circuit pointed out that the defendants could not complain that their rights under RFRA were "violated by the government's refusal to expand its

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78. See 50 C.F.R. § 22.22 (2008). The tribes are recognized and listed under the Federally Recognized Tribal List of 1994. See 25 U.S.C. § 479a-1(2006). An applicant for a permit to obtain eagles or eagle parts for use in a religious ceremony must attach a certification of enrollment in a federally recognized Indian tribe.

79. 297 F.3d 1116.

80. 42 U.S.C. § 2000bb (2006). As noted previously, the Supreme Court ruled in *Lyng* that the AIRFA does not provide for a private right of action. *Lyng*, 485 U.S. at 455. Therefore, tribes have sought protection for their sacred sites through RFRA.

81. See *Hardman*, 297 F.3d at 1126. The Ninth Court of Appeals recently ruled in *Navajo Nation v. U.S. Forest Service* that the use of recycled wastewater to make artificial snow for a commercial ski resort located in a national park on mountain considered sacred by at least thirteen tribes would not "substantially burden" the tribal members' free exercise of religion and that the Forest Service's decision to authorize such use did not violate the RFRA. *Navajo Nation*, 535 F.3d at 1063.

82. 525 F.3d 938 (10th Cir. 2008).

83. 531 F.3d 987 (9th Cir. 2008).

84. In an earlier case, *U.S. v. Hugs*, 109 F.3d 1375, (9th Cir. 1997), the court also ruled that BGEPA does not violate RFRA. The court recognized that restricting the ability of Native Americans to obtain and possess eagles and eagle parts "impose[s] a substantial burden on [their] practice of . . . religion," but decided that the BGEPA prescribes the least restrictive means of serving a compelling government interest. *Id.* at 1378.

85. *Friday*, 525 F.3d at 960.

86. *Id.*

87. *Vasquez-Ramos*, 531 F.3d at 989.

[eagle] collection and distribution practices.”<sup>88</sup>

*D. Archaeological Resources Protection Act of 1979*

In 1979, Congress enacted the Archaeological Resources Protection Act (ARPA)<sup>89</sup> to alleviate some of the problems regarding concerns in *Diaz* that the Antiquities Act was unconstitutionally vague in setting out what objects of antiquity were protected. The ARPA enlarges upon the Antiquities Act and provides for much more substantial fines for a violation of its provisions.<sup>90</sup> It was enacted to protect archaeological resources and sites located on public and Native American lands.<sup>91</sup> The Act prohibits the sale, purchase, transport, exchange, or receipt of any archaeological resources removed without permission from public or Indian land after 1979.<sup>92</sup> The ARPA is more explicit in its coverage than the Antiquities Act. For example, unlike the Antiquities Act, which does not define “ruin” or “object of antiquity,” the Archaeological Resources Protection Act specifically defines a protected “archaeological resource” as “any material remains of past human life or activities which are of archaeological interest” and that is at least 100 years of age.<sup>93</sup>

The ARPA provides more protection for Native American tribes in their attempts to protect their cultural and funerary objects because it requires a permit to excavate on Indian lands. A permit can be procured only by the consent of the Native American tribe.<sup>94</sup> Although archaeological resources are artifacts that are at least 100 years of age and thus would not include religious objects of recent origin, such as religious face masks, the requirement of a permit from the Native American tribe to excavate upon Indian land and the more extensive fines under ARPA have halted much of the taking of Native American artifacts and religious objects from Indian lands.<sup>95</sup>

88. *Id.* at 993.

89. 16 U.S.C. §§ 470aa–470mm (2006).

90. A violator is subject to a fine of \$10,000 and/or imprisonment of not more than one year or, if the value of the object is more than \$500, to a fine of \$20,000 and/or imprisonment of not more than two years. *Id.* at § 470ee(d). A second violation causes the penalty to be a fine of as much as \$100,000 and/or imprisonment for as long as five years. *Id.*

91. *Id.* at § 470aa(b). The “purpose of [the act] is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands . . .” *Id.* In *U.S. v. Austin*, defendants, who were indicted under the Archaeological Resources Protection Act for excavating a Native American archaeological site, alleged that the act was unconstitutionally overbroad and vague. 902 F.2d 743, 744 (9th Cir. 1990), *cert. denied*, 498 U.S. 874 (1990). The court ruled that the act was constitutional. *Id.* at 745.

92. 16 U.S.C. § 470ee(a)–(b). The act prohibits the excavation, removal, damage, or alteration of any archaeological resource. Still, under the Act, “[t]he Secretary of the Interior may promulgate regulations providing for (1) the exchange between . . . universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands . . . and (2) the ultimate disposition of such resources [removed pursuant to the Act] . . .” *Id.* at § 470dd. “Any exchange of . . . resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands.” *Id.* The Act requires a permit to excavate upon public or Indian lands. *Id.* at § 470cc(a). Persons receiving permits under the Archaeological Resources Protection Act need not also obtain permits under the Antiquities Act. *Id.* at § 470cc(h). Native American tribes or their members need not obtain a permit under either act for the excavation or removal of any archaeological resource located on their lands if tribal law regulates the excavation and removal of archaeological resources. 16 U.S.C. § 470cc(g).

93. *Id.* at § 470bb(1).

94. *Id.* at § 470cc(g)(2).

95. In addition, a person who willfully steals or converts for personal use or for the use of another, any

E. *Native American Graves Protection and Repatriation Act of 1991*

In *Lyng v. Northwest Indian Cemetery Protection Association*,<sup>96</sup> a logging company wanted to build a road through forest areas that Karok, Tolowa, and Yurok tribes used for religious rites and for the training of their spiritual practitioners. The Supreme Court ruled that the logging company had the right to build the road and that AIRFA was nothing more than a restatement of the First Amendment to guarantee religious freedom for all U.S. citizens.<sup>97</sup> The Court noted that the government had taken numerous steps to minimize the immediate impact that construction of the road would have on the Indians' religious activities—such as choosing the route that best protected sites of specific rituals from adverse audible intrusions and planning steps to reduce the visual impact of the road on the surrounding country. Thus, the Supreme Court ruled that construction of the road would not unlawfully burden the Native Americans' exercise of religion under the AIRFA.<sup>98</sup> This landmark case, decided in 1988, made the Indian tribes realize they needed more protection.

In 1988, the Senate Select Committee on Indian Affairs held a hearing on legislation which provided a process for the repatriation of Native American human remains . . . . The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate . . . . The Panel concluded that Federal legislation . . . was needed.<sup>99</sup>

As a result of the Panel's findings and after further lobbying from Indian tribes, the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>100</sup> was enacted in 1990 and became effective in 1991.

With the enactment of NAGPRA, Native Americans obtained the legislation they long thought necessary to secure their religious and funerary objects. The Act requires federal agencies and museums that have "possession or control over holdings or collections of Native American human remains and associated funerary objects . . . [to] compile an inventory of such items and, to the extent possible based on information possessed by [these entities, to] identify the geographical and cultural affiliation of such items."<sup>101</sup>

property belonging to, or in the custody of, an Indian tribal organization is subject to criminal prosecution. 18 U.S.C. § 1163 (2006).

96. 485 U.S. 439.

97. The United States Forest Service wanted to construct six miles of paved road to the Blue Creek Unit of the Six Rivers National Forest. The road would provide access to Chimney Rock, which is the sacred high country to the Yurok, Karok, and Tolowa Indians. *Id.* at 442. The Native Americans sought a court injunction to prevent construction of the road. *Id.* at 443.

98. *Id.* at 454-455.

99. Pub. L. No. 101-601 (Oct. 15, 1990), 1990 U.S.C.C.A.N. 4367, 4369-4370. Debate regarding the proper treatment of such remains continues. See *infra* nn. 113-126 and accompanying text (discussing the *Bonnichsen* and *Fallon Paiute-Shoshone Tribe* decisions).

100. 25 U.S.C. §§ 3001-3013.

101. *Id.* at § 3003(a). Those museums that receive federal funds and have possession of, or control over, Native American cultural items are subject to the Act. *Id.* at § 3001(8). The Smithsonian is exempt from the Act. *Id.* Still, the National Museum of the American Indian Act, enacted in 1989, requires the Smithsonian to return human remains and funerary objects to Native American tribes. 20 U.S.C. § 80q-9 (2006). This Act established a museum within the Smithsonian to "collect, preserve, and exhibit Native American objects . . . ." *Id.* at § 80q-1(b)(2). The Act also "provide[s] for Native American research and study programs[.]" *Id.* at

Museums had to complete the inventories “in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders” within a five year period from the Act’s enactment.<sup>102</sup> Museums were to supply documentation of existing records for the “purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects . . . .”<sup>103</sup> If a “cultural affiliation of Native American human remains and associated funerary objects” is established with a particular tribe, then, “upon the request of a known lineal descendant of the Native American or of the tribe[.]” the museum must “expeditiously return such remains and associated funerary objects.”<sup>104</sup>

A review committee, established pursuant to NAGPRA,<sup>105</sup> is responsible for monitoring the inventory and identification process to ensure a fair and objective consideration and assessment of all available relevant information and evidence. Upon request from a tribe, it will review and make findings related to the “identity or cultural affiliation of cultural items or . . . the return of such items.”<sup>106</sup> It is charged with “facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items . . . .”<sup>107</sup> The review committee is responsible for “compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains[.]”<sup>108</sup> It makes “recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.”<sup>109</sup> The committee consults with Indian tribes, and Native Hawaiian organizations, and museums on matters affecting the tribes or organizations and consults with the Secretary of the Interior in the development of regulations to carry out NAGPRA provisions.<sup>110</sup>

In *U. S. v. Kramer*,<sup>111</sup> the court noted that while Congress enacted NAGPRA to protect cultural patrimony and to repatriate cultural objects held or controlled by federal agencies and museums, the Act also applies to individual traders in Native American artifacts.<sup>112</sup> The court pointed to § 4 of NAGPRA that amended Title 18 of the U.S.

§ 80q-1(b)(3).

102. 25 U.S.C. § 3003(b). The Act provides that the intentional removal or excavation of Native American cultural items from federal or tribal lands for purposes of discovery, study, or removal, is permitted only if such items are excavated or removed pursuant to a permit under the ARPA. *Id.* at §3002(c).

103. *Id.* at § 3003(b)(2). Those museums that failed to comply with the act were subject to civil penalties. *Id.* at § 3007.

104. *Id.* at § 3005(a)(1). The act provides that a museum will not be liable to an aggrieved party for claims for breach of fiduciary duty or good faith if the museum repatriates in good faith. 25 U.S.C. § 3005(f).

105. *Id.* at § 3006.

106. *Id.* at § 3006(c)(3).

107. *Id.* at § 3006(c)(4).

108. *Id.* at § 3006(c)(5).

109. 25 U.S.C. § 3006(c)(9).

110. *Id.* at § 3006(e).

111. 168 F.3d 1196 (10th Cir. 1999).

112. *Id.* at 1201–1202; see 25 U.S.C. § 3001(3)(D) (defining “cultural patrimony” as “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture . . . [that] cannot be alienated, appropriated, or conveyed by any *individual regardless* of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered

Code to criminalize the trafficking in Native American human remains and cultural items.<sup>113</sup> The amendment was added in an effort to eliminate the profit incentive perceived to be a motivating force behind the plundering of such items.

In *U.S. v. Tidwell*,<sup>114</sup> an individual was convicted for trafficking in Native American cultural items and for unlawfully removing archeological resources from Indian lands. The individual, Tidwell, attempted to sell eleven Hopi masks, also called Kwaatsi or Kachina, and a set of priest robes from the Pueblo of Acoma. These had been taken from the Hopi reservation.<sup>115</sup> A federal agent purchased three of the religious Hopi masks from Tidwell and found two others when the agent searched Tidwell's properties. The court found that Tidwell knowingly traded in these items and "reject[ed] [his] vagueness challenge to the NAGPRA[.]"<sup>116</sup>

One of the most important series of cases construing NAGPRA are the numerous court rulings in *Bonnichsen v. U.S.*<sup>117</sup> *Bonnichsen* illustrates the continuing conflict between most Native Americans who demand repatriation and subsequent burial of ancient human remains and scientists and others who think the study of ancient remains should prevail over Indian religious beliefs that may require the burial of these remains. In *Bonnichsen*, a set of human remains, believed to be over 9,000 years old, was discovered in 1996 near Kennewick, Washington, along the bank of the Columbia River, by a spectator watching a boat race from the shoreline. A local anthropologist applied for a permit to excavate the skeleton. The Army Corps of Engineers decided the remains were subject to the NAGPRA and, thus, transferred the remains to an Indian tribe for reburial. The Corps had disallowed scientific study of the remains.<sup>118</sup> Scientists (the *Bonnichsen* plaintiffs) contended the discovery of the Kennewick man was of great historical and anthropological significance and wanted to study the remains. They filed suit against the Corps of Engineers to enforce what they contended was a legal right to study the remains.<sup>119</sup>

The court instructed the Corps to consider whether there was more than one wave of ancient migration to the Americas, or if there were sub-populations of early Americans and whether NAGPRA applies to remains or cultural objects from a

inalienable by such Native American group at the time the object was separated from such group" (emphasis added)).

113. To "give teeth" to the Act, Congress amended 18 U.S.C. § 1170(b) "to criminalize trafficking in Native American human remains and cultural items, in an effort to eliminate the profit incentive perceived to be a motivating force behind the plundering of such items." *Kramer*, 168 F.3d at 1201-1202. This provision makes it unlawful knowingly to "sell[ ], purchase[ ], use[ ] for profit, or transport[ ] for sale or profit any Native American cultural items obtained in violation of the [NAGPRA]." 18 U.S.C. § 1170.

114. 191 F.3d 976 (9th Cir. 1999).

115. *Id.* at 978-979.

116. *Id.* at 982.

117. *Bonnichsen v. U.S.*, 969 F. Supp. 614 (D. Or. 1997); *Bonnichsen v. U.S.*, 969 F. Supp. 628 (D. Or. 1997), *rev'd in part*, 217 F. Supp.2d 1116 (D. Or. 2002), *aff'd*, 357 F.3d 962 (9th Cir. 2004), *superseded*, 367 F.3d 864 (9th Cir. 2004).

118. *Bonnichsen*, 969 F. Supp. at 617-618.

119. *Id.* at 618-619. Other plaintiffs in the case were the Asatru, members of the Asatru Folk Assembly, which is "a legally-recognized church that 'represents Asatru, one of the major indigenous, pre-Christian, European religions.'" *Id.* at 618 (quoting the complaint). They "contend[ed] that the man [was] actually one of their ancestors, and [was] not related to present-day Native Americans at all but rather to Europeans." *Id.* The court ruled that the *Bonnichsen* and Asatru plaintiffs had standing to sue. *Id.* at 625.

population that failed to survive and that is not related directly to modern Native Americans.<sup>120</sup> It also instructed the Corps to determine whether NAGPRA requires either expressly or implicitly a biological connection between the remains and a contemporary Native American tribe, whether there must be a cultural affiliation between the remains and a contemporary Native American tribe and, if so, how that affiliation can be established if no cultural objects are found with the remains.<sup>121</sup> The court directed the Corps to determine whether there is evidence of a link, either biological or cultural, between the remains and a modern Native American tribe or to any other ethnic or cultural group including those of Europe, Asia, and the Pacific Islands.<sup>122</sup> On remand,<sup>123</sup> the district court determined that substantial evidence did not support a conclusion that the remains were Native American within the meaning of NAGPRA and held for the scientists. This decision was affirmed upon appeal by the Ninth Circuit Court of Appeals.<sup>124</sup> The Ninth Circuit ruled that human remains must bear some relationship to a presently existing tribe, people, or culture to be “Native American” within the meaning of NAGPRA. The Ninth Circuit decided that no reasonable person could conclude from the record that Kennewick Man is “Native American” under NAGPRA.<sup>125</sup>

In determining affiliation with a current Native American group, the court in *Fallon Paiute-Shoshone Tribe v. U.S.*<sup>126</sup> held to be arbitrary and capricious a determination by the Bureau of Land Management (BLM) that ancient human remains found in a cave adjacent to tribal land were not affiliated with any modern-day Native American tribes.<sup>127</sup> The court noted that after a finding of non-affiliation, interested Native American tribes are permitted to provide their own evidence, both scientific and cultural, in their attempt to demonstrate affiliation.<sup>128</sup> The Tribe in this case contended

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120. *Bonnichsen*, 217 F. Supp. 2d at 1136–1137.

121. *Id.* at 1146–1150.

122. *Id.*

123. *Id.*

124. *Bonnichsen*, 367 F.3d 864, 882 (9th Cir. 2004).

125. *Id.*

126. 455 F. Supp. 2d 1207 (D. Nev. 2006).

127. *Id.* at 1224. The remains were found in 1940 during an excavation near Fallon, Nevada, in a place known as Spirit Cave. The most important find in the excavation was the well-preserved, partially mummified body of a man now known as the Spirit Cave Man. The find was removed from the cave and analyzed. Upon initial review, it was believed that the Spirit Cave Man remains were between 1,500 and 2,000 years old. However, as part of the inventory and identification process required after NAGPRA was enacted, radiocarbon dating was authorized on the remains. “The dating [was] completed in 1994 or 1995 [and] showed that the initial estimate for the age of the bones . . . was significantly flawed. The remains were, in fact, nearly 10,000 years old and, accordingly, were a significant scientific find.” *Id.* at 1210. The scientific community made several requests to study the remains after the discovery of their age. “Around this same time, [tribes] began making inquiries about repatriation of the remains.” *Id.* In 1996, “the Tribe requested that BLM temporarily inter the remains and cease all testing. The Tribe believe[d] that it [was] the caretaker of the Spirit Cave Man remains and that disturbing the burial site of a deceased, such as the Spirit Cave Man, carries negative repercussions.” *Id.*

128. *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1217. The court set out the general statutory scheme for dealing with remains such those found in the cave:

First, the government agency completes, while engaging in appropriate consultation with interested Native American tribes, a study of the remains using the scientific evidence it has available along with the cultural and traditional evidence provided by the tribes. This process is completed openly, with the tribes having full access to the government’s process and procedure. When the



that, once it retained its experts, BLM shut it out of the decision-making process. The court ruled that “NAGPRA require[d] BLM to fully and fairly consider [the Tribe’s] evidence and to uphold or reverse its determination of non-affiliation based on a reasoned and coherent discussion of the evidence and its reasons for believing or disbelieving [affiliation].”<sup>129</sup> Because this did not occur, the court ruled that BLM’s determination was arbitrary and capricious.<sup>130</sup> The court did state, however, that its order should not be read to mandate a finding of affiliation.<sup>131</sup>

#### IV. UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS OF 1995

NAGPRA has also set a precedent with museums on an international level to encourage the repatriation of cultural objects to indigenous communities. It is comparable to a 1995 international convention on the repatriation of cultural property generally, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.<sup>132</sup> This Convention, which endorses the repatriation of cultural property on an international scale, also addresses “claim[s] for restitution of a sacred or communally important cultural object [that belongs] to and [is] used by a tribal or indigenous community . . . .”<sup>133</sup>

The Diplomatic Conference for the adoption of a UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects met in Rome in June of 1995 with the objective of improving the preservation and protection of the international cultural heritage in the interest of all peoples.<sup>134</sup> Drafters of the Convention were conscious that a process was needed to “enhance international cultural co-operation” and to provide and “maintain a proper role for legal trading and inter-State agreements for cultural exchanges.”<sup>135</sup> Their project, this international convention, reflects an international policy to protect the world’s cultural properties and a general philosophy of the international community that unique remnants of earlier artistic periods belong to their homeland.

The UNIDROIT Convention mandates the return of a stolen cultural object to the original owner or country<sup>136</sup> while NAGPRA requires repatriation of cultural properties to an affiliated tribe. The UNIDROIT Convention also requires the return to a tribal or

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government’s evidence cannot demonstrate affiliation, interested Native American tribes are given an opportunity to provide their own scientific evidence as well as any further relevant cultural or traditional evidence in an attempt to demonstrate by a preponderance of the evidence that the remains are in fact affiliated with their tribes. The government should then review that evidence and update its findings accordingly. If the remains are then found to be affiliated, they should be repatriated. If not, the remains are effectively placed in the care of the government until such time as an appropriate regulation for their permanent placement is promulgated.

*Id.* at 1218.

129. *Id.* at 1225.

130. *Id.*

131. *Id.*

132. UNIDROIT, *supra* n. 13.

133. *Id.* at art. 3(8).

134. *Id.* at preamble.

135. *Id.*

136. The Convention does not require that a theft be proven. *Id.* at art. 3(1).

indigenous community of a cultural object made by a member or members of that tribal or indigenous community for traditional or ritual use.

The UNIDROIT Convention provides for time limitations on claims for restitution but does not require due diligence on the part of claimants.<sup>137</sup> “Any claim for restitution must be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from time of the theft.”<sup>138</sup> However,

[any] cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.<sup>139</sup>

Further, each nation “may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law.”<sup>140</sup> The NAGPRA does not prescribe a time limitation on tribal claims.<sup>141</sup>

As noted previously, a court has ruled that a purchaser of Indian artifacts must demonstrate due diligence to acquire good title to the artifacts as a purchaser in good faith.<sup>142</sup> NAGPRA does not consider a covered museum to have been an innocent purchaser of Indian artifacts or funerary objects. Because of NAGPRA provisions, a museum generally cannot acquire good title to Indian artifacts. The NAGPRA requires covered museums to repatriate Native American artifacts unless they can show a “right of possession.”<sup>143</sup> A “right of possession” is “possession obtained with the voluntary consent of an individual or group that had authority of alienation.”<sup>144</sup>

The notion of an innocent purchaser has relevance under the UNIDROIT Convention only with respect to the issue of whether a current possessor of stolen or

137. UNIDROIT, *supra* n. 13, at art. 3.

138. *Id.* at art. 3(3).

139. *Id.* at art. 3(4). The UNIDROIT Convention includes as a “public collection,” which is not subject to time limitations other than the three year limitation period, inventoried or otherwise identified cultural objects owned by religious institutions and other institutions established for “an essentially cultural, educational or scientific purpose” and recognized by a nation as serving the public interest. *See id.* at art. 3(7).

140. *Id.* at art. 3(5). The Convention provides that a claim for restitution of a cultural object displaced from a monument, archaeological site or public collection also is subject to that time limitation. *See generally* UNIDROIT, *supra* n. 13.

141. *See Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996) (where the court ruled that the date and place restrictions on items recoverable under NAGPRA do not apply in a repatriation action against a federally funded museum).

142. *See Williams*, 88 F.3d 614.

143. 25 U.S.C. § 3005(c).

144. *Id.* at § 3001(13).

The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give a right of possession to those remains.

*Id.*

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony . . . [the] agency or museum shall return such objects unless it can . . . prove that it has a right of possession to the objects.

*Id.* at § 3005(c).

illegally exported cultural objects is entitled to compensation. The Convention provides for compensation to a possessor of a stolen cultural object who is required to return the object if the possessor “neither knew nor ought reasonably to have known that the object was stolen” and can prove “due diligence when acquiring the object.”<sup>145</sup> Thus, while the UNIDROIT Convention does not impose due diligence upon a claimant of cultural property, it does impose a due diligence requirement upon a bona fide possessor who seeks compensation after being required to return a cultural object. In determining whether a possessor exercised due diligence, the Convention provides that the following circumstances regarding the acquisition must be considered:

character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.<sup>146</sup>

“In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported . . . the absence of an export certificate required under the law of the requesting State [must be considered].”<sup>147</sup>

The 1995 UNIDROIT Convention prescribes a means to effectuate the principles set out in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The American Association of Museums (AAM) recently reaffirmed its endorsement of the principle concepts of the 1970 UNESCO Convention in its 2008 Standards Regarding Archaeological Material and Ancient Art by recommending that museums have documentation to demonstrate that cultural objects in their collections were out of their “probable country of modern discovery by November 17, 1970, the date on which the [1970 UNESCO Convention] was signed.”<sup>148</sup> If Congress will acknowledge the precedent NAGPRA has established and will follow its ratification of the principles set out in the 1970 UNESCO Convention,<sup>149</sup> and its ratification in 2008 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, with ratification of the 1995 UNIDROIT Convention, which embodies and embellishes the principles of the 1970 UNESCO Convention, it would exert immense influence internationally on efforts to protect the cultural heritage of humanity.

The repatriation requirements set out in the 1995 UNIDROIT Convention are less precise than those in NAGPRA, wherein Congress sanctioned the complete and unequivocal repatriation of Native American cultural and funerary objects to affiliated tribes. Congress has rejected any efforts to point to NAGPRA as congressional

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145. Unidroit, *supra* n. 13, at art. 4(1). Article 4(2) of the Convention provides that “reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.” *Id.* at art. 4(2).

146. *Id.* at art. 4(4).

147. *Id.* at art. 6(2).

148. American Assn. of Museums, *Standards Regarding Archaeological Material and Ancient Art 1* (July 2008) (available at <http://www.aam-us.org/museumresources/ethics/index.cfm>).

149. In 1983, Congress enacted the Convention on Cultural Property Implementation Act to implement part of the 1970 UNESCO Convention into domestic law. See 19 U.S.C. §§ 2601–2613 (2006).

endorsement for the repatriation of other artworks and/or antiquities. In enacting NAGPRA, Congress stated that the Act “reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization, or foreign government.”<sup>150</sup> However, congressional ratification of the 1995 UNIDROIT Convention would make a statement to the international art and antiquities community similar to the one it made to Native Americans in 1990 when it enacted NAGPRA: that it recognizes and respects the property, history, and cultures of others. Its ratification of the UNIDROIT Convention would have the affirmative effect of assisting States rich in art and archeology in protecting their cultural patrimony from the illicit international art and antiquities market.

## V. SUMMARY AND CONCLUSIONS

Congress began a program to protect historical sites and monuments, including Indian sites, in the early part of the 20<sup>th</sup> century. However, a lack of recognition for the unique and separate Native American cultures and the continuing insensitive treatment of Indian tribes throughout most of that century led Indian nations to lobby Congress for recognition and for the return of Indian human remains and funerary objects that were housed in U.S. museums. Native American tribes achieved success in 1990 when Congress enacted NAGPRA to provide for the complete and total repatriation of these items to affiliated tribes.

While tribal nations continue to be hopeful for more complete congressional and judicial endorsement of their laws and practices, Congress and the courts presently do give recognition and respect for the religious practices and cultures of Native Americans. Various federal departments, agencies, and other instrumentalities responsible for administering relevant laws now must evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices.<sup>151</sup> Further, both NAGPRA and ARPA prohibit a person from excavating on Indian land without a permit from the Indian tribe, and ARPA provides substantial penalties for violating its provisions.

Protection of Indian practices and culture continues in the form of requirements for excavating on Indian lands. These are summarized as follows:

1. An individual or entity must obtain a permit pursuant to the ARPA or the 1906 Antiquities Act to excavate on Indian lands.<sup>152</sup>
2. If, pursuant to a permit to excavate, Indian artifacts are found on Indian lands, NAGPRA requires that Indian tribes be given an opportunity to reclaim them.<sup>153</sup>

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150. 25 U.S.C. § 3010.

151. As noted previously, in *Bear Lodge*, 175 F.3d 814, the Tenth Circuit Court of Appeals ruled that rock climbers could not challenge the Secretary of the Interior's approval of a plan that would prevent rock climbing on Devils Tower, which is a national monument that is the place of creation and a site of religious practice for many American Indians during the month of June when Indians engage in the Sun Dance and other ceremonies. *Id.* at 882.

152. See 16 U.S.C. § 470cc.

153. See 25 U.S.C. § 3002(d); 25 U.S.C. § 3005(a)(4).

3. If a tribe declines possession, the Secretary of the Interior must confer with Native American and scientific and museum groups as to the disposition of the remains and objects.<sup>154</sup>

NAGPRA's absolute and unconditional repatriation requirements provide for a much more extensive repatriation paradigm than that imposed on member nations to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Property, which does not require retroactive repatriation and prescribes some time limitations on claims for return of cultural property. Still, Congress endorsed unconditional repatriation in NAGPRA while it has refused to ratify the 1995 UNIDROIT Convention. The example Congress posited by its enactment of NAGPRA, that museums and federal agencies must return human remains, funerary, and cultural objects to affiliated tribes, along with the goodwill the mandate has elicited, should be expanded internationally. The positive message NAGPRA conveys should lead to an acknowledgment that there also is good reason to repatriate stolen and illegally exported cultural property to their original owners and countries of origin.

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154. *See* 25 U.S.C. § 3002(b).