

Preservation of Native American Cultural Property Under US Federal Law:

A Discursive Analysis of NAGPRA

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Abstract

The management of Native American heritage through the legislation of American Federal preservation acts has created a system of public history that has institutionally defined who has been allowed to collect most categories of objects, who may retain them and who may interpret them for the education of the general American public. The Federal government took the responsibility of preserving the nation's history in the early twentieth century; by 1989 it had become a complicated network of both State and Federal laws. With the passage of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), the right of ownership and control over sacred materials, human remains and objects of cultural patrimony was transferred to tribal control. The Congressional dialogue highlights the central debates blocking the passage of NAGPRA: human rights versus scientific analysis, fiduciary obligations of public institutions and the consequences of a mandated repatriation clause. The Federal Acts addressing public history can be read as texts defining regulations of ownership, preservation, protection and control of the management of Native American heritage.

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Glossary

AAM	American Association of Museums
AIAD	American Indians Against Desecration
AIRFA	American Indian Religious Freedom Act of 1979
ARPA	Archaeological Resources Protection Act of 1979
BAR	Branch of Acknowledgement and Research
BIA	Bureau of Indian Affairs
DOI	Department of the Interior
NAGPRA	Native American Graves Protection and Repatriation Act of 1990
NARF	Native American Rights Fund
NCAI	National Congress of the American Indian
NHPA	National Historic Preservation Act of 1966
NMAI	National Museum of the American Act of 1989
NPS	National Park Service
SAA	Society of American Archaeologists
UNESCO	United Nations Economic, Social & Cultural Organization

Timeline

1. Antiquities Act of 1906 (16 USC 431-433) – Federal Legislation
2. National Historic Preservation Act of 1966 (16 USC 470) – Federal Legislation
3. American Indian Religious Freedom Act of 1978 (42 USC 1996) – Federal Legislation
4. Archaeological Resources Protection Act of 1979 (16 USC 470aa-470mm) - Federal Legislation
5. Plenary Session of the Society of American Archaeologists – 1986
6. American Museum Claims Commissions Act introduced as S411 – 1986
7. Native American Cultural Preservation Act introduced as S187 to the Senate Select Committee on Indian Affairs – 1987
8. To Establish the Native American Claims Commission, Senate Select Committee on Indian Affairs – 1988
9. Panel for the Dialogue on Museum and Native American Relations 1989
10. National Museum of the American Indian Act 1989 (P.L. 101-185) – Federal Legislation
11. Report of the Dialogue on Museums and Native American Relations was presented to Congress – January 1990
12. Bill S. 980 and S. 1021 introduced at the Hearing of Senate Select Committee on Indian Affairs – May 1990
13. Bill HR 5237, HR 1381 and HR1647 introduced to the House of Representative's Hearing of the Interior and Insular Affairs Committee – July 17, 1990
14. Bill S. 980 was revisited by the Senate Select Committee on Indian Affairs – July 31, 1990
15. Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001) – Federal Legislation

Chapter One

BEHIND THE SCENE

Native American requests for repatriation¹ have created a tension between the museum's goals for preservation, research and education in the US and the Native Americans' interests in the reburial of human remains and possession and use of sacred material objects. Both Native American human remains and grave goods became a part of many museums' permanent collections. US Federal law defined Native American bodies, grave goods, sacred objects and religious paraphernalia as archaeological resources that in order to be collected legally had to be permanently preserved in legitimate museum collections.

Museums are essentially collecting institutions that amass objects and artifacts that will be the basis for future research. In a way, museums also signal which materials they regard as important and in this process, they convey to the public a sense of direction regarding cultural, scientific and historical interest. Museums have obligations as both educational and social institutions to participate in and contribute to the communities in the country. Museums aim to share in the work of increasing knowledge and understanding. In essence, history and anthropology in museums propose to be done for the public benefit. Museums become a link between the academic research and the

¹ The term 'repatriation' has a variety of meanings in different contexts (international, domestic, cultural and legal). For the purposes of this thesis, unless specified differently, repatriation will refer to the return of human remains and specific cultural items to culturally affiliated Indian tribes. With the passage of NAGPRA, repatriation became a federally prescribed return of specific categories of objects with specific

public; a way to disseminate research and understanding in “layman’s” terms (See Eileen Hooper-Greenhill’s *Museums and the Shaping of Knowledge* 1992; Gary Kulik’s *History Museums in the US: A Critical Assessment* 1989 for more information on museum epistemology and historical practices).

In the mid to late nineteenth century, natural history museums with ethnology departments were established in many American urban centres; Smithsonian Institution in 1845, the Peabody Museum of Archaeology and Ethnology in 1877, a Museum of American Archaeology was established by the University of Pennsylvania in 1889, Field Museum of Natural History (incorporated as the Columbia Museum) in 1893 and the anthropology program of the American Museum of Natural History in 1894. Museum collections expanded as anthropologists tried to obtain Native American materials before they “disappeared” so that their cultures could be preserved, studied and exhibited (Echo-Hawk, Roger C. and Walter R. Echo-Hawk 1984; Buffalohead, 1992; Haas, 1996). Salvage ethnographic collecting methods were used to establish most of these collections. Neither museums nor those in “competition” with museum staff (collectors, amateur archaeologists, landowners) were regulated by Federal law². Preservation laws became necessary to regulate the collection of ethnographic and archaeological material and help facilitate the museums in their collecting endeavours. Before the *Antiquities Act* of 1906 became legislation, private collectors were amassing large collections that would either

definitions and separations for different circumstances. Mandated repatriation became a site of political negotiation and an occasion for ongoing interaction.

² Private collectors and anthropologists working for museums assembled a large portion of museum

be held in private collections, transferred out of the country (by foreign collectors, archaeologists and anthropologists) or sold on the antiquities black market. Members of the public, government officials, archaeologists and anthropologists were concerned there would be a loss of knowledge about America's history if these artifacts continued to be amassed outside of the public domain. Museums and federal institutions were seen as the proper mechanism for the preservation and stewardship of America's cultural and material heritage.

During the 1970s, Native Americans and tribal organizations had initiated formal yet non-legal requests for the return of human remains, sacred artifacts and funerary goods; however, museums, often relying upon solid legal and practical grounds, had typically left many of these requests unfulfilled (Bowen 1979: 125). Museums had generally countered repatriation requests with four persuasive arguments: they had a public responsibility to preserve and exhibit artifacts for the benefit of the American public, there was doubt in specificity regarding Indian ownership, unwillingness to establish a precedent of returning a part of their collection (in fear of a floodgates effect), and their legal property claims to said artifacts (Bowen, 1979: 125, Boyd 1990,). Many museum associations and authorities have also stated that tribal communities need to establish tribal museums to care and preserve for these artifacts in a manner similar to established museum conservation techniques. In turn, Native American organizations have argued that museums do not have the traditional knowledge required to properly care for the artifacts; as the American public trusts curators to have specialized

collections. Some of these artifacts were donated to museums by these people at a later date.

knowledge to preserve artifacts so do tribal communities trust elders to possess such specialized knowledge (Bowen, 1979: 129, Buffalohead, 1992).

During the late 1980s, the American Association of Museums stated that their fiduciary responsibility to the public did not allow for deaccessioning, as their inherent value as museums was dependent on public confidence in the stewardship of their collections (AAM testimony, 100th Cong. 1st Sess. H.R. on S. 187; AAM testimony, 101st Congress. 1st Sess. H.R. on S. 1980). Nonetheless, some museums had a deaccession policy in place for several years to allow for the repatriation of certain categories of objects. These deaccession or repatriation policies cover a broad spectrum of strategies or guidelines to assist in negotiating repatriation claims. Although these policies have in many cases facilitated the building of new relationships with tribal communities, many Native Americans felt that the negotiations were quite confrontational with the burden of proof resting primarily with their communities (NCAI Testimony, 100th Cong. 1st Sess. H.R. on S. 187; Report of the Dialogue on Museums and Native American Relations 1989).

Everything done by the US federal government must be rooted in law, either through an absolute requirement or through permissively worded authorization (Rogers, 1987: 98). Federal preservation acts have institutionally defined who has been allowed to collect most categories of objects, who may retain them and who may interpret them for the education of the general American public. These acts have created a hierarchy of knowledge and protection with archaeologists, anthropologists and museums having a

higher authority to classify, collect, preserve and most importantly retain Native American material culture than the communities from which the cultural property originated.

These acts are aimed primarily at the preservation of cultural objects and human remains for the edification of our society as a whole. The history of preservation acts reflects a consistent Federal policy valuing the preservation of archaeological resources that resulted in the abridgement of religious freedom of Native American peoples. Much of the federal legislation currently in place constitutes an acknowledgement of the significance and value of archeological data, not the value of sacred materials to the Native American communities themselves. In many ways, US Federal cultural preservation statutes treat indigenous remains, ancestral sites and material cultures as public resources. The *Native American Graves Protection and Repatriation Act of 1990* represents a shift in this power structure: changing the hierarchy of authority, insisting that Native American claims of ownership be considered, and regulating a procedure for the transfer of ownership from federal agencies to Tribal Councils.

Native American Grave Protection and Repatriation Act

US Federal legislation entitled *The Native American Graves Protection and Repatriation Act* was enacted on November 16, 1990. This is a comprehensive piece of legislation that allows for the repatriation of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony from all Federal Agencies and

American museums which receive federal funding and possess collections of Native American artifacts³. NAGPRA has also extended the federal government's role in regulating the protection and preservation of Native American graves and burial sites. Any Native American tribe, band or nation that has been granted Federal recognition by the Bureau of Indian Affairs, or any Native Hawaiian, tribal official, or individual who can trace an unbroken line of ancestry to a known Native American or Native Hawaiian individual is eligible to re-claim cultural items under NAGPRA. NAGPRA entrenches the "policy" of the *American Indian Religious Freedom Act* into federal legislation while making the concept of "equal protection under the law" a firm non-negotiable objective.

NAGPRA has a formalized process that is facilitated through several key documents that demonstrate institution compliance:

1. Summaries of the institution's collection of sacred objects, objects of cultural patrimony, and unassociated funerary objects
2. An inventory providing a specific description of the institution's collection of human remains and associated funerary objects

Federal agencies and museums had five years to complete these documents and then had to distribute them to all of the Native American tribes who are affiliated with objects included in their collections. (An extension was granted to those institutions with vast ethnographic collections that, under due process, could not realistically meet the five year deadline. Some of these large institutions were given an additional two years to complete

³ The Smithsonian Institution is the only state, local or federal institution that is exempt for it is required to repatriate under the National Museum of the American Indian Act.

the inventory and summaries). A notice of inventory completion and intent to repatriate is published in the Federal Register for public access.

NAGPRA is seen by many Native American activists and members of the legal community as one of the most important pieces of civil rights legislation enacted in recent history. It could be more appropriately viewed as a human rights bill with important social justice measures; equal protection under the law for fundamental human rights appreciated by all citizens of the United States, in particular, the right to an undeseccrated burial of one's relatives and ancestors and an explicit ownership of material heritage. NAGPRA introduced a fundamental shift in the way in which legislation defined archaeological resources and the protection offered to Native American material culture located on federal and Indian land. Native American remains and cultural property were no longer classified merely as archaeological resources owned by the federal government for permanent preservation in suitable facilities. Tribal organizations can now negotiate with the federal government, in a nation-to-nation format for the ownership rights to cultural property they deem important for the continuation of their own culture. Tribal organizations now have legislation to back up their claims in court and federal law mandates that consultations and proceedings take place.

It has been just over a decade since the enactment of NAGPRA and five years since the completion of the summaries and inventories. It is now appropriate to evaluate how this particular piece of legislation was enacted; what dialogues were taking place that

facilitated the process and what was the proposed intent of NAGPRA. How did NAGPRA become a federal Act? How does NAGPRA fit in with the legislated management of public history in the United States?

Conflicting Ideologies

The conflict between Native Americans and archaeologists is one that encompasses several fundamental principles: equal protection for everyone under the law, preservation, public custodianship of heritage, the generation of public knowledge and religious freedom. The prominent discourse has attempted to explain this conflict by positioning the debate as one of “science vs. religion”, specifically science versus Native American ideologies. Its essence is the difference in worldviews held by archaeologists and Native American communities -- notions of how to view and treat the body, definitions and articulations of time and the place archaeology has in a culture.

The Native American worldview that is often offered as a position against archaeological theory and treatment of the dead is that many Native American cultures believe that the human spirit maintains a relationship with its physical remains until those remains have totally decomposed (Price, 1991: 15). This is positioned against Euro-American professionals who view historic human remains as scientific data to be studied to further public knowledge. Although disturbing the dead is distasteful to many westerners, such concerns tend to lessen with an increase in time between the excavator and the burial (Price, 1991: 16). Both of these positions are often placed in a somewhat

false dichotomy with Native Americans on one side and archaeologists on the other. These views do not take into account the variety of Native American beliefs on the issue nor does it address the breadth of opinions held by archaeologists in this matter. This is not a universal belief among Native American communities since some differ slightly while other communities believe strongly in archaeological exploration. Many communities, the Hopi and Navajo for example, have established their own archaeology programs under the direction of their respective tribal councils. Driver (1969) describes Native American mortuary practices that vary from cremation to inhumation to exposure of the deceased in trees or on special scaffolding. Robinson and Sprague (1965) describe rapid changes within the same culture at the same site. Despite the pronounced diversity, efforts persist to establish a Pan-Indian effort to deter grave desecration and to insist on a respect for individual customs and a desire to let the deceased rest in peace. These efforts are often articulated as a Pan-Indian spirituality that, although it encompasses many different religions and worldviews, positions itself against the Western scientific ideology, under which archaeological investigations fall.

Although typically archaeologists engaged in what they perceived to be standard research programs dealing with cemeteries or isolated burials, they have often been surprised by the vigorous opposition of Native American groups through the courts, through the legislature, or sometimes through non-violent physical confrontations (King, 1983: 150). Archaeologists seem to be an unlikely group of professionals to attract the objection of Native American organizations and communities due to their limited

numbers, funding and public support. K. Anne Pyburn⁴ speculates that archaeologists are not criticized for their perceived complicity in reproducing oppression through “bad science”, but for trying to use science at all to articulate theories on the past (1999). Over the last 70 years, early archaeology has been replaced by a scientific discipline with large explanatory power.

There is a deep commitment to Western science and the ideals of objectivity and “comprehensive truth” embedded in the archaeological tradition (Bray, 2001: 3). The quest for and generation of knowledge are two principles that are embedded in the ideology of Western science. The pursuit of knowledge is a scholarly endeavour and should be practiced with objectivity. Important methodological statements about science and its impact often accompanied advances in knowledge. These translated into what were considered fundamental laws about the world in which we live. Careful empirical research was highly valued and the findings should be disseminated for public knowledge. Science allowed for the analysis of human progress; it could highlight how far humankind had come and in essence, how far humankind could progress in the future. In a rationalist tradition, science was linked to progress and emphasized the importance of education and the freedom of inquiry (Toynbee, 1972: 46).

Archaeology originated in the elite classes of pre-Industrial Europe but developed its modern methodology and theoretical basis under the stimulation of the scientific

⁴ Member of the Department of Anthropology, Indiana University and Director of the Center for

revolution. Archaeology is defined by its methodology and academic goals – it consists of techniques for recovering the physical evidence of past human societies and of a body of theory that guides the interpretations of the evidence. American archaeology, although a scientific discipline, was strongly affected by the current political and religious climate and anthropological theories relating to Social Darwinism.

Although the United States never formally declared war to exterminate Native Americans (even through the Indian Wars), it was believed that they would eventually die out due to undeclared warfare on the frontier, disease and assimilation policies (Thomas, 2000: 19). President Andrew Jackson enacted the *Indian Removal Act of 1830*, which stipulated the removal of eastern tribes westward (Sokolow, 2000: 4). Indian tribes were required, under the threat of military force, to move west of the Mississippi River. Native American communities were confined to specific areas and in some cases confederated into single political tribal entities. This policy continued into the 1880s. In an attempt to ‘civilize’ Native American peoples, the Bureau of Indian Affairs relocated tribes to reservations with the help of the United States military. (The Native American experience was varied depending upon their pre-existing location and relations with the government).

In the 1860s and 1870s, social Darwinism established a fairly tight linkage between archaeology and ethnology. Archaeology showed that humanity had a deep

past, stretching far beyond biblical estimates; ethnologists of the era were developing the explanatory tools necessary to flesh out the specifics of the past, by using what Morgan and others called the comparative approach (Thomas, 2000: 50). In 1879, the Smithsonian Institution formally established the Bureau of American Ethnology to implement a comprehensive research program to record the cultural, linguistic and physical distinctions of the “Vanishing American”. John Welsey Powell set the agenda:

Rapidly the Indians are being gathered on reservations where their original habits and customs disappear, their languages are being modified or lost and they are abandoning their savagery. If the ethnology of our Indians is ever to receive the proper scientific study and treatment the work must be done at once (Thomas, 2000: 73).

In the later 19th century and early 20th century, Indian remains and grave goods became central to archaeological inquiry. The United States Army initiated one of the first policies for collecting Native American bodies. It was initially implemented by the establishment of the Army Medical Museum in 1862. The goal was to study infectious diseases. In 1867, the Museum Curator urged field doctors to collect and send “Indian specimens” with as much contextual data as possible. The US Army Surgeon General Joseph Barnes established an agreement with the Smithsonian Institution by which the Army Museum would receive osteological remains and augment the collection of “Indian crania” and the Smithsonian Institution would receive burial and cultural items. Some 4,500 crania, half of them obtained from the Army in 1898 and 1904, now comprise about one quarter of the Smithsonian’s National Museum of Natural History collection of Native human remains (Harjo, 1995: 4-5).

During Teddy Roosevelt's presidency, archaeology became a way to document the course of American culture from one evolutionary stage to the next – from “Indian” to “American” – in the process validating the doctrine of progress and Manifest Destiny (Thomas, 2000: 140; Carroll & Noble, 1988: 167-168, 1975). Archaeologists and historians usually provided the American public with an image of Indian people and Indian history that conformed to the power relationships of their day (Thomas, 2000: 140). Preservation Acts helped professionalize American archaeology and preserved many archaeological sites for future generations.

As Charles R. McGrimsey⁵ summarizes, archaeologists enable communities to have permanent access to properly identified artifacts with adequate accompanying data for future research and knowledge. It is of paramount concern that these are permanently preserved for future access since this will “largely determine for all time the knowledge available to subsequent generations of Americans concerning their heritage from the past” (McGrimsey, 1972: 3). Archaeology's strong commitment to objectivity is apparent through their definitions of archaeological resources as scientific data; a compilation of data that can and should be revisited as technological advances occur. Archaeological data became the core of the scholastic endeavours of archaeologists. Knowledge was dispersed and made public through numerous academic and layman's publications. Archaeologists, and the institutions they worked for, became public custodians of heritage and an authority on America's history.

⁵ Director of the Arkansas Archaeology Survey and University of Arkansas Museum.

Statements of ethical conduct bound archaeological expeditions and investigations. These statements tried to establish a conformity of practice and a high scientific standard for the profession. The Society for American Archaeologists (SAA) was founded in 1935, and their first statement of ethics was consolidated and published in 1948 (Garza & Powell, 2001: 39). Essentially, ethical conduct meant that an archaeologist would not hoard, exchange, buy or sell archaeological objects for the sole purpose of financial gain or individual satisfaction. The ethical conduct of archaeologists was strictly focused upon their responsibility to the archaeological record.

In 1976, the Society of Professional Archaeologists broke with tradition and published a much expanded and more inclusive Code of Ethics and Standards of Research Performance. The Code of Ethics states that an archaeologist shall “be sensitive to and respect the legitimate concerns of groups whose cultural histories are the subject of archaeological investigations” (King, 1983: 150). These statements echoed the concern that anthropological societies (American Anthropological Association and the National Association of Practicing Anthropologists) articulated by the late 1970s:

In research, anthropologists’ paramount responsibility is to those they study. When there is a conflict of interest, those individuals must come first. Anthropologists must do everything in their power to protect the physical, social and psychological welfare and to honor the dignity and privacy of those studied (Garza & Powell, 2001: 40).

The SAA statement on human remains in 1978 claims that:

Research in archaeology, bioarchaeology, biological anthropology and medicine depends upon responsible scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques.

...whatever their ultimate disposition, all human remains should receive appropriate scientific study, should be respectfully and carefully conserved and should be accessible only for legitimate scientific or educational purposes (In Garza & Powell, 2001: 38).

Many archaeologists strongly believed that they were being ethical and sensitive to Native American human remains when they carried out excavations and research programs. However, Native Americans objected to archaeology's positivist approach to human remains and to intrusive excavations of sacred sites. Archaeology has typically defined human skeletons, sacred goods and funerary objects as archaeological resources to be objectively exhumed and studied. Physical anthropologists and archaeologists cited the need to advance human knowledge as justification for excavating Indian graves and appropriating the contents. The history of the discipline of archaeology has shown that respectful treatment has not always been practiced (public display of skeletal remains, insensitive curation practices and the mismanagement of collections). The past treatment of remains of the ancestors of Native Americans by the archaeological community has contributed to the current climate.

However, there is considerable diversity of opinion about what constitutes respectful treatment of prehistoric Native American remains and grave goods, even among members of the same community. American Indians Against Desecration

reportedly insists that all archaeology is desecration and that all human remains and grave goods should be immediately returned to Indian communities for ceremonial disposition (Price, 1991: 2). This is fundamentally a Pan-Indian approach to the reburial issue and archaeological theory since it does not take into consideration the variety of Native American perspectives on this matter. Many communities, especially within the Southwest region, may not want disturbed remains returned to the community (as they are now considered desecrated), nor would many want sacred grave goods made public within their community.

In 1996, Rebecca Tsosie, in "Indigenous Rights And Archaeology" explains some of the problematic issues Native American peoples have with the discipline of archaeology: the methodology is more invasive than that of historians since archaeologists often seek to excavate and appropriate material remains and to probe spiritual and intangible aspects in a quest for knowledge. Native Americans are perceived as ancient research specimens, and the codes of ethical behaviour that govern treatment of Euro-American burials did not seem to pertain to the treatment of ancient Native Americans (66). Many communities have viewed archaeology as both oppressive and sacrilegious because the profession claimed ownership over deceased relatives of living Native Americans, suppressed religious freedom and denied their ancestors a lasting burial (Riding In, 2000: 106). Unfortunately there was little discussion between the archaeology community and Native American peoples. It was not explained to Native American communities why Native American remains were considered more

valuable to anthropology than those of other peoples nor was there any discussion articulating how experimentation with Native American remains was necessary, proper or beneficial. When fighting legal battles, Native American representatives and lawyers have often argued a position under the Fourteenth Amendment – no state shall deny to any person within its jurisdiction the equal protection of the law (this has been held to be similarly applicable to the federal government through the 5th Amendment’s “due process” clause). The basis of the equal protection argument is the premise that archaeological efforts have concentrated on Aboriginal sites and that state burial and cemetery laws distinguish in practice, if not in intent, between contemporary Euro-American remains and prehistoric Aboriginal remains (Price 1991, Echo-Hawk 1986, 1988, 1994)

One of the fundamental differences in perspectives is based on concepts of time. Most Native American peoples see the past as connected to the present. Therefore, there is no distinction between members of the community that were buried recently and those that have been deceased for quite a long time. It could be argued that part of the conflict has resulted from the fact that many Native American communities do not have a role in their culture for archaeology. Many of the problems arise from the overlay of archaeological theory or interpretations on a society which may already have several distinctive ways of viewing the past. As a part of colonialism, archaeological constructions have been superimposed on Native American peoples’ views about their pasts (Zimmerman, 1996: 45). Because there had been little apparent resistance until the

1960s and 1970s, it was assumed that anthropological and archaeological interpretations of the past had been accepted by Native American communities. Native American national associations had been in existence since the early 20th century: Society of American Indian in 1911; American Indian Association in 1922; the National Congress of American Indian in 1944. Their focus was on enlightening the American public about Indian culture, preserving native cultural values and promoting legal protection for treaty rights (Thomas, 2000: 182). In essence, these organizations were fighting against federal policies that were directly linked to information provided by anthropologists and archaeologists. During the 1960s and 1970s, with the release of Vine Deloria Jr's book *Custer Died for Your Sins: An Indian Manifest* (1969) and the highly publicized American Indian Movement (AIM) 1971 protest against an archaeological excavation in Welch, Minnesota, Native American individuals and activist organizations began to attack the academic community specifically. Archaeology and anthropology were often seen as just other mechanisms for exploitation of their culture, and for exposing traditions and customs of the people against their wishes.

Legislative History

NAGPRA is based on a solid foundation of pre-existing acts addressing notions of preservation, protection and ownership of historic sites, archaeological artifacts, sacred objects and sites of cultural patrimony. The federal government took the responsibility of preserving the nation's history in the early twentieth century. Now there is a complicated network of both state and federal laws. I will be addressing several important pieces of

US federal legislation that facilitated the passing of NAGPRA and helped define and shape how legislation managed public history, with respect to Native American heritage, these include:

1. *Antiquities Act of 1906*
2. *National Historic Preservation Act of 1966*
3. *American Indian Freedom of Religion Act 1978*
4. *Archaeological Resources Protection Act of 1979*
5. *National Museum of the American Indian Act of 1989*

Each of these federal acts, along with NAGPRA, provide the opportunity to evaluate the changing definitions of categories of Native American objects and the protection of Native American heritage under American federal law. The federal Acts addressing public history can be read as texts defining regulations of ownership, preservation, protection and control, and of the management of Native American heritage. Each of the aforementioned acts addressed Native American objects, archaeological specimens and sites of cultural patrimony in different ways.

Analyzing the use of key concepts concerning the public management of history can show why these acts are relevant to America's perceptions of heritage and history. Definitions have been either tightly focused or loosely worded, resulting in differences in interpretation and implementation in the courts of law. This has been both beneficial and destructive to the management of Native American heritage and for individuals seeking redress from federal institutions and publicly funded museums. What is meant by preservation? Who is in control of preserving what for whom? How is preservation

related to protection? What is being protected for what purpose? The qualities of ownership of heritage and the preservation of that heritage for the benefit of different communities with differing perspectives need to be addressed. NAGPRA was enacted after years of negotiation between key players in the management and preservation of Native American heritage; was the intent of NAGPRA to fill in the gaps left by previous public history laws and has it done so?

Methodology

The research has been conducted under an ethnohistorical framework using primary documents and secondary sources to evaluate how these texts have constructed a system of public management of history for the American public and the history and role of previous historic preservation acts in the development of NAGPRA. NAGPRA was legislated after much debate and discussion throughout the academic community and the public. The passage of NAGPRA is placed in context through a thorough analysis of the public texts surrounding its implementation by Congress, Indian Select Committee panel reports, Congressional Hearing reports detailing the discussion of the proposed act, and numerous submissions to Congress by interested parties with particular agendas. These texts have created an archive through which the intent of NAGPRA is analyzed and discussed.

Several acts proposed for review by Congress were dismissed, most importantly the *Native American Cultural Preservation Act* of 1987 and the *Native American Museum*

Claims Commission Act of 1988. These hearings were important because they introduced Congress to the necessity of a comprehensive federal Act addressing preservation, protection and ownership of Native American sacred objects, human remains and grave goods in a manner negotiated by Native American religious leaders, tribal representatives and lawyers. The result was a Senate Select Committee on Indian Affairs that placed this dialogue in the hands of those with vested interests: tribal leaders, Native American lawyers, Museum officials, archaeologists and anthropologists (both publicly and privately employed).

There has been an active academic discussion on these issues in several different fields of scholarly study in the last thirty years; legal analysts, anthropologists, theologians and museum theorists have generated numerous publications addressing the impact of many of these laws (but primarily the *American Indian Religious Freedom Act* and NAGPRA). Much of this work analyzes how these laws are implemented or how they affect differing sub-communities. These federal historic preservation laws have a coded language that can be deconstructed to address conceptual practices of power and authority with respect to protection and preservation.

Critical legal theorists have been instrumental in the analysis of how the language of federal laws has strict definitions for some principles while others are included as vague concepts, leading to national policies that have entrenched the right to practise Native American religions while having other acts and policies that conflict with these

practices. I will be drawing on the work of critical legal theorists to analyze notions of intent, statutory language construction and impact. I have drawn extensively on the work of Pawnee lawyer Walter Echo-Hawk, activist and legal representative for the Native American Rights Fund. Echo-Hawk has produced numerous articles on cultural property rights, repatriation rights and museum property rights. He has addressed these issues within a human rights context, positioning them within a constitutional framework. Echo-Hawk relies heavily on the 'equal protection' clause, freedom of religion principles and interpretation of both American common law and federal property laws. I have balanced his views with those of other legal theorists, anthropologists, museum theorists and archaeologists.

My analysis has also been influenced by John Henry Merryman's theories on "cultural internationalism". Merryman is a professor of law and art at Stanford University who has synthesized international law and cultural theory to design new ways of perceiving cultural property. These new ways require one to consider the relative merits of nationalism and internationalism as guiding premises in the allocation of cultural property. Merryman relies on the *Hague Convention* of 1954 as the charter of "cultural internationalism" since it states that there should not be "cultural property belonging to any people whatsoever" since it is the "cultural heritage of all mankind" (Merryman, 1985: 107). Although highly contested at the time, it has announced the principle that everyone has an interest in the preservation and enjoyment of all cultural property. International law does express a number of values pertaining to objects of cultural

patrimony: a high regard for the respectful treatment of remains, a sense of panhuman identity, a bias against the private control of heritage, an emphasis on the preservation of objects of great antiquity and an endorsement of the advancement of knowledge and understanding (Price, 1991: 14). On the other hand, some scholars and states espouse a position of “cultural nationalism” in which particular peoples have particular interests in particular properties, regardless of current location and ownership. The cultural nationalism argument is assumed in much of the dialogue with the UN and UNESCO. UNESCO policy supports a return of objects to the area of origin and articulates the basic principles of repatriation. Although this theory is applied in an international context between nation states, I have applied this theory to Native American repatriation requests because their political status in the United States is unique and assumes aspects of sovereign authority. Unlike any other ethnic or culturally distinct group in the United States, Indian tribes have had (and continue to have) a government-to-government relationship with the United States. Under the US constitution, Native American tribes were considered “foreign nations” (Carroll & Noble, 1988: 129). In recognition of this relationship, Congress and not the states had the authority to regulate trade and relations with Indian tribes. Although not sovereign nations, they still retained all attributes of self-government that any foreign nation would possess unless Congress chose to limit or abolish those powers (Sokolow, 2000: 4). Tribal government powers were equal to those of a state yet remained subordinate to the federal government; in a sense they were distinct, independent, political communities.

Cultural theories of inclusion and exclusion are particularly relevant when deconstructing the language of these texts. The focus of this thesis is on preservation laws and how the appropriate institutions implemented these laws through policies and legislative acts. Although many of the preservation institutions and museums do not merely collect Native American cultural material to the exclusion of other histories, I have chosen to focus on the departments and policies within these institutions relating to ethnology, archaeology, and anthropology. Many of these museums had large natural history and European history collections which were active in the accumulation of objects. I do not presume to suggest that museums were solely collecting Native American artifacts but such collections are the focus of this thesis.

The protection and preservation of Native American heritage has been conducted in ways that have been perceived as damaging to the continuation of culture and respect for Native American spirituality. Cultural continuity and spirituality have equally been excluded where preservation or protection has been deemed necessary by Native American tribal authorities and religious leaders. A federal preservation law was necessary to address conflicts between the application of previous federal preservation acts and equal protection of the law. NAGPRA attempted to eliminate these discrepancies and addressed human rights principles with respect to freedom of religion cultural property rights and equal protection of burial sites.

There has been a substantial amount of material produced for the consideration of Congress by all parties with a vested interest in the management of America's history. In 1987, the Senate Hearing on S.187 of the *Native American Cultural Preservation Act* provided an opportunity for Native American religious leaders and elders, Tribal legal counselors and chiefs as well as spokespeople from the Society of American Archaeologists, the Smithsonian Institution and the Advisory Council on Historic Preservation to present their views on the protection, preservation and ownership of Native American cultural property. These open testimonies, when combined with prepared statements from the American Association of Museums, the National Congress of American Indians, Native American Rights Fund, and various museum directors, provide an archive of opinions on past and prospective legislation. The Senate and House of Representative Hearing Reports on S.1900, S. 1021, H.R. 1381, H.R. 5237 and H.R. 1646 provide a similar archive of texts on the proposed legislation that eventually was amalgamated to produce NAGPRA. An analysis of these statements, testimonies, Congressional debates, and strongly held opinions can help shed light on the proposed intent of NAGPRA and on the atmosphere and environment in which it was enacted.

Framework

This thesis will provide an analysis of the development of American federal approaches to the management of Native American cultural property. Chapter 2 will provide the legislative background to the enactment of NAGPRA . The *Antiquities Act of 1906* was the first piece of federal preservation legislation and established the federal

government's role in controlling the management of the nation's heritage. Native American human remains, burial goods, and sacred objects were now legally defined as archaeological resources to be collected and preserved in federal institutions. The *National Historic Preservation Act* of 1966 solidified the federal government's role in preserving America's material culture by extending the concept of public history from prehistoric archaeological resources to objects, monuments and sites of regional and local interest. The *American Indian Religious Freedom Act* of 1978 (AIRFA) created a federal mandate to address gaps in national policy regarding the protection of Native American religion and mandated an acceptance and protection of American Indian religions and ancestral sites, burial protection and the use and possession of sacred objects currently controlled and owned by federal agencies. The same year, the *Archaeological Resources Protection Act* (ARPA) was enacted to introduce stiffer fines, criminal penalties and to correct implementation problems that became apparent with the *Antiquities Act of 1906*. In 1989, Congress enacted the *National Museum of the American Indian Act* which created a separate museum to specifically house the Heye collection of artifacts and books within the former Museum of the American Indian, and to transfer title to the Smithsonian Institution for the establishment of the National Museum of the American Indian. The act mandated the repatriation of skeletal remains and associated funerary objects to those who submitted claims.

Until the NMAI, these laws created a system of legitimizing archaeology and scientific evaluation over the religious practices of Native Americans. Chapter 3 will

assess how these acts helped to construct a system of public history in the United States. The history of the public management and preservation of Native American heritage needs to be situated in a legal context as common law principles and concepts of equal protection were not applied to Native American burials. In Chapter 3, I will summarize the implementation of the preservation acts through their attendant regulations and permit systems and reveal the complicated network of constitutional and common law problems that these systems have created.

Heritage plays an integral role in the construction and maintenance of identity. Ownership of heritage allows for control over the creation of contemporary traditions and cultural policy; in a sense, cultural survival. Concepts of identity will be discussed in Chapter 4 strictly in relation to who is directly affected by these acts and how legislated constructions of identity may have conflicted with Native American constructions of cultural affiliation and group identity. I will be exploring issues of cultural patrimony with respect to theories on inalienable wealth. These theories will provide a foundation for analyzing the process of action in the implementation of NAGPRA.

Through a careful analysis of the discourses of the archive of the NAGPRA, Chapter 5 attempts to situate NAGPRA's role in the public management of Native American history and heritage. NAGPRA has been discussed *ad nauseam* with regard to its procedures, implementation difficulties and why it was necessary as a vehicle for the pursuit of social justice to correct past wrongs committed by collecting institutions. By

positioning the Act with respect to the legislative discussion, we can shed new light on the intent of NAGPRA and how Congress may have disregarded the opinions of some communities in favour of others. NAGPRA needs to be situated within its legislative historical context to assess why Congress felt it was necessary to enact.

Chapter Two

HISTORY OF PREVIOUS LEGISLATION

Laws dominate Native American life in a way not duplicated in other segments of American society. Felix' S. Cohen's Handbook of Federal Indian Law. 1982

Congress has confirmed/enacted over 4000 treaties and statutes that address Native Americans; regulations and guidelines concerning the implementation of these laws are even more numerous (Cohen, 1982). Over the last century, Congress has enacted several preservation laws that have had a profound effect on the management of Native American heritage through the preservation of cultural property.

Until 1972, archaeology legislation could be variously seen as permit laws, salvage laws, evaluatory laws, acquisition laws or development laws. Legislation often combined several of these. More specifically, there are three types of legislation affecting archaeology, the management of cultural property and in a sense the system of public history. First, there are enabling legislative acts that establish archaeological research and preservation as public policies and create mechanisms for carrying out those policies. Along with these acts is appropriation legislation that provides the necessary funding to carry out the aforementioned policy. And finally, there is antiquities legislation that provides elements of positive and negative control (McGrimsey 1971: 125). All were designed to provide an element of protection to some sort of historical materials, sites or data, but each class embodies a slightly different approach to the means of preservation.

Legislative acts have provided legal cornerstones for federal activity and have served as models for various state programs.

Until the *National Museum of the American Indian Act* of 1989 and the *Native American Grave Protection and Repatriation Act* of 1990, preservation legislation mandated the preservation of Native American heritage as archaeological resources but did not allow for Native Americans to be a part of their management as public history. This chapter outlines a selection of the key pieces of federal legislation that concern the management of Native American heritage and the preservation of Native American material culture.

The rise of systematic archaeology, the beginnings of scientific geology and Darwinian evolutionism were all European developments of the mid-to late-nineteenth century and were the stimuli that gave rise to the formal discipline of archaeology in America. From 1840-1910, these stimuli and the archaeological excavations of ancient civilizations in key sites (Middle East, Egypt, etc.) had a large impact on the growth of American anthropology (Willey & Sabloff 1993: 86). Archaeological work began to be sponsored by the government, universities, museums and scientific societies. Early preservation efforts were largely directed toward sites important in Euro-American history and large prehistoric ruins of great interest to archaeology and the museums that sponsored their work. When archaeology and anthropology expanded, they defined themselves as separate and distinct disciplines that became taught in American

universities. This era saw a new generation of professionally trained archaeologists increasingly interested in American prehistory. There were now more anthropologists and archaeologists actively pursuing fieldwork on American soil (Willey & Sabloff 1993: 86).

Preservation of archaeological remains became a concern of the federal government in the late 1800s. It was the government's conviction (and that of anthropologists) that Native Americans were 'vanishing' and that someone had to exercise custody of archaeological data. Not only had the population been decimated by disease and warfare, but anthropologists felt that Native American cultures in a pristine form (untouched by European influence) were also dying out. It wasn't until 1892, when President Harrison issued an executive order preserving Casa Grande Ruins in Arizona, that the country had its first federally protected site.

At the end of the 1890s, changing cultural conditions throughout the nation, notions of the "Vanishing Indian", the development of the new sciences and the magnitude of the task of preserving prehistoric remains combined to propel the federal government into the business of preservation. Social change directed by the American government began to broaden its agenda to include a more extensive array of obligations than ever before. Social change directed by the federal government began to play a more important role in shaping policy and a spirit of reform labeled Progressivism entered American political and social reform (Rothman 1989: 14).

Although now conceptualized as an objective science, archaeology in the US developed in the context of colonialism. Archaeological excavations of tribal burial sites during the 1700s and 1800s by American scholars from the academic community and the US Army⁶ created a segment of American public history based upon archaeology. As a consequence of the interest and increase in number of these excavations, amateur collectors began to desecrate Indian graves, taking skulls, entire remains and burial offerings (Riding In, 1992: 20). Amateur collectors were not merely interested in the scientific value of such items, but were also collecting for monetary and aesthetic reasons. These activities necessitated the passage of new legislation to protect archaeological resources⁷. The growth of archaeology as a profession and the knowledge that archaeological sites could provide information about past cultures led to the increasing concern about the destruction of Native American sites by looting or development. As they defined their discipline in the 1890s, anthropologists and archaeologists became distressed by unauthorized excavations and worried over the fate of unattended ruins on both federal and private lands (Rothman, 1989: 14). The next

⁶ The United States Army initiated one of the first policies for collecting Native American bodies. It was initially implemented by the establishment of the Army Medical Museum in 1862. The goal was to study infectious diseases. In 1867, the Museum Curator urged field doctors to collect and send "Indian specimens" with as much contextual data as possible. The US Army Surgeon General Joseph Barnes established an agreement with the Smithsonian Institution where the Army Museum would receive osteological remains and augment the collection of "Indian crania" and the Smithsonian Institution would receive burial and cultural items. Some 4,500 crania, half of them obtained from the Army in 1898 and 1904, now comprise about one quarter of the Smithsonian's National Museum of Natural History collection of Native human remains (Harjo, 1995: 4-5).

⁷ Initial legislation did not protect Native American heritage for the continuation of cultural traditions and practices but protected it as "archaeological resources" for the exclusive right of archaeologists and museum collections. This will be explored in further detail when discussing the development of a public history management system in the US and Native American Identity.

fifteen years saw an increasing concern for the preservation of American antiquities within and outside the government. The destruction and looting of early Native American sites and structures of the American Southwest became the impetus for the enactment of the first general federal preservation legislation (US Department of the Interior National Park Service, 1993: 45). Warnings from independent and professional organizations such as the *American Association for the Advancement of Science*, *Anthropology Society of Washington*⁸, and the *Archaeological Institute of America*, increased public awareness of the destruction of archaeological ruins (especially in the Southwest), leading to the passage of the *American Antiquities Act of 1906* (McManamon 2000: 41).

Archaeological resources in the US lacked clear legal definitions of ownership. This was in part because those in power (archaeologist, anthropologists, government officials, members of Congress) were not of the same ancestry as those whose culture was being studied through archaeological excavations. Although the ethnologies of the time were of contemporary cultures, many of the archaeological excavations during this period contained archaeological data of Native American communities that lived long ago (Mississippi Valley carvings, Verde Valley, shell work of the Southwest) (Smithsonian Institution: 1997). Although the definitions proved to be ineffective and biased towards the pursuit of scientific knowledge, a definition was necessary in the beginning to help protect Native American heritage from private collectors and the illicit black market trade.

⁸ Later known as the American Anthropology Association.

Antiquities Act of 1906

The year 1879 marked the beginning of the preservation movement. During the same year, the American Association for the Advancement of Science elected an anthropologist as its president for the very first time – Lewis Henry Morgan. Under his leadership, the association inaugurated a sector called ‘Section H’ to allow the growing number of anthropology students the opportunity to read and discuss contemporary research. This section soon established a committee to lobby for legislation to protect antiquities on federal lands (Lee 2000: 199). This period also saw the incorporation of the *Anthropological Society of Washington* (1879), the *Archaeological Institute of America* (1879) and the *American Anthropology Association* (1902); all of these associations provided crucial support and lobbying for the *American Antiquities Act of 1906*. An analysis of the legal and social contexts for the enactment of the *Antiquities Act of 1906* will establish its role in the preservation movement and system of public history.

Marshall Pinckney Wilder and Edmund Farwell Slafter, supported by the New England Historic Genealogical Society, were determined to introduce Congress to the concept of preservation legislation and specifically to the protection of American antiquities on federal Land (Lee 2000: 202). This issue was new to Congress. Wilder and Slafter sent their petition to Congress through Senator George Frisbie Hoar of Massachusetts:

...that those remaining are the remnants of very ancient races in North American, whose origin and history lie yet unknown in their decayed and decaying antiquities; that many of their towns have been abandoned by the decay and extinction of their inhabitants; that many of their relics have already perished and so made the study of American ethnology vastly more difficult...

...that relic-hunters have carried away, and scattered wide through America and Europe the remains of these extinct towns, thus making their historic study still more difficult, and, in some particulars, nearly impossible (US Congress 1882: 3777) (Lee 2000: 203).

This was the first time the preservation issue was discussed in Congress. It received a reserved response. At this point, the notion of forever losing historic objects from scientific inquiry and aesthetic admiration was the driving force behind preservation legislation. Wilder and Slafter also seemed to address national pride and identity by mentioning the “scattering” of ethnographic artifacts beyond American borders. Noticeably absent is a discussion on the recent forced relocation of Native inhabitants and how this pertains to these perceptions of “abandonment” and “extinction”. Congress felt that it was impossible for the federal government to protect all of the areas required and suggested that the interested societies should “travel and collect the antiquities and bring them back for preservation” (Lee 2000: 204). This is the first mention of collecting artifacts for preservation, laying the groundwork for future public history policy.

The petition was quickly referred to Plumb’s Senate Committee on Public Lands

where it met a swift demise. Seven years elapsed before another archaeological preservation proposal reached Congress; these years had witnessed an extension of knowledge and a deepening of public interest in American archaeology and ethnology.

The preservation legislation issue was revisited on January 30, 1889 when fourteen citizens⁹ from the Boston area forwarded a petition to Congress urging the enactment of preservation legislation to protect Casa Grande from further destruction or injury. Once again the petition was presented to Senator Hoar and was sent to Congress on February 4th 1889. The proposed legislation was only to involve the protection of Casa Grande, and was not a general preservation law. Congress moved to provide for the protection and repair of Casa Grande in an appropriation act approved March 2 1889 (25 Stat. 961). Two thousands dollars were appropriated to enable the Secretary of the Interior to repair and protect Casa Grande, while the President was authorized to reserve the land on which the ruin was situated from both settlement and sale (Lee 2000: 205). After repairs had begun, on June 22, 1892, President Benjamin Harrison signed an executive order, reserving Casa Grande Ruins and 480 acres around it for permanent protection due to its archaeological value. By limiting the legislative protection to the specific area surrounding Casa Grande, the petition proved to be successful. Although limited in scope and application, this was the first act to be approved by Congress that pertained to the preservation of American antiquities.

⁹ The list of citizens was impressive and included: Oliver Ames, Governor of Massachusetts; John Fiske, a popular writer and lecturer of American history; Francis Parkman, historian. Several of the signers had promoted American archaeological expeditions and the preservation of historic houses (Thompson, 208:

Until the *Antiquities Act of 1906*, the chief weapon available to the federal government for protecting antiquities on public land was the power to withdraw specific tracts from sale to private entities/persons or from entry for a temporary period. As the problem of protection grew, and as complaints from academics and archaeologists reached the General Land Office in steadily increasing numbers, this power was exercised more and more frequently. During this period, there were few professional archaeologists in America. The discipline was in its infancy and was little known to the general public. There was an increasing demand and interest in authentic prehistoric artifacts by collectors, dealers, exhibitors, curators, teachers and scientists. The result was a rush on prehistoric ruins of the Southwest that continued unchecked until 1904 when the General Land Office finally withdrew land from sale or entry¹⁰ (Lee 2000: 213). After “impressive collections” began to travel outside the United States in permanent collections, American archaeologists provided strong arguments in Congress for protective legislation in order to protect potential artifacts from leaving the country, and decrease the chance of their leaving Native communities.

J. Walter Fewkes wrote an eloquent plea for protective legislation that appeared in the August 1896 edition of the *American Anthropologist* 9(3). He included a description of the vandalism of the large cliff dwellings located in the Southwest, where he did most of his field research:

2000).

...if the destruction of the cliff houses of New Mexico, Colorado and Arizona goes on at the same rate in the next 50 years that it has in the past, these unique dwellings will be practically destroyed and unless laws are enacted, either by state or by the general government, for their protection, at the close of the twentieth century many of the most interesting monuments of the prehistoric peoples of our Southwest will be little more than mounds of debris at the bases of the cliffs. A commercial spirit is leading to careless excavation for objects to sell and walls are ruthlessly overthrown, buildings torn down in hope of a few dollars gain....it would be wise legislation to prevent this vandalism as much as possible and good science to put all excavations of ruins in trained hands.... (Lee, 2000: 215).

Early preservation was concerned with the protection for the benefit of “scientific inquiry” and the enjoyment and education of the American public. Ruins on Native American reservations presented another administrative problem. Under Commissioner A.C. Toner of the Office of Indian Affairs preservation objectives were also supported. On October 22, 1904 he wrote that he was again instructing officials in charge of the various reservations “to use their best efforts to keep out intruders and relic hunters and to see that such remains of antiquity...are kept intact until such time as proper scientific investigations of the same can be had (Lee 2000: 222).

Even before general legislation was enacted a force of forest supervisors, rangers, special agents, Indian school superintendents, teachers, Indian agents, farmers, police and the Native Americans themselves had mobilized to protect the ruins from vandalism and unauthorized looting to save them for scientific investigation (Lee 2000: 222). At this time, there was a significant increase in historic preservation by local community groups. Cultural impulses to protect American prehistory were a logical extension of the actions

¹⁰ The ruins throughout Chaco Canyon are an example of the GLO’s policy.

of local groups interested in their own pasts. Exploration of the west led to the “discovery” of impressive prehistoric structures throughout the Southwest. These structures sparked the imagination of many and fueled a quest for more knowledge about Native American history. The upsurge of interest in contemporary and prehistoric Native American cultures resulted from the public sense that Native American people, like the frontier, were a relic of the past worth preserving (Rothman 1989: 10). The chain of federal laws governing land indicated that the government was expanding its obligations. There was greater government control over public land through the implementation of laws with centralized power in the executive branch. This was the impetus for legislative protection of archaeological ruins (Rothman 1989: 6).

From 1899 to 1906, Congress discussed several versions of a proposed preservation legislation bill. During the ‘first round’ of discussions, the *American Association for the Advancement of Science* established a committee to promote a bill in Congress for the permanent preservation of Aboriginal antiquities situated on Federal lands – the Committee on the Protection and Preservation of Objects of Archaeological Interest. This proposed bill began with the major provision that:

The President of the United States may from time to time set apart and reserve for use as public parks or reservations in the same manner as now provided by law for forestry reservations, any public lands upon which are monuments, cliff-dwellings, cemeteries, graves, mounds, forts or any other work of prehistoric, primitive or Aboriginal man, and also any natural formation of scientific or scenic value or interest...as he may deem necessary for the proper preservation and subsequent investigation of said prehistoric work or remains (Lee 2000: 224).

This provision continued the growing national policy of reserving lands of archaeological value as a protection measure against settlement. Now that the antiquities issue had been raised once again in Congress, competing viewpoints were quickly made known. This bill authorized the Secretary of the Interior to grant permission for archaeological excavation to qualified institutions and made unauthorized excavations a misdemeanor subject to fine.

At this time, three slightly different (and competing) preservation bills were introduced, and the main difference between them was the statutory language. The Department of the Interior was plainly seeking broad discretionary authority for the President to reserve a wide range of resources for public use. This viewpoint was embodied in section three of Lacey's proposed bill HR 11021, which authorized the Secretary of the Interior to permit examinations, excavations and gatherings of objects of interest within such national parks, provided they were undertaken for the benefit of the Smithsonian Institution or a reputable museum, university, college or other institution of scientific or educational authority (Lee 2000: 228). The preservation movement was beginning to formalize who would be the key players in the preservation of American public history. The process was becoming regulated as these latest bills proposed "permits", "excavations", "gatherings" and for the benefit of "the Smithsonian Institute or a reputable museum, university, college". Native American representatives and tribal authorities were clearly left out of the process. This is a defining moment, because for the next 90 years they continued to be left out.

Several forms of a proposed antiquities bill were introduced over the years, primarily differing over the extent of the proposed presidential authority; there was a split between eastern and western state sentiments regarding presidential authority over issues of land reserves. For the next six years, the Lacey bill went through only minor modifications and eventually embodied the views of the Department of the Interior on the form antiquities legislation should take.

Although the Public Lands Committee was showing a growing awareness of the need for preservation of prehistoric antiquities, Congress took no action on any of the five formal bills the committee introduced. The first round of discussions became a sparring session between scientists, representatives from the Department of the Interior, the Bureau of American Ethnology and the House Public Lands Committee. It ended in a draw, with no legislation being enacted.

Reverend Henry Mason Baum initiated the ‘second round’ of Congressional discussions¹¹. He testified before the Senate Public Lands Committee in 1904 as an editor of an historical journal entitled “Records of the Past”. Rev. Baum recommended the following be embodied in a national preservation law:

¹¹ Reverend Henry Mason Baum, the president of the Records of the Past Exploration Society, played an active role from 1902 to 1905 in the race to protect American antiquities. Baum was also the editor of a new historical journal published in Washington, D.C., called *Records of the Past*. He testified before the Senate Public Lands Committee in 1904 as a witness for a national preservation law (Thompson, 2002: 230).

First, that the antiquities be placed under the control of the Secretary of the Interior; second, that the institutions of the country shall have an equal right to excavate the ruins; third, that all excavations shall be prohibited without a permit from the Secretary of the Interior (Lee 2000: 229).

Reverend Baum had established the need for a regulatory preservation bill, which was not merely a policy act, nor was it based upon the reservation of land. A letter was sent throughout the country to presidents of universities, historical societies and museums with a copy of the proposed bill included. Favourable responses poured in from across the nation as an endorsement for this preservation bill.

At the same time, the Smithsonian Institution introduced a bill that gave itself (through the Secretary of the Interior) complete authority and ownership rights of all antiquities. The Smithsonian Institution would accept all responsibilities over the care and management of land set aside for the preservation of antiquities. Richard Rathburn, Secretary of the Smithsonian Institution, informed the Secretary of the Interior that letting the public take what they wished from public land was a flawed policy. He felt it affected scientific efforts to understand prehistory, and he in turn suggested that artifacts found in the public domain should remain the property of the US and might not be appropriated by private persons (Rothman 1989: 2). The Smithsonian Institution wished to implement a policy that was grounded in scientific investigation with the control and ownership of American antiquities resting with the federal government and its agencies. The Smithsonian Institution, like many others at the time, felt that archaeological excavations and the objects collected from such endeavours were intrinsic to

understanding Native American history and culture. These items should remain in the United States in a public collection, to be accessed by qualified researchers, not in private collections where they could be sold in an international arena. Congress eliminated this proposal because it saw the Smithsonian Institution as having an unfair advantage over the potential for scientific inquiry.

When Edgar Lee Hewett entered the preservation movement, the third round of Congressional discussions began. Hewett was an appointed member of a committee formed by the American Anthropological Association to lobby for antiquities legislation. Hewett felt that it was impossible to concentrate the entire authority in this matter in any one department as this would “muddle the process” (since reserve areas were held under the control of different departments) and there might be future conflicts of interest. He drafted an antiquities bill that he believed preserved the spirit of the American Anthropological Association, the Archaeological Institute of America and met the wishes of various federal departments (Lee 2000: 238). Representative Lacey introduced it to the House of Representatives on January 9, 1906 as HR 11016. On February 26, at the request of Rep. Lacey, Senator Patterson introduced a companion measure (S4698) to the House bill into the Senate.

Bill 11016 expanded upon the coverage of previous legislation by stating that the bill applied to “lands owned or controlled by the Government of the United States”. Previous bills applied only to public lands, leaving their applicability to forest reserves,

Native lands and military reservations uncertain. After investing the Secretary of the Interior, War and Agriculture with the authority to grant excavation permits, the bill provided that they make and publish “uniform rules and regulations” to carry out the law’s provisions. Although not explicitly mentioned, it was understood that the role of the Smithsonian Institution as scientific advisor would be protected.

These differences from the previous legislation allowed the bill to be passed. The eventual legislation had barely changed from the draft bill that Hewett had presented to the AAA and AIA six months earlier. It was enacted by Congress as the *Antiquities Act of 1906* (S4698 – HR11016) on June 8, 1906 . The US government had officially declared a national policy to protect American antiquities. The act is considered by many to be the most important piece of preservation legislation ever enacted by the US government. It created a mechanism through which federal officials, interested professionals and other special-interest groups could achieve preservation goals (Rothman 1989). The *Antiquities Act* allowed for permanent preservation of public lands with significant prehistoric, historic or material features and it gave federal administrators a flexibility that no other piece of legislation had allowed. The *Antiquities Act* declared that federal officials were now responsible for protecting archaeological sites on all of the lands that they administered¹². With its passage, the act codified established government practice by centralizing power in a group of people presumed to have the best interests of the public in mind.

¹² Most chief executives since 1906 have used this authority to establish national monuments as they see fit.

The strongest impact of this act was that it made any other type of archaeological excavation on public lands illegal. Although this could be seen as a double-edged sword since it gave no proprietary rights of ownership for cultural property found on lands administered as Indian land by the Bureau of Indian Affairs, it did try to restrict the burgeoning illicit trade of Native American antiquities. Although the Bureau of Indian Affairs was responsible for administering and managing federal lands held in trust for Native American peoples, archaeological resources and cultural property within its geographic borders were federal property. The assumption of this act was that all “cultural resources” located on federally administered land now “belonged” to the United States government and that they could only be excavated for the benefit of public museums (Echo Hawk, 1989: 71). Although the majority of cultural property/archaeological resources found would be Native American heritage, no provisions were made for Native ownership or possession.

Congress was promoting archaeological inquiry when it enacted the *Antiquities Act of 1906*; it bequeathed Native bodies and burial objects found on public lands to science. Prior to 1906, historic preservation was undertaken through the private financing of excavations and museums, and private legal remedies such as trespass or conversion (Boyd, 1990: 893). There were no federal regulatory or enabling provisions. In contrast to the situation in many other countries, Native American sites and artifacts in the US had never been viewed as a national patrimony because of a strong private

property ethic and because they are not associated with the dominant European-American culture (Nichols, Klesart & Anyou 1999: 29). In fact, the United States preservation policy for any historic or archaeological sites was not consistent with international trends. This point was raised during the House of Representatives Committee on Public Lands report in 1906, “practically every civilized government in the world has enacted laws for the preservation of the remains of the historic past, and has provided that excavations and explorations shall be conducted in some systematic and practical way so as to not needlessly destroy buildings and other objects of interest” (Thomas, 2000: 141). The *Antiquities Act of 1906*, established that Native American artifacts and sites were now considered a vital part of America’s history¹³ and were to be viewed as American federal cultural property.

There were several key limitations to the *Antiquities Act of 1906* that diminished its legislative effectiveness. Fines were not high enough to constitute a deterrent and it did not encompass the variety of Native American sites (e.g. cliff dwellings, burial mounds, and other sites on private or state owned lands). The statutory language was declared constitutionally vague after its first application. In 1973, the first arrest under the *Antiquities Act* was brought before the court in the *US vs. Diaz* case (499F.2d113, 9th Circuit, 1974). Twenty-two face masks, headdresses, ocotillo sticks, bullroarers, fetishes and muddogs were taken from an Apache medicine man’s cave on the San Carlos

¹³ They were, of course, an integral part of many museums’ collections previous to the enactment of the Antiquities Act of 1906. Museums with natural history, anthropology, ethnology and archaeology departments had long considered these artifacts valuable and an integral part of America’s history. With the passage of the Antiquities Act, the federal government concurred.

Reservation. The objects had been made in 1969 or 1970. Diaz was charged with appropriating objects of antiquity without the permission of the Secretary of the Interior. Although archaeological material may be historic as well as prehistoric, of European or Indigenous origin, had the religious objects been made by Europeans it is doubtful that the case would have involved the *Antiquities Act of 1906* (Fish, 1981: 687). The defendant's lawyer argued that the *Antiquities Act* was unconstitutionally vague because it failed to define "ruin", "monument" or "object of antiquity". The testimony of anthropologists stated that age should not be the sole determinant of whether something is an object of antiquity. Its socio-religious importance and its place in a people's cultural heritage are as much determinants of antiquity as its age. The courts agreed and stated, "there can be no definite time limit as to when an object becomes antiquity" (Cooper, 1976: 99). Diaz took his appeal to the 9th Circuit Court. The issue presented on appeal was whether the objects taken were in reality "objects of antiquity", since they had been made in 1969 or 1970.

An attempt to circumvent the Diaz interpretation was made in *US vs. Jones* (449 F.Supp.at 4b). In this case, archaeological vandalism was prosecuted as theft and depredation of government property. The US District Court for the District of Arizona ruled that the case could not be brought under these statutes, since the *Antiquities Act* was the proper statute governing such offences (Fish, 1981: 688). The trial judge noted, however, that since the Diaz ruling held that the provisions of the *Antiquities Act* were

unconstitutionally vague, there was no statute under which the defendant could be prosecuted.

The 9th Circuit Court eventually declared the *Antiquities Act of 1906* unconstitutionally vague and essentially unenforceable. The court decided that the *Antiquities Act* did not give sufficient notice of what objects could be recovered and what should be left alone. On appeal, the 9th Circuit Court reversed the district court's decision and held that the passage of the *Antiquities Act* did not preclude prosecution of the defendant under the general theft and depredation statutes (Fish, 1981: 689). The 10th Circuit, however, had a decision that was contrary to the Diaz rule and did not find that the *Antiquities Act* was unconstitutionally vague. Although the act was still viable in the remaining circuits, the disagreement between the 9th and 10th circuits consequently undermined the deterrent value of the act.

The full preservation intent of Congress in passing the *Antiquities Act* is unclear since the House only debated the issue as to whether or not this act would prevent public lands from being sold (40 Cong. Rec. 7331, 1906). In the Senate debate, however, Congressman Lacey stated that the bill was intended to cover cliff dwellings and cliff dwellers of the Southwest and their ruins, monuments, objects of antiquity and other objects of special importance. These words, which could have given the statute broader coverage, were omitted from the statutory language. The statute is limited to "historic or prehistoric ruin or monument, or any object of antiquity" (*Antiquities Act of 1906*, 16

USC 431-433). There is sparse legislative history supporting the act; there are no means to clarify its intention.

All subsequent legislation alludes to the *Antiquities Act of 1906*, and it still remains a major piece of legislation pertaining to preservation and the regulation of archaeology. The public sentiments changed as did the sites that were preserved. Officially, if applied under modern ethical principles, the *Antiquities Act* allowed for the preservation of different pasts – archaeology, natural, historical, as well as various aspects of these categories. The government land office used the *Antiquities Act* to codify into law what had been its standard procedure during the previous fifteen years. It was ambiguous enough to be useful as a catchall preservation law. The *Antiquities Act of 1906* laid the basis for further federal legislation to preserve the cultural resources of the public domain. Although the original concerns were driven by scientific investigations, the end result was to preserve Native American heritage for future generations. It was the intention that objects would remain in the country and under a public trust's fiduciary obligation. By including the statement "to put all excavations of ruins in trained hands", Fewkes was initiating a discourse on the actual regulation and management of public history. The *Antiquities Act of 1906* became the foundation for the management of anthropological and archaeological collections and created a set of regulations that structured a system of public history. Although never formally repealed, it was eventually superseded by the *Archaeological Resources Protection Act* of 1979 after the Diaz case displayed its inadequacies.

National Historic Preservation Act of 1966

The precursor to the *National Historic Preservation Act* of 1966 was the *Historic Sites Act* of 1935. This act established that it was now a national policy “to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the US” (US Department of the Interior National Park Service 1993:1). Basic statements of public policy articulated in the 1906 and 1935 legislation were broadened and described more specifically by sections of the *National Historic Preservation Act* of 1966 (NHPA). In the 89th Congress, the National Park Service, building upon 30 years of experience in preserving and interpreting places of national significance enacted NHPA¹⁴. This act expanded the public policy of protection, preservation and use for the public benefit to include a wider range of cultural resource types, including those that have importance regionally and locally but not of national significance (McManamon, 2000: 43). NHPA established national concern for the protection, preservation and public use of cultural heritage sites by state, tribal and local governments in the US. This act outlined six kinds of actions or activities that the national government would undertake to provide for the preservation of US historic properties:

¹⁴For the previous fifty years, the US Army was in charge of the preservation of national heritage. The National Park Service assumed leadership in 1933.

1. Through financial and technological means, the Federal Government will foster conditions under which American society and their historic, prehistoric and cultural resources can co-exist and fulfill the social, economic and other requirements of present and future generations.
2. Provide leadership in the preservation of the prehistoric and historic resources of the US and of the international community of nations
3. Administer federally owned, administrated or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations.
4. Contribute to the preservation of non-federal prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means.
5. Encourage public and private preservation and utilization of all usable elements of the nation's historic built environment.
6. Assist state and local governments and the national trust for historic preservation in the US to expand and accelerate their historic preservation programs and acts (McManamon 2000: 43)

Through the *Historic Sites Act* of 1935, the US clearly contemplated the identification, recovery, preservation and display of archaeological data for public use. With NHPA, Congress established the Federal Government's role in preserving the nation's heritage (Boyd 1990: 895). The 1966 act authorized the Secretary of the Interior to maintain a National Register of special structures, as well as general areas or districts that were significant in American history, archaeology, architecture, engineering and culture. This became the basic federal law governing preservation of historic and archaeological resources of national, regional, state and local signification to avoid loss of historic resources of less than national significance (US Department of the Interior National Park Service 1993: 2). With this act, Congress formally recognized the vital need for an active partnership between educational institutions, historic societies and the various

scientific associations to ensure the involvement of groups that were capable of providing skilled research and proper preservation techniques.

The Secretary of the Interior had the power to: conduct a national historic preservation program; study, document and design nationally significant sites; regulate the removal of archaeological resources from federally-owned land; acquire privately owned historic properties; the preservation of historic sites on federal land and assistance to a number of specific federal agencies with programs that might adversely affect historic properties. Both the *National Historic Preservation Act* and the *Historic Sites Act* expanded upon the policy of providing permits – as under the *Antiquities Act* – and set forth a full-bodied plan of action for historic preservation.

The *National Historic Preservation Act* is mainly an acquisition and development law. It was intended to provide ways for protective agencies to obtain historic sites, protect them against encroachment, physically preserve them and develop them for use as museums, parks, historic houses etc. (King, 1972: 33). Facing considerable pressure from urban and industrial development projects, these acts implemented a federal program for registering national historic sites of both regional and federal interest. A system of registration, preservation, restoration and maintenance of historic properties was implemented.

An Advisory Council on Historic Preservation was established and mechanisms for listing a site would be available at the local, regional and federal level. The Advisory Council on Historic Preservation was in charge of regulating NHPA and implementing the statute – it became independent of the National Park Service in 1976 (O’Bannon 1994: 15). The National Register of Historic Places (the nation’s official list of resources eligible for public preservation and protection) is a basic preservation planning tool and is largely unused by historic archaeologists. NHPA projects have set standards and guidelines that involve acquisition, protection, stabilization, preservation, rehabilitation, restoration and reconstruction (O’Bannon 1994: 15).

American Indian Religious Freedom Act of 1979

In the beginning of the 1970s, the public history discourse was still mostly concerned with preservation, protection and regulating who should be allowed to perform excavations. It became clear to Native American advocacy groups, archaeologists and government officials that the passage of a new act was imperative. The decision as to who the protector would be helped further define a system of public history. The anthropological and archaeological discourse of the 1970s was quite concerned with the “wanton excavation and appropriation of artifacts” from sites because this was seen as a loss of valuable information concerning the lives of the makers of the artifacts (Cooper 1976: 101). There was a high level of concern regarding the integrity of the artifacts with respect to provenience and situational data. The discourse was predominantly against amateur collectors because they destroyed the time sequence and archaeologists had

difficulty distinguishing what is of “sufficient interest to deserve protection and those which are not and are of little real significance”. There was minimal discussion on Native American rights to equal protection under the law concerning ownership of property and sanctity of the dead. Nor was there any discussion of the contribution Native Americans could make to archaeological investigations.

The *American Indian Religious Freedom Act* was enacted on August 11, 1978 under the sponsorship of Senator James Abourezk (Democrat, South Dakota) and Representative Morris Udall (Democrat, Arizona). Congress took extraordinary steps when it identified a specific genus or type of religion or the religion of a particular group. Congress recognized the government’s unique relationship with Native Americans and created an act that addressed issues that should have been covered by the First Amendment¹⁵.

AIRFA had the potential to affect the preservation of Native American heritage and material culture. Through AIRFA, Congress asked that all government agencies review their policies and procedures to take into account American Indian religious beliefs. The greatest potential was the specific inclusion of sacred sites and those areas that included graves (with buried funerary and grave goods) and the possession of material objects:

¹⁵ I refer to the first phrase of the First Amendment which reads, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof”.

...whereas such laws and policies often deny American Indians access to sacred sites required by their religion, including cemeteries....

...whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies (*American Religious Freedom Act* of 1978 42 USC 1996, P.L. 95-341)

These notions were highlighted in the Task Force report that Congress had demanded to help implement AIRFA. Congress established a Task Force consisting of nine federal agencies (which included the Bureau for Indian Affairs and the American Indian Law Center). It was their duty to submit a set of recommendations that required changes to legislation, policy and regulations with respect to Native American Religion. The AIRFA report was completed in 1979. The report submitted to Congress comprised thirty-seven pages of recommendations for administrative and legislative changes with regards to the protection and preservation of cemeteries, sacred objects, ceremonies and sacred land. It reported that there had been 522 abridgements of the religious practice of seventy tribes in twenty-eight states (Thomas 1991: 756). The intentions of Congress were quite clear and the Task Force submitted a report that upheld the reasons why Congress had pursued the enactment of this legislation, but government agencies did not address these requirements and thus the legislation proved to be ineffective.

There was no enforcement section for AIRFA; thus it did not mandate that Congress alter policies if they were found to be obstructive. The impact of AIRFA has been weak at the federal level and virtually nonexistent at the state level. Pursuant to policy objectives, section 2 directed the federal agencies to consult with “native

traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices”, yet the act did not specify how these leaders were to be identified and nominated (O’Brien 1991: 27). To have achieved improvement in public practice of free exercise of Native American religions Congress needed to provide accurate descriptions and interpretations to inform public planning (Michaelson 1984: 93). Congress took no action to establish means of implementation of the legislation and although Federal agencies were required to review their operations and comply, few changes were made.

An assessment of the effects of AIRFA depends upon one’s interpretation of congressional intent in passing it. If AIRFA was seen as a measure directed internally toward administrative agencies that dealt with Native Americans, it represented a statement directing the executive branch to review its procedures and regulations. This view holds that the act did not mandate substantive changes and was only procedural in nature. The Act could also be seen as providing Native Americans with substantive claims. Some courts have ruled that AIRFA provided tribes with a statutory claim to religious freedom that is in addition to their constitutionally guaranteed First Amendment rights (O’Brien 1991: 31). The most expansive interpretation perceived AIRFA as a statutory recognition of the Federal Government’s trust responsibility to protect and to preserve Indian culture and religion (O’Brien 1991; 31). But just as with other procedural statutes, the agencies were not required to do more than consider the impact

on Native American religion. They were not required to protect Native American culture and religious beliefs or to mitigate damage to them (Price, 1991: 30).

The Smithsonian Institution's actions during the Task Force investigations and Congressional debates affected the subsequent impact of AIRFA. The Smithsonian Institution refused to participate in the AIRFA Federal Agencies Task Force or adopt its recommendations. It claimed that because it was created by Congress it was not one of the "federal departments, agencies, or other instrumentation" subject to section 2 of AIRFA (Echo Hawk 1986: 440). The failure of the Smithsonian to review its policies was profound, not only because of its extensive collection of Native American objects but also because it controls the actions of many other museums under the *Antiquities Act of 1906*.

While the Federal Agencies Task Force heard many complaints about government interference with free exercise, few have been addressed since AIRFA (Michaelson 1984: 98). By the mid 1980s, while some federal agencies had modified their procedures and practices to be more accommodating, very few recommendations for administrative action made in the Task Force Report had been implemented and none of the proposals for legislation had been followed.

The specific mention of "sacred objects" and "sacred sites" in AIRFA made this a preservation law as well. In retrospect, AIRFA represented a critical first step in a

tremendously difficult effort to change federal law and policy to respect and deal responsibly with Indian religious and cultural issues. Effective meaningful amendments to AIRFA could assist in the process of creating a means or mechanism for directing such change in the collective American psyche (Moore 1991: 17). As of 1995, no government agency had developed actual regulations based on AIRFA.

Archaeological Resources Protection Act 1979

The term artifact is very useful as it connotes objects and materials, whether ancient or not, and is broad enough to encompass all man-made objects worthy of protection. The term artifact should be included in any new law passed by Congress to remedy the unenforceability of this act [The Antiquities Act of 1906] (Cooper 1976: 100).

Due to the large increase in looting and problems with the enforcement of the *Antiquities Act* of 1906, the *Archaeological Resources Protection Act* (ARPA) was passed in 1979. This act affirms and enhances the basic preservation and public benefit policy articulated by the *Antiquities Act*. ARPA was seen as a response to the 9th Circuit ruling, a correction of the “constitutional vagueness” implicated in the *Antiquities Act* of 1906. The significant differences between the American *Antiquities Act* of 1906 and the *Archaeological Resources Protection Act* is that the latter cures the constitutional defects of the former, upgrades the criminal and civil sanctions and expressly protects Native interests in cultural resources located on Indian land (and to a lesser degree Federal land).

ARPA’s definition of archaeological resources included a marker of 100 years; archaeological resources are now defined as those 100 years old or older. This was seen

as an administrative convenience to help mitigate the vagueness problems of the *Antiquities Act* of 1906 (Bowman 1989: 185). ARPA also addressed the custody and disposition of collected or excavated material and the confidentiality of sites (McManamon 2000: 44). Only individuals who possess “adequate professional expertise shall be granted permits for excavation and removal of this type of archaeological data.” The disposition rights remained the same and archaeological resources remained US property, to be preserved in locations such as museums or universities. This limits control over more recent burials that may be excavated; but Congress had just passed the *American Indian Religious Freedom Act* that was to protect Native American graves in all of their forms.

The *Archaeological Resources Protection Act* is the most comprehensive heritage preservation act to date. The American Indian Religious Freedom Task Force was partly responsible for many of the sections of this act; it complies with the AIRFA directives by implementing many of the Task Force recommendations. ARPA explicitly states that the directives of AIRFA must be taken into account during the implementation of this act. However, ARPA did continue the policy of archaeological resources being defined as federal property preserved in suitable institutions. Despite Congress’ well-intentioned legislative efforts, there were major problems created by such legislation – classification of human remains as property and preclusion of repatriation by requiring objects/human remains to be permanently preserved in specific institutions – which provided a formidable barrier to resolving Native American concerns. This position held by

Congress was in direct contradiction with common law (Thomas 1991: 759). This became the basis of many future repatriation cases and the shifting of public sentiment. Congressional debates of the mid-1980s focused on this inherent contradiction and it was felt that future legislation should rectify this problem at a national level.

The impact of ARPA was twofold: Native Americans were provided an alternative method other than judicial action to address their concerns and an articulated standard was codified to provide guidance for all future legislative action concerning issues of desecration of Indian remains and grave goods (Thomas 1991: 757). ARPA focuses on preserving the past, so that information will not be lost for scientific study. Although all of these provisions require that Federal Agencies act responsibly, Congress did not address the concerns of Native American communities (Hutt 1992: 137).

Chapter Three

PUBLIC HISTORY EFFECTED BY LEGISLATION

Are the material remains of past cultures a “common good” or “public resource” for the people of the nation state, where they were found? Or do they represent cultural resources that belong to the descended cultures of contemporary Indigenous America? In many ways, the federal cultural preservation statutes treat Indigenous remains and ancestral sties as public resources (Tsosie 1997: 65)

In Chapter Two, I discussed a series of legislative acts that could be described as preservation legislation. Each of these acts either directly pertained to the preservation of American histories or could be applied in the courts to help regulate the preservation of American histories. These preservation acts directly affected the management of public history by the American Federal government. These acts were a combination of policy acts, regulation acts, criminal deterrent acts and management guidelines that helped guide the Federal government into the transition from a passive to active role in the management of the nation’s histories. While developing national public history policies, the preservation of Native American heritage became a central issue of debate. Throughout Chapter Three, I will be addressing how these legislative acts developed the nation’s sense of public history and in turn, how this affected the preservation and management of Native American heritage.

Antiquities Act of 1906

The *Antiquities Act* stated:

That any person who shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situate don lands owned or controlled by the Government of the United States, without having the permission of the Secretary of the Department of the Government having

jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.....

...to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest.....with proper care and management of the objects protected (16 USC 431-433)..

The *Antiquities Act* contained no definition of artifact that would include human remains, yet thousands were excavated for archaeological collections along with whatever was buried with them. Over the previous two decades, Congress had discussed the objects of antiquity that could be found in Native American cemeteries and graves. Although cemeteries and graves were not specifically mentioned, in the discussions held in Congress, it was assumed that they were accessible to be excavated by permit. The *Antiquities Act* did not allow Native Americans to maintain possession of sacred objects or funerary goods that were located on their lands as they were currently under federal jurisdiction. There was no “protection” per se but preservation through collecting.

The *Antiquities Act* of 1906 established the American system of managing archaeological data; all objects collected under an *Antiquities Act* licensed permit would be permanently preserved in collections as federal property. By stating:

That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity,.....to institutions which they may deem properly qualified to conduct such examination, excavation or gatherings.....for the benefit of reputable museums, universities, colleges, or other recognized scientific educational institutions, with a view to increasing the knowledge of such objects, and that the gathering shall be made for permanent preservation in public museums (16 USC 431-433).

the government had divided the public by acknowledging those that would be a part of the system and those that would be excluded. This was done through permit allocation and determining which institutions would be considered “appropriate”. The government had taken on the role of preserving material culture, and the statutory language prohibited any objects or human remains being returned for ownership or reburial by a tribal entity. The *Antiquities Act* was quite clear that the federal government was now in the business of permanent preservation and anthropological research.

The primary goals of the *Antiquities Act* were to preserve sites that contained information about the past through excavation and other types of investigations and to facilitate the acquisition of objects for permanent preservation as a part of the collections contained in museums (Boyd, 1990: 893). The objective was clear. Preservation could entail removal of objects for housing elsewhere. Within the plan for historic preservation, restrictions were placed on excavation permits that limited applicants to credible museums, universities, science and educational institutions. The act specified that the excavations must be done by those “deemed properly qualified” on the behalf of “reputable” establishments (American *Antiquities Act* of 1906, 16 USC 431-433)¹⁶. The Smithsonian Institution was primarily responsible for reviewing, recommending and issuing permits for federal land archaeological excavations; the *Antiquities Act* of 1906 was primarily a permit and regulatory consequences law (King, 1972: 31).

¹⁶ The terms “reputable” and “properly qualified” place the Secretary of the Interior (more importantly the Smithsonian Institution) in charge of defining who has the rights to this knowledge and who has the rights

With this Act, only qualified anthropologists and archaeologists with permits , could legally disinter Native American bodies for storage in museum collections. Although the *Antiquities Act* did not specifically classify Native American skeletal remains, grave goods or funerary objects as objects of antiquity, the Smithsonian Institution was issuing permits to excavate and collect such items for preservation in museum and university collections. It could be argued that the disinterment of skeletons was not explicitly made legal but that these actions were regulated through the permit process. In the past, it was not illegal to conduct archaeological excavations and obtain archaeological data, therefore the *Antiquities Act* of 1906 effectively restricted these efforts and gave authority to accredited persons.

Congress had enacted a law that in practice contradicted pres-existing common law principles with regard to sepulchre laws. In the American system of jurisprudence, formal law may arise through the will and act of legislature (statutory law) or it may arise through a cumulative body of case law resolved through judicial decisions (common law) (Price, 1991: 20). Although American common law is derived from the common law of England, it frequently departs from that base.

The strong foundation for American common law was developed by the end of the nineteenth century. Under American common law one can bring action for the desecration of graves within the definitions of cemeteries and burial yards. In the late 19th

century, under common law no person may own a dead body – persons immediately related to the designated remains are deemed trustees who may have quasi-property rights for the exclusive purpose of interment (Boyd, 1990: 788). There are no explicit property interests in a dead body in the eyes of common law, as it is impossible to own human remains. Graves on private land are in ‘technical possession’, meaning they are held in trust and the landowner has no right to convey the contents (Trope & Echo-Hawk, 1992: 131). Disinterment of the dead is strongly disfavoured under the common law except under the most compelling cases, and then under close judicial supervision or under carefully prescribed permit requirements (Trope & Echo-Hawk, 1992: 124). Although in 1879 the federal court ruled that an Indian was to be considered a “person” within the meaning of federal law, Native Americans were confronted with a discriminatory denial of equal protection under the law. Aboriginal burial sites and unmarked graves were not specifically considered under the definition of “burial yards” and questions of legality were not brought before the court when the US Army Museum began officially collecting skeletal remains.

The preservation movement began with the exclusion of Native Americans from the process. Section 3 of the American *Antiquities Act* of 1906, through the exclusion of tribal representation or rights had effectively defined Native Americans as non-authorities on their culture. Within this procedural explanation of how the *Antiquities Act* would be applied, Native Americans were excluded from the process with regards to land management, land occupation, status as “qualified” for information retrieval, and part of the “collectors and keepers” of important information. This act clearly established the

way in which heritage would be preserved and by whom. Although most of the cultural resources excavated, researched and collected in the US were of Native American origin, there were no mechanisms in place for the management and protection of cultural property and heritage without removal procedures.

Implementation of the National Historic Preservation Act of 1966

In the *National Historic Preservation Act* of 1966, Congress stated the importance of heritage for community strength and direction:

...the spirit and direction of the Nation are founded upon and reflected in its historic heritage...

...the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American People....

Congress clearly agreed that the preservation and management of historical cultural property and heritage was important for future generations. Native Americans were included with respect to the preservation of archaeological material and structures deemed to be “important” or “impressive” under the regulations of NHPA and government policy. Those that attracted the attention of the general public would be considered eligible for protection. This has been clearly demonstrated in the number of Native American sites listed in the National Register and the form/type of places listed. Native American sites visited for recreational purposes have been included in the register and actively preserved, while Native Americans have been left out of much of the process of identification of sites necessary for preservation.

There are two key restrictions that make the NHPA ineffective for the preservation of Native American heritage: community relocation and religious significance. The NHPA clearly states that sacred or spiritual institutions of any religion are not to be protected (Gardner 2002; 16 USC §§ 470). As a federal act, under the Establishment Clause of the Constitution, Congress cannot establish the protection of a specific religious institution. The United States' government has a strong tenet for the separation of church and state. This proved to be problematic for many sites that Native Americans requested to be placed on the register including cemeteries, medicine wheels, and spiritual centres with great historical significance. As many Native American sites, important for numerous reasons, yet embedded with spiritual value, they can be considered ineligible for inclusion. Therefore it is quite difficult for Native Americans to use preservation laws to protect sacred property and sites for the spiritual benefit of their communities. Congressional intent, however, clearly implies that heritage preservation should be a priority for the education and enjoyment of future generations and is therefore a necessity.

The NHPA of 1966 and subsequent amendments have included statutory elements for the recognition of Native Americans within the process as a part of the partnership to be developed with "States, local governments, Indian tribes and private organizations and individuals" (16 U.S.C. 470-1, Section 2). The federal government's role was to help facilitate the expansion and acceleration of historic preservation programs and activities

within all of these political and governmental organizations. This was to be accomplished through “leadership in the preservation of the prehistoric and historic resources” in partnership with the aforementioned groups (16 U.S.C. 470-1, Section 2(2)). By stating that they would be preserving “prehistoric resources”, the federal government had essentially stated that they should be working in partnership with Native American tribes to develop, administer and preserve these resources. A key requirement in NHPA was that the “Corps must ensure that tribal values are taken into account to the extent feasible” (33 C.F.R. 320, 325, 324-Appendix C). Although the Congressional intent was valid, without stronger statutory language then enforceability issues were once again quite apparent.

Despite the 1980 amendments to the *National Historic Preservation Act* of 1966 that required federal agencies to inventory all significant cultural resources on federal land and nominate them to the National Register, federal employees rarely spoke with Native Americans about the preservation of tribal sites¹⁷. Congress attempted to encourage Native American participation in policy development and the decision making process through “partnership with the States, local governments, Indian tribes, and private organizations and individuals” (Public Law 89-665; 80 STAT. 915; 16 U.S.C. 470). This statute expressly authorizes the Secretary to make grants and loans to Native American tribes “for the preservation of their cultural heritage”. The NHPA provides a

¹⁷ The 1992 amendments (executive order 11593) allowed for greater authority to State and local governments and encouraged the tribal governments of American Indians, Alaska Natives or Native Hawaiians to participate in administering the Federal preservation program by assuming functions of state historic preservation offices. The tribal governments were to nominate traditional religious and cultural properties to the National register of Historic Places (US Department of the Interior National Park Service,

pathway to bring traditional tribal cultural knowledge and values into federal decision making concerning sites of tribal religion and cultural importance by opening up the possibility of Native American participation in that decision-making. The NHPA offers protection to places because of their historic significance rather than their religious value (Gardner, 2002: 79). Therefore, to have such places gain National Register protection, tribes have to demonstrate to the federal agency responsible for identifying the historic property the historic significance of a sacred place.

Less than three percent of more than 100,000 sites on the list (as of 1994) are recognized for historic archaeological value reasons. This is due to inherent impediments to the listing of archaeological resources in the actual regulations that govern the National register process and the limited success achieved by archaeologists in their efforts to prove the necessity of the inclusion of such resources without altering the site in a substantial way (O'Bannon, 1994: 15). According to the Advisory Council on Historic Preservation, a site needs to possess "integrity of location, design, setting, materials, workmanship, feeling and association" to be eligible but ascertaining the integrity, condition and boundaries of an archaeological site generally necessitates some degree of testing or excavation to pass National Register Standards; complete excavation makes a site lose integrity and therefore ineligible (O'Bannon, 1994: 16).

NHPA affected the preservation of Native American sacred goods. The Advisory Council on Historic Preservation policy states that human remains and grave goods

should not be disturbed if possible. If they must be disinterred, scientific study may be conducted but only to address “justified research topics’ according to a definite agreed-upon schedule (Bowman, 1989: 163). The policy allows a balancing negotiation process; if scientific value of remains outweighs any objections that the descendants have to scientific study, the remains may be retained in perpetuity for study. But they may also be reburied without any study being initiated.

Public History and the American Indian Religious Freedom Act

The 1970, the UNESCO (United Nations Economic Social and Cultural Organization) Convention on the Means of Prohibiting and Preventing Illicit Import and Transfer of Ownership of Cultural Property was a watershed moment for both domestic and international concerns to establish a standard outlining the fundamental elements of cultural property rights between peoples (including repatriation, national guidelines and protection standards) (Nason 2000b: 238). For the US federal government, the international discourse on cultural property rights was perhaps somewhat unexpected. Americans had legislated very few preservation-oriented laws designed to protect interests that could be considered American national cultural property and Congress did not ratify the convention until 1983.

The 1970s brought immediate demand at the national level from Native American communities for attention to issues of religious freedom and ownership of cultural

property: access, control over and ownership of sacred sites and objects (Nason 2000b: 239). The development of cultural resource management in the United States coincided with an increase in activism on the part of Native Americans for self-determination and concern for the protection of archaeological sites, repatriation of sacred objects and reinterment of burial goods (Nichols, Klesert & Anyou 1999: 28).

In 1972, the standard policy was to issue permits only to institutions employing professional archaeologists and having sufficient staff and facilities to ensure that recovered material was cared for and made available to both scholars and the public. Standard policy was not to grant permission for archaeological research on Native American reservations without the consent of the governing body of the reservation (King 1972: 31). However, this was difficult to monitor and conviction was even more difficult, because hard evidence was required to achieve a guilty verdict.

In 1974, Elden Johnson raised the question of the role of Native Americans in the management of cultural property:

Scattered protests against archaeological research by American Indian groups have occurred during the past several years in the US and Canada. These protests have focused on both field excavations of American Indian sites and on the disposition of archaeological data and they suggest, sometimes very strongly, that a few, some or even many American Indians feel that we, as professional archaeologists have a responsibility that we have not yet acknowledged (1974: 129).

Native Americans were becoming increasingly concerned with the excavation of both recent and ancient burials. It was felt that Native American heritage had been

appropriated by the Federal government and its institutions of public history. Native Americans were no longer interested in being the subject of “scientific study”. Many of these “scientific studies” that had been conducted had been designed without Native American consultation and the results had been published without any distribution to Native American communities. Some archaeologists felt that since the excavations were perfectly legal, with the proper permits following state or federal statutes, the protests were not warranted (Johnson, 1974: 129). The system of public history was defined not only by institutional policies and the actions of their employees but was now increasingly relying on the law to deflect the weight of these protests.

Native Americans were becoming more politically active and museums were beginning to realize that they were to be held accountable for the exclusion of Native Americans in the management of cultural property. Learning from the civil rights movement of the 1960s and the 1970s, Native American tribes believed that it would be a mistake to leave the protection of basic human rights to individual organizations. Laws would be necessary. Organizations such as the American Indians Against Desecration (AIAD), American Indian Science and Engineering Society, Association of American Indian Affairs, National Congress of American Indians and the Native American Rights Fund (NARF) worked together to lobby for and help create legislation to protect burial sites and to repatriate skeletal remains and sacred items from museums, universities, and private collectors to tribes. Throughout the 1970s and 1980s, AIAD challenged the right to own collections of human remains as well as the curatorial policies of government

agencies, museums and universities. These actions catapulted the repatriation movement into the consciousness of sympathetic politicians, newspaper editors and members of the general public. Increased knowledge of the issues subsequently spawned unprecedented levels of non-Indian support for repatriation and calls for institutional accountability. As the United States became a champion of international human and group self-determination rights in the latter half of this century, Congress and the White House could no longer ignore criticism from the world community regarding the degree of protest mounted by Native American communities, whose participation in the confrontation politics of 1960s and 1970s had captured global media attention (Harjo 1992: 324). AIRFA was a part of their announcement to the world that things were being done to improve the situation.

The primary directive of AIRFA is the protection and entrenchment of Native American religious freedom. However, many Native American communities held spiritual beliefs that intrinsically linked religion with many (or all) aspects of their secular life. Public history institutions were being held accountable for the desecration of graves, collecting of sacred artifacts and possession of items necessary for cultural and religious continuation. AIRFA can be considered a preservation law as it specifically addresses public history institutions, the preservation of Native American heritage and access to objects collected under *Antiquities Act* permits. This is explicitly stated in the following:

Whereas the religious practices of the American Indian are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian

identity and value systems....

...whereas such laws and policies often deny American Indian access to sacred sites required in their religion, including cemeteries....

...it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of American Indians, Eskimos, Aleuts, and Native Hawaiians, but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonials and traditional rights.... (42 USC 1996, PL 95-341)

The phrase “use and possession of sacred objects” was of particular interest to federal institutions containing Native American ethnology collections. It is important to note that in AIRFA, heritage is intrinsically linked to identity and throughout the document cultural property, sacred sites and objects of cultural patrimony are intrinsically linked to religion and heritage. Although it was vague as to the extent that AIRFA would affect existing collections of cultural property, its intent could be interpreted as relevant to all future legislation, policies and procedures considering the ownership and control of Native American heritage. AIRFA was a policy act directed to all federal departments. It was mandated that all departments would change their policies and practices to reflect the “spirit” of AIRFA.

When the AIRFA Task Force Report was submitted to Congress, there was a concern as to how this would affect the management of historical, cultural and material property. The Task Force Report offered several recommendations to the public history field on how it should change its policies to reflect AIRFA: institutions should refuse to accept objects of religious importance to Native Americans collected in violation of

existing federal law; tribal organizations/governments should be notified when such items were offered or known to be available; institutions that managed cultural property should return all religious objects currently in their collection in which no third party asserted ownership; employees should consult with traditional religious leaders concerning the appropriate exhibition and conservation techniques of sacred objects in the institution's possession (Thomas 1991: 756). The most important section of the AIRFA report – with regard to the system of public history – included statements concerning the provenance of Native American objects in many museums. Although records showed that some sacred objects were sold by their original Native owner/s, the report outlined that in many instances, the chain of title does not lead to the original owners. There were instances of property leaving original ownership during military confrontations and as a result of less violent pressures exerted by federally sponsored missionaries and Indian agents (Trope & Echo Hawk 1992: 29). The AIRFA report submitted a statement to Congress essentially stating that a refusal to return stolen or improperly acquired sacred material to Native American communities impacts their first amendment rights and basic American property rights.

The Task Force also recommended legislation expanding the protection of Native American religious objects not already protected by Federal Law with special reference to those removed specifically from Indian lands. Within the same document, it was concluded that Indian religious concerns and needs identified in AIRFA could be met in part through existing laws. Most agencies believed that they were fulfilling the mandates

of AIRFA because they had archaeological resource regulations. Although AIRFA does not mandate the return of sacred objects to tribes or groups, the phrases “access to” and “use and possession of sacred objects” have supported arguments by Native American groups seeking the repatriation of their traditional cultural material.

AIRFA, The First Amendment and the Constitution

Larry Simms, a representative from the Justice Department, was apprehensive about enacting the *American Indian Religious Freedom Act*. He relayed two points of concern from the Justice Department: that the bill would require Federal Agencies to protect Native religions at the expense of society’s larger interest and that the act would conflict with existing federal laws thereby violating the Equal Protection and Establishment Clauses (O’Brien 1991: 29). The Equal Protection Clause of the Fourteenth amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction equal protection of the law. In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. Generally, the question of whether the equal protection clause has been violated arises when a state grants a particular class of individuals the right to engage in an activity yet denies other individuals the same right. The fourteenth amendment is not by its terms applicable to the federal government. Actions by the federal government, however, that classify individuals in a discriminatory manner will, under similar circumstances, violate the due process guarantees of the Fifth amendment.

The United States Supreme Court has interpreted the Non- Establishment Clause (also known as the Establishment Clause) of the First Amendment as prohibiting official sponsorship of, support of, or active involvement in, religious activity. The Non- Establishment Clause promotes religious freedom in the United States by limiting the influence of federal, state, and local governments on religious thought and practice, whether the influence originates in the legislative, executive, or judicial branch of government. This clause recognizes the right of an individual or group to be free from laws and governmental decisions that aid one religion, aid all religions, or prefer one religion to another. It can be argued that AIRFA would value Native American freedom of religious rights over those of another citizen. Simms proposed that the act include the following statement, “nothing in this resolution shall be construed as affecting any provision of State or Federal Law” (O’Brien 1991: 29). Senator Abourezk responded by stating that the act intended to modify existing federal regulations and laws; this impeded the acceptance of the proposed change in the Senate. The Senate unanimously approved the passage of AIRFA without further discussion. Approval in the House of Representatives was more difficult. Representative Udall, in an apparent effort to secure the bill’s passage, characterized the act as “the sense of Congress...merely a statement of policy” with “no teeth in it”. The Bill passed the House, without any major revisions by a majority of 337 to 81 (O’Brien 1991: 29).

Native Americans face a number of barriers in obtaining recognition and protection of their religious rights under AIRFA and the First Amendment. The courts have been strict in upholding the Establishment Clause of the First Amendment which

prohibits the “establishment of religion” while Congress has enacted laws and the federal government has implemented policy that has abridged the “free exercise” clause of the same amendment. Primary obstacles include the government’s limited and inconsistent interpretation and application of AIRFA: the court’s application of more stringent requirements in Native American First Amendment cases and the judicial systems’ ignorance of Native American religions.

The courts have held that road construction and accompanying intrusion into areas sacred to several tribes did not unlawfully burden their free exercise rights (*Northwest Indian Protective Association vs. Peterson*, 552 F. Supp. 951, 1982) (Michealson, 1985: 68). The court held that the expansion and development of a government owned ski area did not violate AIRFA or First Amendment rights of the Navajo and Hopi tribes, who, according to the court, were not denied access to the area or impaired in their ability to gather sacred objects or conduct ceremonies (*Wilson vs. Block* 708 F. 2d 735, 741, 1983) (Michaelson, 1985: 68). Native American concerns were pressed in the courts when land-altering activities, or destroying important sacred sites or holy places would cause irrevocable damage to tribal religions. Because of the primary importance of natural geography to many Native American religions, cultural impacts arising from state action should give pause for serious consideration under AIRFA. Yet some of the most significant court losses for tribal plaintiffs have come precisely in connection with access to sacred sites. The most frequently cited case is *Lyng vs. Northwest Indian Cemetery Protective Association* (485 US 439, 452, 1988). It was

articulated that the free exercise of religion clause does not bar federal government from allowing timber harvesting in or constructing a road through a National Forest Area used by Native American communities for religious purposes (Gardner, 2002: 71). It was established that the Free Exercise Clause only requires the government to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out.

Religious and cultural differences became sharply focused in cases dealing with religious claims involving land and sacred geography, and sacred geography is the fundamental difference between American Indian and Western religion. Western religions build structures to designate holy sites, while Native American religions hold the land itself as holy. Native American litigants "Free Exercise" claims often fail precisely as a result of the unique nature of Native American beliefs and the inability of the courts to protect those beliefs adequately within the Constitutional framework. It was soon proven, that AIRFA could not do so either.

The courts have not generally accorded any special role to the government's trust relationship with Native American tribes. Representative Morris Udall assured the House of Representatives that AIRFA had no practical effect thus later, when this resolution was cited by Native Americans in court, judges and justices quoted Udall and turned them aside (Riding In 2000: 174). The suppression of religious practices has been pervasive to such a degree that AIRFA has proven to be insufficient to grant the freedom that many

Native Americans feel is necessary for the complete affirmation of their respective religious identities (Michaelson, 1984).

In the end, AIRFA was of limited value in addressing Native American needs but it did open up discussions on repatriation; it gave tribal leaders greater bargaining power in their discussions with museums about the return of sacred objects. It opened the floor to debates on what “use and possession” really meant. Museums began to fear that AIRFA gave tribes federal authority to reclaim sacred material in museums.

Archaeological Resource Protection Regulations

When ARPA was passed in 1979, it became clear that certain elements of public history would not be changed with respect to AIRFA guidelines. Congress began section 2 of ARPA by stating that, “archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation’s heritage” (16 U.S.C. 470aa-470mm, SEC.2a1). Congress continues by stating one of the purposes of ARPA:

...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, and to foster increased co-operation and exchange of information between governmental authorities, the professional archaeological community and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act (16 U.S.C. 470aa-470mm, SEC 2b).

There are no stated purposes reflecting the need to preserve Native American heritage for tribal communities and governments. The preservation is for the scientific and aesthetic enjoyment of the American people. ARPA’s goal was to promote the exchange of

information that was obtained from these excavations throughout the academic community. There was no mention of exchange of information between these stakeholders and Native American communities, neither for the verification or augmentation of current information nor for the interest of these communities.

ARPA was not a general application law; its definitions were more rigidly defined and the regulations were comprehensive. The sections ARPA contained were key: Purpose, Definitions, Excavation and Removal, Custody of Resources, Prohibited Acts and Criminal Penalties, Civil Penalties, Regulations, Intergovernmental Coordination and Reporting methods. These sections construct archaeology regulations and define its role in the system of public history. In the “Findings and Purpose” section, Congress outlines ARPA’s role:

1. Archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation’s heritage;
2. These resources are increasingly endangered because of their commercial attractiveness;
3. Existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and
4. There is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions; .
 - b) The purpose of this Act is to secure, for the present and future benefit of American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this act.

Although AIRFA had just been enacted, Native Americans were still left out of the

consultation and information exchange process. ARPA protects irreplaceable archaeological resources on federal and native land from individual and commercial interests and fosters the professional gathering of information for future benefits.

This Act is an extension of previous preservation philosophies. Excavations were to be done by professionals, Native American heritage should be protected and preserved by federal government institutions and objects should be obtained. However, with ARPA criminal sanctions and forfeiture were now widely used as protection tools. ARPA provided for felony sanctions with up to five years in prison for a second offense; when this is added to a fine of up to \$250 000 and the prospect of seizure of the tools and vehicles used to commit the offense, ARPA would seem to provide ample deterrence. In actuality, it has not seen widespread use. It was only subsequent to November 1988, when the jurisdictional limit for a felony was reduced from \$5000 to \$1500 in damages, that ARPA became a widely used law. ARPA prosecutions increased from a few a year during 1979-1988, to some significant action being taken under the law each month thereafter (Hutt 1992: 141). Amendments to ARPA in 1988 improved its law enforcement provisions and focused efforts on public education and resource inventory programmes. It became a more effective resource management tool as well as on geared to preservation. The thriving black market in Native American cultural property had forced Congress to strengthen the deterrent principles of ARPA (Gulliford 2000: 45).

In order to aid archaeological permits, a long list of potential artifacts was made.

ARPA did not uphold the common law protection of sepulchres when it allowed for the desecration of Native American burials and for human remains to be defined as archaeological resources. The intent of ARPA was to “fill in the gaps” left by previous archaeological preservation legislation. At the time that ARPA was enacted, it was positioned within the context of previous preservation acts. Therefore, it was not prepared with the intention of protecting constitutional rights with respect to Native American burial rights. Although Native American burial rights had become a larger issue for many communities, they had not been specifically addressed under a human rights framework or within the constitutional framework.

The Fourteenth Amendment of the American Constitution prohibits any state (applies to federal agencies as well) from denying any person within their jurisdiction equal protection under the law. Law and policies that treat Native American human remains as archaeological resources, property or historic property conflict with the “equal protection” clause when compared to laws that ordinarily protect the dead of other races (Trope & Echo-Hawk, 1992: 179). The analysis and preservation of Native American skeletal remains were still considered to be in the public interest. ARPA was heavily criticized for characterizing Native American human remains and cultural items as “archaeological resources” and the fact that ARPA placed the ownership of these items in the federal land-managing agency having authority over the land (Hutt 1992: 136). This had profound effects on the management of public history. The inclusion of “human skeletal materials” in ARPA made the collection of human remains official; this in turn

allowed for direct lobbying action against the legislation using legal values of equal protection under the law and common law principles.

NAGPRA was the first federal law to directly address the protection against desecration of Indian remains and funeral goods – and actively sought testimony and input from Native American religious leaders, tribal representatives, activist organizations and Native American lawyers. However, early federal laws concerned with the protection of archaeological resources provided a foundation upon which much of the current federal law protecting Indian remains and grave goods is based. ARPA recognizes Native American interests by requiring consent by Native American landowners before a permit is issued. This legislation provides Native Americans with a more active role in determining who may receive permits and what objects may be excavated and removed. Native tribes also have the authority to determine the ultimate disposition of objects uncovered on tribal land and the Act gives the courts the power to order the return of any archaeological resources obtained in violation of ARPA (Bowman 1989: 185). ARPA also required that tribes be given notice if any permit will result in harm to a religious or cultural site but the Secretary of the Interior may regulate the manner in which archaeological resources removed from such lands shall be disposed (Echo Hawk 1988: 72).

Because of the Department of the Interior's (DOI) influence, responsibility and extended expertise in ARPA permits, many federal agencies were led to believe that the

DOI policy¹⁸ represented the law regarding possession of funerary and grave goods. The policy recognized that the proper treatment of human remains often involves “especially sensitive issues in which scientific, cultural and religious values must be considered and reconciled.(Bowman 1989: 159)” . The policy further provided that preservation in situ is generally preferable to removal; if removal is necessary, the policy calls for consultation with “groups of individuals interested in the disposition of disturbed human remains (Bowman 1989: 159)”. Although there is a consultation process and interested individuals must be heard, the head of the bureau is not required to follow any recommendations obtained through the process¹⁹.

Towards the end of an era...

Many of the components of public history that Native Americans were objecting to throughout the 1970s represented a conflict among different cultural precepts. These conflicts are often positioned as debate between those that represent scientific investigation and those that hold Native American spiritual beliefs. Science can be viewed as a culture as much as any other organized way of thinking (Goldstein & Kintigh 2000: 181). Throughout the 1970s, 1980s and within pre-NAGPRA discussions, conflicts over the management and preservation of Native American heritage, reburial rights and repatriation resulted in Native Americans on one side with the museum and archaeology community on the other.

¹⁸ DOI policy was written in 1982 and developed by the Department Consulting Archaeologist at the National Park Service.

¹⁹ The policy required that the bureau make a “reasonable effort” to identify and locate any individuals who can demonstrate direct kinship or any federally recognized tribe (or ethnic group) known to have an affinity

Towards the end of 1980s, the primary means for protecting archaeological resources was to leave them undisturbed whenever possible. When resources could not be preserved in place, they were scientifically excavated, removed and placed within museums. In the late 1980s, professors of law and political activists (Walter Echo-Hawk, NARF, AIAD, NCAI) surfaced as leaders in the repatriation movement. Unlike the universal reburial advocates (forceful lobbyists in the beginning), moderates (professors of law and politics) tended to see compromise as the most expedient means available to acquire the desired legislation (Riding In, 2000: 111). A balance was negotiated between the scientific rights of archaeologists and museum personnel and the need for Native Americans to gain religious burial and repatriation rights under the law. This quickly transformed the repatriation movement, and moderates gained reform relatively swiftly.

The successful lobbying of the Pawnee Tribe in the 1980s led to burial sites being protected in Kansas (HB 2144), and human remains and associated grave offerings returned to the tribes of origin in Nebraska (LB 340) under new state legislation (Fine-Dare, 1997: 25). The passage of these state laws contributed to congressional hearings that eventually led to the enactment of Public Law 101-185 – *The National Museum of the American Indian Act* of 1989.

with the remains. The land manager can decide if reburial is appropriate, if the determination is made that they are not of archaeological interest and that the scientific value is minimal (Bownman 1989: 160).

On May 11, 1989, The *National Museum of the American Indian Act* provided for the transfer to the Smithsonian Institution of title to the assets of the Museum of the American Indian, Heye Foundation. The act established the National Museum of The American Indian with a Board of Trustees (subject to the general policies of the Smithsonian Board of Regents) that has the sole authority to lend, exchange, sell or otherwise dispose of any part of the Museum's collection and specify criteria for the use of the collection. Congress contributed to the repatriation policy through the enactment of the NMAIA; it contains a process through which Native Americans may obtain the return of human remains and funerary objects. Under this legislation, the Smithsonian is required to complete an inventory of human remains, funerary objects and associated grave goods in its possession or under its control. The purpose of the inventory is primarily to identify origin. It was established that a process for the inventory, identification and subsequent repatriation was necessary for full implementation of the law. This process also set a precedent for further legislative action while substantiating the necessity of legislating both the action and process of repatriation.

The Smithsonian Institution, under the direction of Secretary Robert McCormick Adams, reversed its previous position against repatriating human remains and artifacts. Forced by legislative decree to change its policies, the Smithsonian re-evaluated all aspects of the curation of Native American artifacts. The testimonies during the hearings recognized the significance of certain sacred objects and how the repatriation process should be in effect more inclusive. Although "sacred artifacts" that were not funerary

goods were not covered by the act, it was a foundation upon which many new proposals were built. Sacred artifacts were a strong part of the Congressional dialogue in 1986 and 1987 and as the panel report suggested, equally important.

This law signaled a turning point. The government had formally recognized that Indian remains were human beings and not archaeological resources. Susan Harjo described the law as helping to bring about “the orderly transition from inhumane treatment to the humanization of Indian people in law, in museum policy and in the scientific professions” (Echo-Hawk, Roger C. & Walter R. Echo-Hawk, 1994: 50)

Because the NMAIA applies only to the Smithsonian Institution, a coalition was formed of representatives from the National Congress of the American Indian (NCAI), Native American Rights Fund (NARF), the Assembly for American Indian Affairs, and the National American Indian Council “to lobby for the passage of Federal legislation to repatriate Indian dead for proper reburial and to protect against this activity in the future” (Fine-Dare, 1997: 26). Secretary Adams, when testifying before the US Senate stated “Native Americans today are increasingly asserting their right for their heritage to be reclaimed and protected as a national responsibility”. This law opened up new dialogues concerning the maintenance and further creation of just practices, attributes and laws vis-à-vis Aboriginal human remains, cultural property and knowledge. Congress’ philosophy of preservation and public history management made a drastic turn in 1989 with the enactment of the *National Museum of the American Indian Act*. This position was restated with the enactment of the *Native American Grave Protection and Repatriation Act*

of 1990. The Congressional testimonies, texts, proposed bills and Task Force Reports provide an archive of the changing discourse on archaeological regulation, preservation and the ownership of Native American cultural property.

Chapter Four

NATIVE AMERICAN HERITAGE PRESERVATION AND IDENTITY

POLITICS

We have been, we are, and we will continue to be, and you must respect us as we define ourselves. Eric Pettifor

Those involved in discourses of identity politics and the repatriation movement have strongly suggested that a strong sense of identity and community is intrinsically linked to the ownership, control and management of cultural property and heritage matters. The lack of access to sacred material has affected the continuation of specific systems of cultural expression, community learning and expression of identity in Native American communities (Coombe, 2000: 84).

Issues of inclusion and exclusion can be addressed on several levels. For the purpose of this thesis, identity refers to the ways in which Native Americans are defined for the purposes of heritage preservation and management laws. Different ways of viewing objects and basic concepts of cultural property rights render the situation quite complex. Since many Native American communities assert communal property rights that can include the whole community or specific familial or religious groups, some property and wealth can be considered inalienable from the tribe. NAGPRA has rectified some of the conflicts over right of possession through their inclusion of items of cultural property as a repatriatable object. This chapter is a foundation for the discussion of NAGPRA's definition of cultural property in Chapter 5.

Legal Identity

In order to understand how Native Americans have been represented in preservation laws, one must first address how Native Americans have been presented in the federal statutes. 'Native American' as a category of identification has been constituted in complex ways over the last 500 years. In many ways, the legal texts have defined many aspects of Native American identity. Native Americans often find that their culture is valued while their peoples and political struggles continue to be ignored. Native American peoples have often made it quite clear that issues of culture and the proper place of texts cannot be separated from their spirituality, political determination and title to traditional lands.

The term "tribe" is commonly used in two senses; an ethnographic sense and a legal-political sense (Cohen, 1982: 3). For ethnographic purposes, the term tribe depends upon a variety of precise considerations concerning the socio-political organization of its members²⁰. The term tribe traditionally refers to speakers of a common language living within a specific area. The term 'tribe', however, has no universal legal definition. Historically some definitions of tribe rely critically on language, as most "tribal" names are in fact names of languages. There is no single

²⁰ According to Kottak (2000), a tribe "is a form of sociopolitical organization usually based on horticulture or pastoralism where socioeconomic stratification and centralized rule are absent in tribes, and there is no means of enforcing political decisions." William A. Haviland (1991) defines a tribe as a group of bands occupying a specific region, which speak a common language, share a common culture, and are integrated by some unifying factor. Bodley (1994) defines a tribe as a small scale society with no central political authority.

federal statute defining an Indian tribe for all purposes, although the American constitution and many federal statutes and regulations make use of the term. Most recently it has been necessary for the identification of eligible recipients of federal programs of support, protection and assistance. Congress and the Executive have often differed from ethnographic principles in order to determine tribes with which the US would carry on political relations. During this process, Congress created “confederate” tribes consisting of several ethnographic tribes for federal, political, legal and administrative purposes (Cohen, 1982: 5).²¹ When negotiating with Native Americans, the federal government is often negotiating with members or descendents of political entities not with persons of a particular “race”.

Federal, State and tribal definitions can differ greatly. Definitions vary widely from the Department of the Interior, The Indian Health Services and the Department of Labour. The Department of the Interior will generally use the affiliation with a recognized tribe as a starting point (Chaudhuri, 1985: 21). Sometimes affiliation is determined by blood quantum or tribal registration rolls, and either of these can vary with the definition at use; some of these tribal registration rolls have been frozen since land allotment. States and tribes have great latitude on defining who is an Indian, but the legal definition is complexly contextual. Congress has often deferred to tribal determinations of membership but it has also departed from this standard by imposing additional regulations such as blood quantum or by dispensing with tribal membership or relations.

²¹ Some confederacies existed prior to European arrival (i.e. Creek and Cherokee) but others were created

It is therefore necessary to determine the specific purpose for which Indian identity is relevant (Cohen, 1982: 20). Congress has the power to define membership differently when necessary for administrative purposes, and has done so to determine eligibility for social programs, jurisdiction in criminal matters, preference in government hiring and administration of tribal property.

The regulations for the acknowledgement of Indian identity at the Branch of Acknowledgment and Research (BAR) within the Bureau of Indian Affairs are very conservative. These regulations assume that the group has substantially retained its aboriginal social, genetic and cultural character over 300-400 years (Paredes, 1997b: 38). Contemporary social structures and cultural characteristics of groups recognized by BAR are very different from those of their ancestors at the time of first sustained contact with non-Indian governments. BAR regulations insist on some documentable Indian ancestry for group membership. In order for a tribe to achieve status, the federal government must recognize a “government-to-government” relationship between the tribe and the United States (Paredes, 1996: 38). These regulations require the members of a group to have a sense of community of people with recognized boundaries who internally regulate their own affairs and deal with outsiders as a corporate entity.

In addition to classifications by communities – such as reservation or off-reservation – there are additional complexities in defining various kinds of individual

by the federal government.

Native Americans (Chaudhuri, 1985: 20). Self-identification is still a matter of great pride; identity of individuals is traced through descent, lineage, clan and acceptance in specific tribes. This is a contrast to Anglo-American preoccupation with formal blood relationship definitions. Some tribes require that their members have at least one-quarter Native American blood and others consider one-eighth Native American blood (Gulliford, 2000: 178). As Devon A. Mihesuah states, “because of assimilation, acculturation and inter-marriage with non-Indians, American Indians have a variety of responses to describe themselves: full-blood, traditional, mixed-blood, cross-blood, half-breed, progressive, enrolled, unenrolled, re-Indianized, multi-heritage, bicultural, post-Indian”, or they use their tribal names.

What may be more important than “cultural” differences are the structural inequalities and differing degrees of sovereignty that Native Americans experience within the Federal system. Disparities between the ways that cultural identities are constituted in the face of historical oppression and biologically defined “blood quantum” definitions of “Indianness” means that Native Americans often have to justify primordial claims to land, while expressing traditional cultural values as defined by mainstream American society (Fine-Dare, 1997: 39). Native Americans discuss the issue of cultural appropriation in a manner that links issues of cultural representations with a history of political powerlessness, a history of having Indian identity defined and determined by forces committed to its eradication. These issues are pushed to the forefront of repatriation debates as claims are often substantiated through proven evidence of cultural

affiliation. This situation becomes more complex when one is part of a confederated tribe that does not maintain jurisdiction over traditional land areas or is not economically stable enough to devote tribal resources to cultural property issues.

Pan-Indian Identity and the Preservation of “Native American” Heritage

Native Americans reside at the intersection of two identities; hypodescent (“visible” Indianness) and self-identification (Nagel, 1995: 950). Official membership in tribes is both internally and externally regulated. The tribe, state and federal government can recognize whether or not an individual is an “enrolled” member. An individual has a certain level of choice about his/her ethnicity but the above considerations limit his/her recognition.

Native American is a purely social construction since the “Native American” population has many linguistic, cultural, and religious groups with their own legal constructs, political councils, police system, economy, and land base. Therefore, when we speak of an American Indian race or ethnicity we are, of necessity, referring to a category of individuals from various tribal backgrounds.

Along with identity based on kin or clan lineage, tribe, reservation, language and religion, is a Pan-Indian “Indian” identity that is often reserved for use when interacting with non-Indians (Nagel, 1995: 953). Walker (1972) views Pan-Indian identity as a

response to acculturation and as essentially a vehicle by which Native Americans can interact with the larger mainstream culture and a mechanism by which distinct Native American peoples can interact with one another. Lurie (1971) outlines several Pan-Indian cultural elements that distinguishes Pan-Indian identity from values held by Euro-American traditions: decision by consensus, oratory, institutionalized sharing with disapproval of greed and selfishness, mistrust of overt expressions of ambition and tolerance of personal idiosyncrasies. Whatever the variations are among distinct Native American cultural groups, they often consider themselves more like one another than they are to Euro-Americans. This perhaps can be explained as a reaction to Euro-American pressure on tribal traditions and identities. Pan-Indian identity provides a sense of community offering a source of distinction vis-à-vis the Euro-American majority of the general public. There was a marked emergence of Pan-Indian identification with the civil rights movement in the 1960s and the increase in activism during the 1970s.

The contemporary Pan-Indian movement is quite complex, involving a broad variety of ethnic groups in a dynamic state. It is not necessarily a solidified social movement as there are various Pan-Indian issues that do not garner the support of the majority of the members of Indian communities (Price, 1991: 8). There has been pressure on Pan-Indian activists to establish a Pan-Indian identity to avoid progressive fragmentation of the Indian social reform movement. Attempts to bring together a diverse population under a single identity can be expected to inspire the invention of “traditions” with which the constituent groups can identify; often they are new or

modified religious practices that are likely to be ambiguous (Price, 1991: 11). It seems likely that Pan-Indian issues and resolutions can be in direct conflict with traditional beliefs of their constituents considering the diversity of the Native American population.

The Pan-Indian movement promotes a unified sense of Indian identity that values traditional histories. It stresses a Pan-Indian worldview that is culturally unique and distinctive from the scientific and museological community. Anthropologist Marcus Price (1991) believes that a Pan-Indian defense is somewhat problematic and contradictory. By espousing a distinct worldview, sponsors of the Pan-Indian movement assert that the basic assumptions of a people about the world in which they live and their place in it is distinctive. But, can one expect that a population exposed to approximately 300 years of enculturation would have a worldview completely different in most respects? He believes that the differences “appear to lie with conflict in priorities given to competing values generally shared, not to a conflict in general perceptions of reality (1991: 15).” The recent success in promoting and achieving remedial legislation at the state and national level shows that there are indeed values shared between Native American groups and the general American public regarding the respectful disposition of all human remains, including those of prehistoric Indians.

Pan-Indian identity has drawn together many diverse Native American communities to demand repatriation of human remains and grave goods. Newly developed Pan-Indian definitions of sacredness have emerged, reinforced through law in

the context of reburial and repatriation of prehistoric Indian remains and grave goods. Apparently concerted efforts, as in the case of the reburial issue, may actually be the result of an approximately simultaneous but essentially individual expression of concerns by Indian tribes regarding the disposition of the remains of individuals with whom affiliation is claimed. However, the individual concerns when taken together form an element of Pan-Indian identity as effectively as if they were part of a designed national political movement.

Cultural Affiliation & Cultural Property

James Clifford describes the art-culture system as that which “emerged from European imperialism as a means to categorize art and culture goods –categories that continue to inform our laws of property in a post-colonial age” (Clifford, 1988: 189). European cultural standards are mirrored in our legal categories for the preservation and protection of cultural property. Laws of cultural property reflect and secure the logic of the European Art/culture system that Clifford outlines. Laws of cultural property protect the material objects of culture (Coombe, 2000: 82).

Cultural property laws enable collectivities to physically control objects that can be shown to embody the essential identity of a “culture”. Harvard law professor Martha Minnow has suggested that most legal treatments of identity questions fail to acknowledge that the cultural, gender, racial and ethnic identities of a person are not

simply intrinsic to that person, but emerge from relationships between people in negotiations and interaction with others:

...the relative power enjoyed by some people compared with others is partly manifested through the ability to name oneself and others and to influence the process of negotiations over questions of identity

...need to explore the pattern of power relationships within which a question of identity is framed...who picks an identity and who is consigned to it? (In Coombe, 2000: 86).

Until the 1970s, Native American communities have often been named by government officials and anthropologists with their identities defined by others. These are issues that Native Americans foreground when they oppose practices of cultural appropriation. Members of the general public and government officials often required that Aboriginal peoples should represent a fully coherent position that expressed an authentic identity formed from an uncomplicated past that bespeaks a pristine cultural tradition before their voice would be recognized as Native (Coombe 2000: 89). Tribes have, in many cases, had to consider carefully the creation of their own new cultural policies that reflect contemporary community beliefs and attitudes about important traditional issues. The notion – often held by collectors of Aboriginal art -- that only pristine objects untouched by the forces of modernization bespeak cultural identities has often been discounted as a form of imperialist nostalgia. Private collectors and auction houses still elevate the notion of “authentic” and pristine traditional Native American objects.

Theories on Cultural Patrimony

According to James Clifford (1988), collecting in Euro-American cultures “has long been a strategy for the development of a possessive self, culture and authenticity” as individual identity formation under capitalism features “the individual surrounded by accumulated property and goods (in Hinsley, 2000: 48). In a cross-cultural reference, some cultural objects are seen as so integrally related to cultural identity that they should be deemed inalienable as essential to the preservation of group identity and self-esteem (Coombe, 2000: 84). Within cultural nationalism, a group’s survival, its identity, or objective over time depends upon the secure possession of culture embodied in objects of property. The capacity of peoples to live in history and to interpret creatively and to expressively engage historical circumstances through their cultural traditions, is now recognized as the very life and being of a culture (Coombe, 2000: 85).

Most Native American communities recognize the existence of objects that cannot be owned individually, but that can be held in collective guardianship. An individual in possession of such property cannot be the owner since ownership lies with the community, not a particular individual (Bell, 1996: 319). Anthropologist Annette B. Weiner discusses the concept of artifacts of cultural patrimony in her paper “Inalienable Wealth” (1985). Her purpose in raising the issue of inalienability was to show significant differences between certain kinds of exchange systems and the necessity to recognize and analyze the meaning that certain valued objects of exchange carry. Although she often applied the concept of inalienable wealth to theories of wealth and ranking, her overall

discussion shed light on notions of inalienable property. Communal guardianship becomes relevant in the Congressional discourse of property rights, rights of possession and definitions of cultural patrimony.

Weiner stated that property and material objects could be inalienable from a group within a group and therefore inalienable from the community as a whole (1985: 210). Inalienable possessions are instilled with qualities that are expressions of the value an object has when it is retained by its owners and inherited within the same family or descent group. The primary value of inalienability is expressed through the power these objects have to define who one is in a historical sense. The object acts as a vehicle for bringing the past into the present so that ancestral histories, social titles or mythological events become an intimate part of a person's present identity (Weiner, 1985: 211). To lose this claim to the past is to lose part of one's identity in the present and their role within the community. Bill Tall Bull, an elder and religious leader of the Northern Cheyenne Tribe, substantiates Weiner's theories on inalienable wealth in his testimony to the Senate arguing for the creation of the Native American Museum Claims Commission Act: "[we] need certain artifacts as they are necessary for roles to be met, laws to be enforced and membership to be complete" (100th Cong 1st Sess. H.R On S.187.). Rituals in which the sacred articles are used are exacting and no substitutes should be used because much of the meaning and spiritual value would be lost as a consequence.

The loss of an object diminishes one's ancestral identity as a social or political

force in the present. A loss is not merely something in the social or economic sense, but it may indicate a perceived weakness in a group's identity and therefore in its power to sustain itself for future generations (Weiner, 1985: 212).

Leading to NAGPRA

Although the definitions (Indian, tribe) used in NAGPRA legislation may be reductionist (some Native Americans have stipulated that some of the categories, labels and procedures do not reflect the diversity of experience among the different tribes within the United States), it is important to realize that the use of the repatriation concept implies the recognition of cultural plurality with the US nation-state. Cultural property repatriations have been a part of the international discourse for over 30 years but domestic repatriation within a nation state is a relatively new concept. The term repatriation is often considered to involve nation-to-nation negotiations.

Indian tribes and Native Alaskans are broadly defined by NAGPRA (US Code vol. 25 sec 3001 (7)) as "any tribe, band, nation or other organized group or community of Indians, including any Alaskan Native village which is recognized as eligible for the special programs and services provided by the US to Indians because of their status as Indians". This is based upon US Code Vol. 24, sec 3001 (9) that defines Native Americans as "of, or relating to, a tribe, people, culture that is Indigenous to the US (Carillo 1998: 158). Tribal identity issues are implicated in NAGPRA. The discovery of

skeletal remains or cultural items requires Native Americans to prove cultural affiliation to the object through various means: standard methods of status identification; Bureau of Indian Affairs recognition; recognized title boundaries; Aboriginal title boundaries; definition of terms of Indigenous (Carrillo, 1998: 158).

The key point is not the mechanics of repatriation per se but the far more important and broader issue of who ultimately has the right to control a group's heritage. The key feature of NAGPRA is the assumption that museums cannot and should not arbitrarily decide what objects might or might not fall into which repatriation categories, because under NAGPRA this authority is vested solely with tribal governments and their representatives. Although museums and federal agencies produce the inventories and summaries on which repatriation claims are based, they are required to include all objects and materials that have been potentially identified as Native American (some objects are not identified and should be included in the spirit of the law). Inventories are compiled for human remains and associated funerary objects and summaries are to be provided of unassociated funerary objects, sacred objects and objects of cultural patrimony. Native American community representatives have the right to decide what is affiliated with their community and whether objects fall within the sacred and cultural patrimony categories.

NAGPRA requires tribes to select representatives who will act on the behalf of the tribal government and community in repatriation negotiations. This has its own consequences; most notably, the need for tribal governments to consider who and what is

being represented (Nason 2000b: 304). This is particularly acute in tribal communities that are reservations with confederated tribes created by Congress. These confederate communities are often a combination of many formerly autonomous tribes, distinct from one another in language, history, tradition and various aspects of culture. There are also many circumstances where the opposite occurs; separate reservation communities of the same original tribal community claim the same items. This makes the repatriation issue very complex.

For NAGPRA, repatriation is contingent upon a finding of cultural affiliation which is defined as a “relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group”. For many Native American groups (for example those with roots in Texas and those in confederated tribes relocated to Oklahoma), both forced removal from their land and forced assimilation could make it difficult to meet the cultural affiliation standard.

Chapter Five

NAGPRA - THE PROCESS

This chapter will analyze the process by which NAGPRA was enacted. This is not an easy narrative to unfold but I will attempt to clarify the dialogue that took place in Congress and how that dialogue evolved to allow for the enactment of NAGPRA. I have placed NAGPRA within a historical legislative context in order to show the environment in which previous preservation laws were passed and in turn the context within which NAGPRA was passed. This is neither a narrative on “bones” nor a discourse on the ownership of human remains but is an exploration of the preservation of Native American heritage under federal laws. An analysis of skeletal remains, human rights and scientific ownership will be highlighted as a part of the process of the passage of NAGPRA; I will not be discussing the moral or ethical implications of federally funded institutions owning skeletal remains.

A national dialogue was precipitated by the archaeological and Native American ideologies being verbalized in a public forum. This resulted in profound changes in how Congress perceived the future management of Native American cultural property. Hearings held by the House of Representatives Interior and Insular Affairs Committee and the Senate Select Committee on Indian Affairs²² have created an archive of sorts.

²² The Committee was comprised of Daniel Inouye (Chairman), Daniel J. Evans (Vice-Chairman), John Melcher (Montana), Denice Deloncine (Arizona), Quentin N. Burdick (N. Dakota), Thomas A. Daschle (S. Dakota), Frank H. Murkowski (Alaska), John McCain (Arizona), Alan R. Pack (Staff Director), Patricia M. Zell (Chief Counsel) and Joe Menton Jr. (Minority Counsel).

They constitute a collection of discussions and dialogues that can inform us on Congressional intent. This is not a discussion of repatriation, but is in a sense a discussion of how the repatriation dialogue informed Congress on the necessity for the passage of a national standard to resolve these issues. Congressional lobbying for human and civil rights caused a positive change in federal attitudes towards Native American rights (Marsh 1992: 83).

NAGPRA

The Bureau of Indian Affairs (BIA) was established in 1832 as a part of the Department of War. In 1849, primary responsibility for Indian affairs was transferred to the newly created Department of the Interior (Paredes, 1997: 35). Today, the BIA carries the bulk of federal responsibility to Indians; it is responsible for protecting tribal lands and administers a variety of programs authorized by Congress specifically for Native American tribes and Native Alaskan communities. The National Park Service (NPS) – also an agency of the Department of the Interior - however, is responsible for the protection and administration of federal lands designated as National Parks, Monuments etc. The NPS responsibilities cover all the resources of these areas, including cultural resources (buildings, documents, historically significant artifacts and archaeological collections). Although authority rests with the Secretary of the Interior, NPS is the federal agency responsible for the administration and implementation of NAGPRA.

NAGPRA is the strongest current federal legislation recognizing the

interests of contemporary Native American communities in prehistoric remains and artifacts (Price, 1991: 32). NAGPRA is twofold: it applies to human remains and certain categories of objects discovered after its enactment and it addresses collections of Native American material held by federal agencies²³ and museums receiving federal support²⁴. NAGPRA protects Native American burial sites and controls the removal of human remains, funerary objects, sacred objects and items of cultural patrimony on Federal and tribal lands. NAGPRA also describes the rights of Native American lineal descendants and Indian tribes to existing collections with respect to human remains, funerary objects, sacred objects and objects of cultural patrimony with which they can demonstrate lineal descent or cultural affiliation. As a part of this recognition, NAGPRA affirms the right of such individuals or groups to decide disposition or take possession of such items. The purpose is to require federal agencies and museums receiving federal funds to inventory holdings of such remains and objects and work with Native American tribes to reach agreement on the repatriation or other disposition of these remains and objects (McManamon & Nordby, 1992: 21). Under NAGPRA a museum is relieved of liability for breach of fiduciary duty or other breaches of state law if it has complied with the standards of proof in the legislation and has repatriated in good faith (Bell, 1996: 316).

²³ Federal agencies that manage land, that are responsible for archaeological collections from federal land or manage collections that are generated by their activities must comply with NAGPRA.

²⁴ NAGPRA does not apply to material found on private or state property and exempts the Smithsonian Institution (as if is covered by the NMAI of 1989). The NAGPRA committee specified that it did not wish to change the agreements reached under NMAI with respect to Native American human remains and funerary objects but it did intend the Smithsonian Institution to fulfill NAGPRA obligations with regards to

NAGPRA covers several categories of objects for both future “discovery” and disposition rights. Excavations are permitted with a permit. If the proposed site is located on federal land then consultation with the relevant Native American group(s) is mandatory and if it is located on tribal land then the consent of the tribal council is necessary (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237). Native American cultural items and remains excavated or discovered on federal or tribal lands are placed under the ownership or control of Native American groups. NAGPRA regulations have listed an order of priority for ownership in these matters. Human remains and grave goods can be primarily claimed by lineal descendants and if they can not be established then ownership rests with the tribe who controls the land (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237). Property rights regarding sacred objects, objects of cultural patrimony or funerary objects rest with the affiliated tribe and if this is uncertain then the group with the closest cultural affiliation retains property rights (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237). Failing proof of the aforementioned, the Native American group occupying the area has disposition rights (those recognized by the ICC as having aboriginally occupied the area).

For objects in pre-existing collections, funerary objects, sacred objects and objects of cultural patrimony are the core categories. Funerary objects are divided into two categories; associated and unassociated. Associated funerary objects are those that are

sacred objects and objects of cultural patrimony.

reasonably believed to have been placed with human remains as a component of a death rite or ceremony (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237). They retain their association with the human remains with which they were found. These include objects that were “exclusively made for burial purposes or to contain human remains” but may have not been found with human remains per se.

Unassociated funerary objects are defined as artifacts that were a part of a death rite or ceremony of culture and are reasonably believed to have been placed with individual human remains but for which human remains are not in the possession or control of the museum or federal agency. A preponderance of evidence must show that these objects were “related to specific individuals or families or to known human remains” or “as having been removed from a specific burial site of an individual that is culturally affiliated with a particular Indian tribe” (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237).

The required inventory, created with the use of readily available information, identified all of the aforementioned items with a description of the method of acquisition, geographical and cultural affiliation attached. All items had to be listed, even those that were not culturally identifiable. The inventories had to be distributed to all appropriate Native American tribes. If it was clear which tribe was related to the remains or objects and return was requested, these items were to be returned expeditiously.

Instead of an object-by-object inventory, a summary for sacred objects, items of

cultural patrimony and funerary objects was also to be distributed. A summary includes a description similar to catalogue reports to provide relevant information for tribal representatives to determine if they wish these items to be repatriated. A description of the collection, the number of objects in it and how and when the items were received should all be indicated. All relevant documents and records had to be made available to the tribal groups. Once the summaries have been distributed, the two sides should meet to discuss future disposition of items in question.

The Secretary of the Interior, through NPS, is responsible for:

- a) Establishing and maintaining the seven person Review Committee to monitor and review the inventory, identification and repatriation activities.
- b) Providing administrative and staff support for the Review Committee along with rules and regulations for its operations.
- c) Promulgating regulations for implementing NAGPRA (McManamon & Nordby, 1992: 277)

The Secretary of the Interior is also authorized to develop and administer grants to assist tribes and museums in repatriation activities, review requests for time extensions on the inventories and assess civil penalties.

Legislative Foundation

Although 1986 and 1987 introduced legislation that laid the foundation for the enactment of new federal legislation, 1989 was an impressive year of symposia and dialogues that involved participants from museum, academic and Native American communities. Through an analysis of the Congressional dialogues and legislative

process, it became apparent that 1989 was the year that communications between communities reached a critical level.

In 1990, the focus shifted to allow for a discussion on what was learned during the process of open dialogue and public debate. Recommendations on policy and legislation were introduced and further delay in federal legislation was discouraged by Congress. They had received testimony from numerous key players, listened to the Native American Elders and religious leaders, had accumulated feedback from tribal communities and Pan-Indian collectives and had facilitated a year-long dialogue between participants. Several bills were introduced throughout 1990, five overall, in both the Senate and House of Representatives. Much of 1990 was spent deliberating the proposed definitions, the parameters of the law and Congressional intent. By November of 1990, NAGPRA had been enacted and several of the key issues had been resolved as a national standard under Federal law.

The chart below presents key legislative actions, symposiums and conferences that either informed or directed Congress in their final decision.

DATE	ACTION	IMPORTANCE
April 1986	Plenary Session of the Society of American Archaeologists	<ul style="list-style-type: none"> ▪ First time Native Americans and archaeologists appeared in a public forum together to discuss ownership of human remains ▪ Tensions over cultural affiliation and reburial rights halted discussions
1986	S411 American Museum Claims Commission Act – Senator John Melcher	<ul style="list-style-type: none"> ▪ Authorized to resolve Native American repatriation claims involving museum held human remains, ceremonial objects & grave goods necessary for the proper observance of Native American religions

		<ul style="list-style-type: none"> ▪ Facilitate the repatriation of items not acquired with proper conduct ▪ Strong opposition due to constitutional concern over the 5th Amendment Establishment Clause and payment required for transfer of property
1987	S187 Native American Cultural Preservation Act – Senator John Melcher	<ul style="list-style-type: none"> ▪ This act was forwarded along with S411 to the Senate Select Committee on Indian Affairs and required Congress to address these issues ▪ To Establish a process for repatriation of Native American human remains, funerary objects , items of cultural patrimony and sacred goods ▪ Discussion was halted as it was decided that further discussion was required
July 28, 1988	Continuation of Hearings on S411 and S187	<ul style="list-style-type: none"> ▪ Hearings continued on the establishment of a bill to provide a legislative process for the repatriation of Native American human remains and sacred artifacts ▪ Congress was working towards establishing a Native American Claims Commission as an amendment to S187 ▪ Several witness organizations suggested representatives should meet to devise non-legislative solutions to the repatriation dilemma ▪ Hearings halted to allow for a Panel Dialogue (below) to take place
1989	Panel for Dialogue on Museum and Native American Relations	<ul style="list-style-type: none"> ▪ Established as a directive from Congress to provide recommendations to Congress on repatriation issues ▪ Museum personnel, archaeologists, anthropologists, tribal and Native American religious leaders gathered for a year-long dialogue
1989	National Museum of the American Indian Act (PL101-185)	<ul style="list-style-type: none"> ▪ Enacted before the findings from the Panel Report could be fully articulated in a public forum ▪ Specific to the Smithsonian Institution and required repatriation of human remains and grave goods after an inventory process had been completed
January, 1990	Report of the Dialogue on Museums and Native American Relations	<ul style="list-style-type: none"> ▪ Presented to Congress ▪ Officially discussed on May 14
May 1990	<ol style="list-style-type: none"> 1. S1980 Native American Repatriation of Cultural Patrimony Act 2. 1021 Native American Grave & Burial Protection Act 	<ul style="list-style-type: none"> ▪ Introduced to the Hearing of the Senate Select Committee on Indian Affairs by Senator Inouye and Senator McCain respectively ▪ S1980 was modeled after NMAI but extended the requirements to all federal agencies and institutions and included sacred and ceremonial artifacts
July 17, 1990	HR1381 Native American Burial Site Preservation Act.	<ul style="list-style-type: none"> ▪ HR1381 Prohibited excavations and removal of any content from any Native American burial site without a state permit; any item in violation

	Introduced to the House of Representatives Hearing of the Interior and Insular Affairs Committee	would become US property <ul style="list-style-type: none"> ▪ Positioned as a furtherance of AIRFA policy ▪ Repetitive of earlier legislation and did not offer a solution to pressing repatriation claims
July 17, 1990	HR1646 Native American Grave & Burial Protection Act Introduced to the House of Representatives Hearing of the Interior and Insular Affairs Committee	<ul style="list-style-type: none"> ▪ Main component required all Federal agencies to list and identify all human remains and sacred ceremonial objects in their possession or control ▪ Tribes would be notified within 3 years and would then have to make a decision concerning repatriation within a year. ▪ Non compliance equaled a withdrawal of Federal Funding ▪ Protected graves and burial grounds ▪ Developed effective mechanisms to provide for repatriation and clarify ownership interests in Native American cultural property located on tribal and federal land ▪ Options other than repatriation were not considered
July 17, 1990	HR5237 Native American Graves Protection and Repatriation Act Introduced to the House of Representatives Hearing of the Interior and Insular Affairs Committee	<ul style="list-style-type: none"> ▪ A counter-measure to S1980 that was introduced to the Senate Select Committee hearings. ▪ Combined with S1980 to become NAGPRA

National Policy

Determining the necessity of a national policy was a substantial obstacle to the enactment of federal repatriation and burial ground protection legislation. It was discussed throughout the Senate Select Committee on Indian Affairs hearings, the Panel Dialogue and within the House of Representatives. To be effective, national public policy for the protection and preservation of cultural resources must have three components: a strong statement of national interest, political support of its implementation, and co-operation by agencies, departments or ministries at the national level acting with other levels of government and the public (McManamon, 2000: 6). National laws and policies are to be statements of the public interest in the protection and

preservation of the nation's cultural resources. Unless equal consideration or priority is given to cultural resource protection and preservation as a result of public policy, the policy is not effective. Laws, regulations and procedures strive to balance principles of resource development, land use and scientific endeavours with the preservation of cultural resources reflecting the diverse histories of the nations (McManamon, 2000: 7). Effective management of cultural resources requires decisions about how the resources can be best protected, preserved, utilized and interpreted.

The debate on whether federal legislation or a binding national policy was necessary at all was flourishing in 1988. The need for federal legislation was raised by the National Congress of American Indians (NCAI); in recent years states had begun to enact protection laws for unmarked cemeteries and for repatriation of human remains, it was felt that federal law was still lacking in protection of these areas (NCAI Statement submitted to John Melcher, 100th Cong. 1st Sess., S187, 1987). John Fowler, Acting Executive Director-Advisory Council on Historic Preservation²⁵, emphasized that although they often found a solution of compromise, the absence of any clear national policy, any statement in any Federal legislation or preservation laws, hindered the ability of the Council to reach successful solutions on a regular basis (Advisory Council on Historic Preservation Statement, Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess, S187, 1987).

²⁵ The Advisory Council on Historic Preservation is an organization in the Federal Government established

Those who participated in the National Dialogue on Museum and Native American Relations indicated that there was a strong need for federal legislation setting standards for repatriation and would be judicially enforceable. Even though the Secretary of the Interior had recently announced that the Department of the Interior would change its policy to allow repatriation, such a change could not legally be accomplished until federal laws were amended to clarify and confirm the legal capacity concerning the disposition rights of skeletal remains and funerary goods (Jerry L. Rogers, NPS Witness Testimony, Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S. 1980 & S. 1021, 1990). Otherwise, the policy change would either be inadequate at the outset because of the limitations placed on it by existing law or be subject to legal challenge. It was felt that this legal standard had to be an over-riding federal standard and it needed to be under tribal control (Paul Bender, Witness Testimonial, Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S. 1980 & S. 1021, 1990). Mr. Sullivan, Director of the National Dialogue on Museum and Native American Relations, clarified why the report recommended federal legislation. There were no mechanisms to enable Native Americans to identify which museums might be holding remains or objects with which they were culturally affiliated. The US government was the political entity with which tribal organizations have their primary relationship, and present Federal laws had not proven adequate to protect burial sites or discourage illicit trafficking (Second Panel, Hearing before the Committee on Interior and Insular Affairs, 101st Cong. 2nd Sess., 1990). Human rights violations of this nature, where fundamental First, Fifth and

by the National Historic Preservation Act of 1966.

Fourteenth Amendment rights are at stake had never been left for protection on a purely local basis by policies of non-federal entities.

Although Congress had clearly decided it was necessary and the Panel Report had recommended federal action, the AAM felt it was not the only option; deaccession policies could be used to repatriate objects determined through a community-based set of negotiations. At this point, the Society for American Archaeologists also disagreed with the need for federal legislation (Mark Leone, SAA Statement submitted to Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S. 1980 & S. 1021, 1990). The SAA felt that discussions and solutions could be more fruitfully held at the local level and would prefer that there not be any federal legislation enacted. By early 1990, it had become clear to the national museum community that repatriation legislation in some form would be passed by Congress despite their intense lobbying in opposition (Nason, 2000: 297). At a special session of the Western Museums Conference meeting in October 1990, Dan Monroe, special AAM representative on repatriation, noted that ultimately Congress considered the museum community perspective on repatriation to be “retrogressive and lacking in moral leadership” (Nason, 2000: 297). Congress was effectively stating that the scientific & fiduciary responsibility arguments had not been substantiated sufficiently to counter the opposing equal protection of the law arguments.

Preceding NAGPRA’s enactment, there was considerable debate amongst professional groups with proprietary interest concerning whether federal legislation

should be extended to all organizations that received federal money. Some archaeologists and anthropologists felt it would pre-empt private efforts to develop policies governing disposition of remains and artifacts. Congress eventually disagreed, stating that there should be common standards and mechanisms in place (Marsh, 1992: 99).

The Issues

The hearings witnessed an extensive discussion on current museum activities and policies concerning the repatriation of Native American skeletal remains and sacred objects and an overview of the anthropological and archaeological research use of such artifacts. NAGPRA can be viewed as a culmination of three years of dialogue between the key stakeholders as witnesses, offering testimonial to both the Senate and the House of Representatives and through public conferences and forums. The Panel had “discovered” that during case-by-case negotiations many repatriation requests were met with resistance from the museum community (Hearing before the Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S. 1980 & S. 1021, 1990). This was compounded by the notion that tribal entities did not have basic knowledge of where their cultural property resided and had met many constraints when trying to obtain this information. Several key issues were considered obstacles to the passage of a new piece of federal legislation. It is important to review the process of how these issues were resolved to become key components and definitions in NAGPRA.

Human Remains, Human Rights and Scientific Analysis

A Plenary Session of the Society for American Archaeologists (SAA) was held in April 1986. Conflicts arose over the disposition rights of human remains that could not be claimed by lineal descendents and once definitions of cultural affiliation were articulated it became clear that this would be a substantial obstacle to a consensus. A requirement to prove cultural affiliation with a preponderance of evidence was considered an unreasonable request by Native Americans as they believed it placed a considerable burden upon them. At the end of the session, archaeologists were encouraged to advocate for the perpetual preservation of archaeological data relating to the origin of skeletal remains. Within a month, the SAA Executive Committee issued a statement concerning the treatment of human remains and general repatriation issues:

Mortuary evidence is an integral part of the archaeological record of past cultures and behaviour that it informs directly upon social structure and organization and, less directly, upon aspects of religion and ideology. Human remains as an integral part of the mortuary record, provide unique information about demography, diet, disease and genetic relationship among human groups....research depends upon responsible scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical technology (Also in SAA Statement submitted to Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess. S187, 1987).

Data collection that would create a permanent record for future research became clearly articulated as fundamental to archaeology as a science. At this point there were attempts to explain the value of scientific analysis on skeletal remains to the public and more specifically to those that could affect legislation. There was an encompassing fear that new legislation would offer a 'carte blanche' for the repatriation of human remains

regardless of strong scientific cultural affiliation or age of the skeletal remains.

Archaeologists were being asked to reconsider the methodology of their discipline and their professional right to participate in scientific endeavours. For members of the scientific museological community, human remains yield data that can advance our understanding of human variation and evolution thus benefiting all of humanity (Boyd & Haas, 1992: 423). Their views on the value of scientific exploration and the preservation of a permanent record highlighted the way in which scientists and archaeologists seemed to feel as strongly about this right as Native American activists did of religious freedom. Freedom of inquiry and the right to scientific investigation were principles of Western scientific ideology that archaeologists felt quite strongly about. Preservation of a permanent record would allow future scientist to re-examine the archaeological data as technology improved and methodology progressed. Methodology that had been supported and regulated by federal law since 1906 was now in question and this addressed scientific, academic and professional rights and freedoms.

Cultural affiliation had been a contentious issue since the discussion on repatriating human remains began. This entailed an establishment of the relationship between a present day Indian tribe and a historic or prehistoric Indian tribe or Native Hawaiian group. This relationship would be reasonably established through an offer of the evidence that shows a continuity of group identity from the earlier to present day group. It was to be established by a preponderance of evidence and it was not intended that scientific certainty be shown (Inouye 1990). Any Native American human remains

or funerary objects excavated or discovered on federal or tribal land after the enactment of these proposed acts, gave right of possession to the lineal descendants. Where none existed, the tribe, family or organization on whose land the items were found or those with closest affiliation would have right of possession.

In November 1987, during a continuation of the Select Committee hearing, Smithsonian Institution's Secretary Robert McCormick Adams stated that of the 34 000 skeletal specimens in their collection, approximately 42.5% of them were of Native Americans and 11.9% represented Eskimo, Aleut and Koniag populations (Inouye, 1992: 2). This led to strong tribal reaction to both the number of Native American human remains and the percentage breakdown.

The National Congress of American Indians (NCAI) agreed with the principles of S. 187 and its stated goals of protecting Native American rights to the remains of their ancestors and sacred material. The hearing had taken place after its Annual Convention and the NCAI was in a position to represent a broad spectrum of communities to address tribal concerns (NCAI Statement submitted to Hon. John Melcher, Hearing before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. S187, 1987). The notion of this proposed act being more than a protection or preservation act was addressed in NCAI's prepared statement; the discourse was now being negotiated under a human rights framework. Both NCAI and NARF testified that the fundamental right of ownership of Indian people to the graves of their ancestors was a human right which

should be protected by the First Amendment and AIRFA (NCAI Statement submitted to Hon. John Melcher, NARF Statement submitted to the Hearing before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. S187, 1987). It was recommended that the federal government enter “into [a] cultural property agreement[s] with Indian nations similar to those it is party to at this time with others in the world community of nations” (NCAI Statement submitted to Hon. John Melcher, Hearing before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. S187, 1987).

In 1989, the Panel Dialogue participants were still split on what to do about human remains that were not culturally identifiable. Throughout the year-long dialogue, this issue remained unresolved. A majority felt that a respect for Native human rights required that a process be developed for disposition of these remains in cooperation with and with the permission of Native Americans (Hearing before the Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S1980 & S1021, 1990). This process should take legitimate scientific interests into account only when Native consent had been secured. Other panel members felt that scientific and educational values should prevail where cultural affiliation with a present-day Native group did not exist. The report seemed to lack a clear process for how these connections would be made and who would have the authority to determine them.

The discussion on repatriation rights under a legal framework led to a discourse on disposition rights as not merely the right to preservation and ownership but control

over what could be “done” with human remains and sacred goods in the long term. This highly impacted the archaeologists’ goals of perpetual preservation for scientific analysis as reburial rights gained momentum. Bill S.1980 was unclear as to both the quantity and quality of research necessary to “reasonably trace” and determine “cultural affiliation”. Although it expressly prohibited “the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information for such remains and objects”, the Act was otherwise silent as to the level of research and investigation that museums must perform for inventory and summary compilation (Boyd & Haus, 1992: 429). Scientific rights to human remains were being strongly positioned against the human rights of Native Americans to have absolute disposition rights over human remains.

The Native American Rights Fund (NARF) submitted a report addressing guidelines for assessing competing legal interest in Native cultural resources; while they applauded the underlying purpose of S1980 and its “effort to work an equitable compromise between diverse, competing views, [they] believe the legislation ignores a fundamental legal precept which cannot be overlooked.” (“Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interest in Native Cultural Resources” submitted to a hearing Before the Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S1980 & S1021, 1990). Where cultural affiliation could be reasonably demonstrated, a tribe or tribal group had property rights in human remains and associated grave goods superior in the law to the asserted property rights of either the

federal government or public or private institutions; the legislation as written perpetuated the mistaken presumption of federal ownership of these materials. NARF supported the concept of federal protection of grave sites and human skeletal remains but believed that the authority of the US to preserve and protect such resources stemmed from the federal trust responsibility owed to Native Americans and not by virtue of any property rights which the US had acquired (NARF Statement submitted to NCAI Statement, Hearing before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess. S187, 1987). These legal principles under a human rights framework proved to be strong arguments in the public forum, affecting the cultural affiliation discourse when notions of human rights were applied to legal property rights.

As mentioned, the opposition of human rights and science allowed a discourse to flourish based upon firmly established legal precepts. To a degree, this led to a compromise being established. In 1990, Dr. Keith Kintigh, the Senate Select Committee Hearing representative from SAA, acknowledged that SAA had adjusted their views since they issued their statement in 1986. SAA recognized that where a modern group had a reasonably clear cultural affiliation with human remains or objects, that group's desire to control its own material heritage should take precedence over the broader scientific and public interests. SAA was also in full agreement with the proposed procedural elements; inventories and notifications would provide Native American groups with the information necessary to prepare repatriation requests and make available to them a tremendous amount of information about their heritage (Keith Kintigh, SAA

Statement submitted to Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S1980 & S1021, 1990).

The 'cultural affiliation' debate lingered, and definitions and implementation acts were still highly contested in this area. The H.R. 5237 definition for cultural affiliation was used in the draft bill of S. 1980, a definition which during the Senate Select Committee hearings in May had been heavily criticized by tribal witnesses as too problematic, restrictive and essentially unworkable. Dr. Keith Kintigh, the SAA representative (both for this hearing and the Senate hearing), reiterated similar issues with H.R. 5237 as he did when testifying on S. 1980; cultural affiliation definitions are problematic (Dr. Keith Kintigh, SAA Statement submitted to Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S1980 & S1021, 1990; Second Panel, Hearing before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess., 1990). Dr. Kintigh stated that when the standards for cultural affiliation had been met then control over heritage should be transferred, however, the cultural affiliation definition still failed to ensure control over whether human remains and objects were transferred to the appropriate group. Museums and federal institutions had legitimate fears concerning the transference of property to an incorrect claimant as a clear set of procedures to address competing claims had not been fully articulated. As both the previous owners and a public institution, museums would be held accountable if it became known that an incorrect transfer had taken place. Since disposition rights would be transferred to tribal entities or lineal descendents, they would have control over what would eventually be

done with the remains in question. Since there were no restrictions placed upon their actions, if a competing claim arose after disposition rights had been transferred then serious conflicts could arise.

The years of discussions and negotiations on cultural affiliation definitions were resolved to the extent that Congress felt it could enact NAGPRA. If the human remains and associated funerary goods are from an archaeological context on Indian lands, the tribe that owns the land is considered the owner and as such determines the treatment and disposition (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237). The key issue for repatriation is the establishment of lineal descent or cultural affiliation between modern Indians and human remains or other cultural items located in museum, federal collections or as yet undiscovered on federal or tribal land. Cultural affiliation is the cornerstone for successful repatriation requests (McManamon & Nordby: 1992: 223). NAGPRA defines cultural affiliation as “a relationship of shared identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group” (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237). In regards to the section entitled “Proof of Cultural Affiliation”, standards for establishing that the claimants are “lineal descendants” for repatriation purposes were established in a compromise reached between representatives from the American Association for Museums and the Native American Rights Fund (Marsh 1992: 98). If the remains or objects are discovered off reservation and on federally owned lands, the

tribe with the “closest cultural affiliation” is the recognized claimant. Here the law shifts from individuals as claimants (lineal descendents) to groups (affiliated cultures).

NAGPRA establishes that once lineal descent or cultural affiliation had been established and in some cases right of possession also has been demonstrated, lineal descendents or culturally affiliated Indian tribes often make the final determination about the disposition of cultural items.

Fiduciary Obligation

When the SAA stated its concerns over fiduciary responsibility to the general public, it was highlighting a common concern reiterated by museums throughout the Congressional hearings (SAA & AAM Statements submitted to Senate Select Committee on Indian Affairs – 100th Cong. 2nd Sess., S. 1987, 1988). The SAA believed that a museum which would “indiscriminately” deaccession, transfer disposition rights or repatriate human remains and objects undermined its “own scientific mission and seriously damages its credibility as an institution”. The SAA feared that passing a federal repatriation act would damage a museum’s reputation as a center for research and depository of artifacts. The museum and archaeology associations were articulating their roles as fiduciaries using federal property laws to argue their ‘legal title’ to these categories of objects. In contrast, Native American lawyers and organizations were using federal property laws to address whether museums had ever gained legal title when objects were acquired. Neither of these positions changed from 1986 to 1990.

This led to a discussion of fundamental property rights that was eventually articulated as “right of possession” in 1990. Right of possession is based upon the general property law principle that “an individual may only acquire the title to property that is held by the transferor” (Trope & Echo-Hawk, 1992: 144). Possession can only be obtained with the voluntary consent of an individual or group that has the authority of alienation. This became a legal code to discuss whether certain objects held in trust by federal institutions were indeed owned by these institutions if property rights had not been legally, ethically or morally transferred properly in the past. Therefore, repatriation requests were instead asking for cultural property to be returned to rightful legal owners and fiduciary trust would not be affected. Essentially, if an institution did not have a legal right to requested objects they would in a sense not be breaking fiduciary obligations but would be acting as good stewards with high ethical standards (Mr. Inouye submitted Report 101-473 to the 101st Cong., 2nd Sess. 1990).

According to the preliminary definitions, burden of proof remained with the museum or agency; if it could not prove right of possession then items would be repatriated unless scientific study or competing claims exceptions applied (Trope & Echo-Hawk 1992: 145). Legal title was assured if museums could prove by a “preponderance of the evidence” that it had legal title to the remains or objects. Many museums had found the “right of possession” definitions and procedures to be contentious due to their understanding of state legal provisions and fiduciary responsibilities (Tom Livesay, AAM, Witness Testimonial, Hearing before the Senate

Select Committee on Indian Affairs, 101st Cong. 2nd Sess., S1980 & S1021, 1990) .

However, the proposed bills specifically provided that they do not alter or supersede existing laws of property and ownership. Most private and state-sponsored museums are bound by state laws to maintain fiduciary responsibility over their collections²⁶.

Therefore, the museum must demonstrate that it does not have a right of possession under the prevailing laws of a particular state. This may be extremely difficult where there is no clear written documentation describing the circumstances under which the museum obtained the collection. The museum has the burden of proof to offer evidence of acquisition pursuant to consent by an authorized party. AAM testified that unless and until these issues were decided in specific situations, public museums that performed deaccession activities did so at the risk of violating their duties as fiduciaries (AAM Statement, submitted to Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess., S187, 1987; AAM Statement submitted to Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess. S1980 & S1021, 1990). There would have been substantial consequences to these actions. Donors often expected that a museum would preserve and display their gifts to the museum for the benefit of the general public and those that bequeath substantial collections to a museum often requested the same consideration.

The 'right of possession' is a legally sound codification of American property law and law of disposition of human remains (Hensly & Johnson, 1990: 153; Echo-Hawk,

²⁶ If a museum has title to a particular objects under state law, it is bound to maintain that object in trust for

1989: 68). With respect to fiduciary obligation, if a museum or federal institution could establish that they indeed have “right of possession” then legally and ethically they should maintain the current standard of preservation. However, AAM was quite concerned with the “extremely difficult” burden on museums to demonstrate “right of possession” (Dr Thompson, Second Panel, Hearing Before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess, July 17, 1990). AAM interpreted the “burden of proof” clause to require museums to:

Provide affirmative proof of voluntary consent and perform exhaustive research and investigations as to whether the party or parties to the transaction had authority to transfer title to an object (Dr Thompson, Second Panel, Hearing Before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess, July 17, 1990).

The Congressional intent was to provide reasonable proof based on a preponderance of existing evidence not “exhaustive research and investigations”. “Burden of proof” did not need to be proven beyond a reasonable doubt. AAM further stipulated that under existing law, the existence of both of these issues was generally presumed and it was for the party challenging the possession to make these proofs. AAM felt that the burden of proof should be shifted to Native American claimants, and that the statute was unclear on whether museums must prove superior legal title over particular Native American groups, or whether the museum must go further and prove legal title as to all other potential claims and persons regardless of whether they would be participating in the process. AAM statements implied that human remains and funerary objects should be separated from religious and cultural objects in such a manner that they

would be dealt with quite differently, as they felt that religious and cultural objects are more likely to be viewed as items in which private parties may hold property interests. In such cases, AAM implied that the federal government should value the Fifth amendment and compensate the taking of private property for public use.

NAGPRA resolved the debate by clearly defining what “right of possession” meant and what it would mean to establish it. NAGPRA “right of possession” refers to the authority by which a museum or agency came into possession of a particular object, funerary good or human remain. Once these circumstances were determined, ‘right of possession’ was a legal framework in which to assess the museum’s title. This section of the act hoped to set a clear standard for determining whether an object was originally acquired with the voluntary consent of an individual or an Indian tribe that had the authority to alienate the object. This is a legal standard for viewing an object that will operate in a manner consistent with common property laws.

NAGPRA’s language provides that nothing is intended to affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects or objects of cultural patrimony. It was intended to meet the concerns of the Justice Department about the possibility of the Fifth Amendment taking of private property. The Committee did not feel that the act would give rise to this possibility as the language used was not jurisdictional. This meant that ‘right of possession’ definitions and regulations did not detract from existing laws to determine ownership. ‘Right of

possession' was meant to supplement any existing law applicable by a competent court (Federal, State or tribal).

Repatriation

A discussion of basic repatriation issues is necessary to provide a backdrop for the transition from ARPA to NAGPRA. Disagreements over the statutory language of ARPA and its intent led to intense lobbying for action. There were fundamental objections to the statutory language of previous acts and the legislated expression of Federal ownership of such important pieces of cultural property. Many of these objects, while certainly historic, also have substantial meaning and utility in the contemporary lives of Native Americans. Advocacy for active use obviously conflicts with the preservationists' view because it involves consumption and leads to the deterioration and perhaps eventual destruction of the objects. This set the stage for the mid 1980s, where many conflicts arose in a public arena.

The classification of human remains and sacred artifacts changed from being defined as archaeological resources owned by the federal government to Native American heritage in which control and disposition standards should be set by tribal organizations. The Congressional hearings committees provided a forum for the stakeholders to express their concerns and communicate their position on repatriation. Many debates centered on issues of preservation, protection, ownership or knowledge and essential control over a community's heritage.

The issue of a federally legislated repatriation process was a main obstacle to the passage of new federal legislation. As mentioned previously, although they strongly believed in a formal repatriation process, initially the museum and scientific community did not accept a federally mandated repatriation law. However, the repatriation process was a key aspect to NAGPRA's widespread acceptance by Native American organizations (NARF, AIAD, NCAI) and tribal and religious leaders.

In 1987, bill S187's purpose was "to demonstrate basic human respect to Native Americans regarding repatriation" by addressing "these issues which are fundamentally important to them" (John Melcher, Senator Testimony, Native American Cultural Preservation act, 100th Cong., 1st Sess., S187, 1987). Congress found that:

1. Numerous museums, universities and government agencies have considerable Native American collections that include artifacts of a sacred nature and human skeletal remains that morally should be returned to the families, bands and tribes.
2. Controversy exists between museums, universities, government agencies and Indian tribes or Native Hawaiian organizations regarding the title to, preservation and contemporary disposition of human skeletal remains and sacred artifacts (January 6 S.187 100th Congress 1st Session).

Senator Melcher's intentions with S187 were to incorporate, by law, procedures to return the skeletal remains and sacred artifacts to the families, bands and tribes of Native Americans (John Melcher, Senator Testimony, Native American Cultural Preservation act, 100th Cong., 1st Sess., S187, 1987). He felt that since these sacred artifacts were intrinsically linked to religious ceremonies, it was important that they be identified immediately and the procedures for repatriation set in motion. This would have given

assurance to Native Americans that it was a formal procedure and repatriation would occur. The legislation was vigorously opposed by the Smithsonian Institution, American Association of Museums and the Society of American Archaeologists (Trope & Echo-Hawk, 1992: 136). Although not enacted at this time, the Native American Museum Claims Commission Act was important for laying a foundation for future discussions within the Senate Select Committee on Indian Affairs.

Two months after the bill was introduced, the Select Committee²⁷ initiated the discussion with a formal hearing. The purpose of the hearing was to discuss a proposal which “would accommodate the interests of historic preservation and scientific inquiry while responding to the concerns of Native Americans regarding their sacred artifacts and skeletal remains.” (Senator Daniel Inouye Testimony, Native American Cultural Preservation act, 100th Cong., 1st Sess., S187, 1987). More specifically, The Native American Cultural Preservation Act (S. 187) was introduced by Senator Melcher in order to provide for protection of Native American rights to sacred artifacts, to establish a board to mediate disputes between museums and native groups over these issues, and to establish a Native American education center and conform the amendments to ARPA.

During this initial exploration, the Senate Select Committee expressed concern about whether these items were necessary for cultural continuation, religious practices

²⁷ The Committee was comprised of Daniel Inouye (Chairman), Daniel J. Evans (Vice-Chairman), John Melcher (Montana), Denice Deloncine (Arizona), Quentin N. Burdick (N. Dakota), Thomas A. Daschle (S. Dakota), Frank H. Murkowski (Alaska), John McCain (Arizona), Alan R. Pack (Staff Director), Patricia M. Zell (Chief Counsel) and Joe Menton Jr. (Minority Counsel).

and in some cases asked for explanations on whether their returned items would be deemed a positive benefit to their community (Chief Earl Old Person, Witness Testimonial, Hearing before the Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess., S187, 1987). These questions were further expanded upon with reference to authenticity. How would claims be validated and authenticated? How would one be able to ascertain whether an artifact should be considered a “sacred object”? It seemed that this bill posed more questions and opened more issues for debate than it proposed to solve.

During these hearings, NCAI provided a strong legal argument and began to deconstruct previous government policy and law through two resolutions that were adopted at their 43rd Annual Convention on September 22-26, 1986:

1. Resolution condemning the Department of the Interior’s policy on human remains and sacred objects, which was developed without Tribal consultation #43-86-51
2. Resolution regarding the excavation and curation of human remains and sacred objects, protection of and access to sacred sites and comprehensive revisions to federal laws and policies 43-86-57 (NCAI Statement submitted to the Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess., S187, 1987)

When Congress included Section 5 of ARPA it was concerned primarily with the long-term curation of artifacts and other materials included under the term “archaeological resources”. This section was not only applicable to curation but more importantly to the “ultimate disposition”. It is the “ultimate disposition” component with which NCAI is primarily concerned. It was stated that this rule could and should be the mechanism for establishing a federal policy that provided for the repatriation to Indian tribes of sacred

objects and human remains for treatment in accordance with tribal religious beliefs and practices . The current rules governing the curation of archaeological resources might not be consistent with the guarantee of freedom of religion in the First Amendment and the policy established by AIRFA²⁸.

The hearing was concluded with a statement by Edward H. Able Jr., Executive Director of AAM and it clearly expressed the museum community's stance on fiduciary obligations. AAM still strongly believed in national cultural patrimony and the right to knowledge about our collective human pasts:

Although the history and prehistory of this nation are directly related to the heritage of modern Native Americans, they are also part of the heritage of all who call themselves Americans. The arbitrary removal of objects from museum collections may indeed far lessen public exposure to and appreciation of Native American culture and thus to our national heritage (Edward H. Able, AAM Statement submitted to Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess., S187, 1987).

The general intent of S. 187 was “strongly supported” by AAM and the museum community – although that statement was followed by a comprehensive deconstruction the statutory language and definitions of the act and a request for a halt in legislative action. AAM felt they were bound by fiduciary responsibility, legal responsibilities and property rights laws. While arguing that the objects were held in a public trust and should not be deaccessioned, they were counter-arguing that if that happened, the bill did not include provisions for compensation of a museum for the appraised value of the

²⁸ AIRFA imposes a procedural requirement to consider the impact of administrative actions on Native religious belief and practice.

object (Edward H. Able, AAM Statement submitted to Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess., S187, 1987).

When, on January 15 1988, the Council of the American Association of Museums adopted a policy regarding the repatriation of Native American Ceremonial objects and human remains, the museum community was signaling that they now accepted the notion that repatriation would soon be seen as mandatory (AAM, 1988). Perhaps, it was also seen as a measure to deter national legislation that would circumvent case-by-case negotiation procedures. This policy was adopted after the Museum Claims Commission Act and the Cultural Preservation Act had been introduced and AAM had been a witness during both hearings. The introductory statements of the policy related the role museums have played in the preservation of Native American heritage; “through their collections, exhibitions and programs, museums have helped to underscore the inherent value and integrity of Native American culture and Native Americans’ place as America’s first inhabitants. Together with the Native American community, museums are helping to assure the survival of Native Americans’ values, ideas and traditions into the twenty-first century and beyond” (AAM, 1988). The AAM restated their belief that the resolution of requests for repatriation would be best accomplished on a case-by-case basis with an understanding of the necessity of preserving collections for the access of information. Sensitivity and respect for the meaning and value of Native American artifacts would be realized within the context of the museum’s mission to preserve, interpret and exhibit its collections. Ceremonial objects would only be repatriated to Native American groups

claiming relation to the object with legal and cultural standing. If an object had been possessed illegally – the statement also addressed the balance between ethics of the past and ethics of today – it should be repatriated if requested by legal tribal entities. The repatriation policy was often vague, with language that allowed for various interpretations, conditions and implementations to occur. It was considered appropriate for museums to weigh both legal and ethical considerations, the value and benefit of such objects to their public mission versus the interested party and initiate discussion with all of the legitimate groups.

Bill S1980, although it could facilitate repatriation, did not mandate it in all cases. Where both parties could agree to a mutually acceptable alternative, S1980 established a process that facilitated the disposition of objects and remains in museum collections. S1980 would regulate ownership, trade and disposition of Native American remains, burial objects and objects of sacred or cultural significance. This addressed a change in perspective on the differences between repatriation and disposition rights; while many of the early dialogues focused on the need for repatriation, S1980 allowed for a higher level of control by Native American tribes.

During the S1980 hearing a category titled ‘cultural patrimony’ was introduced. This can be seen as a direct impact of the Panel Report. Items of cultural patrimony are those items having ongoing historical, traditional or cultural importance that are of central importance to a Native American group. Items of cultural patrimony are owned

by the tribal group and are inalienable. Objects of cultural patrimony are of such great significance that they cannot be conveyed, appropriated or transferred. Legal title rests with the tribe as a whole. It is unclear as to whether this is a new interpretation of federal property law or an application of international cultural property rights to a domestic context. Although an item that is no longer used in religious ceremonies by present day adherents may still be protected as cultural patrimony, these categories were meant to be narrowly applied (McManamon in Hutt, 1992: 144). According to statements from Tom Livesay, the AAM representative for these hearings, many museums had questioned the definition of cultural patrimony (Tom Livesay, AAM Statement, Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess., S1980 & S. 1021, 1990). It was felt that the definition was quite broad and the number of claims that may result from the inclusion of this term would impose extreme practical problems for inventories and notification. AAM felt that there had “been a considerable amount of federal legislation enacted during this century that affects the disposition and treatment of Native American human remains, funerary goods and religious and cultural objects” (Tom Livesay, AAM Statement, Senate Select Committee on Indian Affairs, 101st Cong. 2nd Sess., S1980 & S1021, 1990).

Bill H.R. 5237, the last to be introduced, essentially became the foundation on which NAGPRA was written. As several organizations were represented at the House of Representative and Senate hearings, discussions surrounding HR 5237 were affected by statements and definitions introduced during the earlier Senate hearings. This bill

expanded the legislative action of NMAI and included all federal agencies that had Native American property under their control. Many definitions were solidified with noticeable difference apparent in the category entitled “inalienable communal property” instead of “cultural patrimony”. Inalienable communal property was a category similar to cultural patrimony in scope but focused more tightly on communal tribal property rights versus individual Native American rights. It was intended to classify property that was owned by a community or group of people within a tribe rather than an individual Native American person. Therefore, this property was considered inalienable and could not be appropriated or conveyed by an individual. SAA reasoned that the inalienable communal property was a more accurate and descriptive term than the S. 1980’s cultural patrimony (Keith Kintigh, SAA, Panel 2, Hearing Before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess., July 17, 1990).

The ‘sacred object’ definitions also seemed to have been generally accepted by the witnesses present. NARF was in support of the definition of sacred objects as it clearly indicated that the primary purpose of the object had to have been for religious purposes; this excluded primary secular objects and allowed for more extensive tribal rights when defining what was sacred (Henry J. Sockesbon, First Panel, Hearing before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess., July 17, 1990). Sacred objects are those which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. It was intended to include both objects needed for ceremonies currently practiced by

traditional Native Americans and objects needed to renew ceremonies that are a part of their traditional religion (Henry J. Sokesbon, First Panel, Hearing before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess., July 17, 1990). The inclusion of sacred artifacts represented a furtherance of the federal government's repatriation policy. Sacred artifacts were not included in the original NMAI Act and demonstrated a further understanding of the needs expressed by Native American religious and tribal leaders. In argument against statements offered by the AAM on previous occasions, NARF felt that there was no logical reason why the presumption which applied to human remains and funerary objects should not have been extended to sacred objects and inalienable communal property (Henry J. Sokesbon, First Panel, Hearing before the Committee on Interior & Insular Affairs, 101st Cong. 2nd Sess., July 17, 1990). In essence, NMAI had established a precedent for federal repatriation claims but had not gone far enough to include a variety of categories of objects.

NAGPRA is unique legislation, since it requires for the first time that the federal government and non-Indian institutions consider what is sacred from a Native American perspective. Rights can be asserted if the requested objects are definable as items of cultural patrimony within the context of the claimant's own tribal culture. NAGPRA's language is quite clear about the role of Native legal concepts-- in particular the definition of sacred objects, cultural patrimony and rights of possession – as they define and enforce repatriation. The tribe is the only unit with the ability to obtain the historical facts and interpret their cultural meanings relating to the return of sacred objects, objects

of cultural patrimony and unassociated funerary objects. In most cases, it is the tribe that mandates repatriation -- for NAGPRA is concerned with disposition rights and control. NAGPRA contains definitions that constrain the categories of objects but Native Americans will assume the responsibility of classifying what objects will be considered sacred, ceremonial, or of important cultural patrimony. Disagreement between Native American groups or competing claims will be assessed by the NAGPRA Review Committee to try and avoid resolving the dispute in a legal courtroom.

NAGPRA establishes that human remains and associated funerary objects must be expeditiously returned to lineal descendants or tribes if requested. There are two manners in which repatriation rights can be established: a museum or federal agency establishes cultural affiliation during their inventory process or cultural affiliation is proven by a tribe through a preponderance of the evidence . Museums and agencies are not required to repatriate unassociated funerary objects, sacred objects and objects of cultural patrimony unless the claimant can demonstrate all of the following:

- a) objects conform to the definitions of unassociated funerary objects, sacred objects or object of cultural patrimony
- b) cultural affiliation exists for these kinds of items
- c) sacred objects and objects of cultural patrimony were in the claimant's ownership or control; and
- d) evidence presented by the claimant exists which support a finding that the agency or museum did not have right of possession (Public Law 101-601: NAGPRA (November 16, 1990), 25 USC § 3001 et.seq – HR 5237).

If these four elements are satisfied, the claimant has disposition rights and may decide the next step. The possibility exists that the dialogue between the agencies, museums and Native American tribal representatives may result in treatments that recognize Native American ownership yet allow for curation, display or research on these cultural items. If repatriation does occur, there are no requirements for Native American groups regarding the use, access, treatment or care of repatriated cultural items.

At this point, the revised definitions of the term “sacred object” addressed earlier arguments and eliminated ambiguity. Many felt that Native Americans would state that all objects were sacred if it was too broadly defined, leading to the repatriation “flood gates” being permanently left open. Within this final definition, a sacred object was defined as “an object that was devoted to a traditional religious ceremony or ritual when possessed by a Native American and which has religious significance or functions in the continued observance or renewal of such ceremony” (Inouye, 1990). The Committee was quick to establish their intentions in this area. A sacred object must not only have been used in a Native American religious ceremony but the objects must also have continuing religious significance. Therefore, the Committee has eliminated objects that have a secular purpose yet may have been a part of a religious ceremony. With respect to objects pertaining to inalienable property, NAGPRA chose the term “objects of cultural patrimony” and synthesized the definitions from S1980 and HR5237. These objects are considered to have been held by the whole community and not an individual member and

only refers to those objects that have such importance to the Native American culture that they cannot be conveyed, appropriate or transferred by an individual member.

Conclusion

Considerations of traditional Native American mortuary practices – e.g. unmarked burial sites – presented new problems with which the established laws were ill equipped to deal. These laws have reflected a national policy that supported preservation but a form of preservation and protection that has placed museums and federal institutions in roles of authority. The legislative history does not support the repatriation of any remains or cultural property as preservation for perpetuity seems to have been the legislative goal. These laws have preserved objects or human remains primarily for the American public at large. Previous legislation regulated archaeological excavations for the preservation of heritage for the general public but they did not offer equal protection of burial sites for Native Americans. Archaeological data and cultural property were collected to be analyzed, documented, exhibited and retained in federal institutions. While this was done for the dissemination of knowledge to the general public, it left a gap in the protection and preservation of Native American material culture for the benefit of Native American communities. NAGPRA addresses these gaps in preservation policy.

Witness testimonies by Native American rights organizations and lawyers, religious leaders and tribal council members changed how people viewed preservation policies by articulating that the preservation or protection of Native American graves and

ceremonial objects should not be synonymous with archaeological resources and Federal property rights. Although National Congress of American Indians (NCAI) acknowledged that the desecration of Native cemeteries would have been more extensive were it not for the federal protection/preservation legislation previously enacted, they rejected the notion that Native American ancestors should be considered as archaeological resources (NCAI Report "Resolution 43-86-51", Senate Select Committee on Indian Affairs, 100th Cong. 1st Sess. S. 187, 1987). These values were apparent in the existing preservation laws and in the failure of federal government agencies to rectify their policies to be in accordance with AIRFA. Fundamental equal protection of their religious beliefs, ceremonial objects and material heritage was articulated as a basic human right. Congress responded greatly to a human rights bill. From the perspective of the social activist, effecting statutory change requires recruiting the support of the majority population or at least convincing a majority of the legislators that such support has been obtained (Price, 1991: 116). An attempt is more likely to be successful if appeal can be made to dormant values already held by the majority population than through the promotion of new values. It was not just tribal representatives and NARF lawyers that were referring to it as a human rights legislation. Paul Bender, trustee of the Heard Museum and witness for the Panel Report, felt quite strongly that this was a human rights issue:

It is a human rights issue because museums only have this material as a result of human rights violations. If the Native American population in this country had been treated equally, with full respect, over the past 100-150 years, then these materials would not have been collected in the way they were. For the museums to continue to keep them over the objections of tribes from which they were taken without the tribe's full, free, voluntary consent, is a continued human rights

violation. That was the view that a very strong consensus of the panel agreed upon.

Both the Committee and the witnesses that testified began to see new legislation as a human rights bill as opposed to preservation or protection legislation.

From a legal perspective, Congress had legal authority to enact NAGPRA. Although many witnesses had debated for years over definitions of legal title, property rights, and just compensation, NCAI and NARF lawyers presented to Congress sufficient arguments for Congress to enact new federal preservation legislation that allowed for the repatriation of human remains and various categories of objects. Congress has broad plenary authority to carry out its trust obligations in this manner under the Commerce Clause, the Treaty Clause, the Property Clause, the Indian Commerce Clause and the Supremacy Clause. More importantly, Congress had the constitutional authority to legislate and protect basic human rights such as those implicated under the First Amendment and the Fourteenth Amendment. These prior civil rights laws had already been upheld by the courts in other legislation.

NAGPRA represents a fundamental shift in perception. Native Americans are now in an equal bargaining position with museums, which are no longer listed as superior in the law. It is an historic land-mark piece of legislation because it represents a fundamental change in the basic social attitudes towards Native People by the museum community, scientific community and public at large (Trope & Echo-Hawk, 1992: 123).

Unlike its legislative predecessors, NAGPRA does not grant museums or the value of scientific inquiry a higher level of authority than Native American ideology. Instead it values human rights with a greater authority given to Native Americans for negotiation purposes. As Dan Moore, the executive director of the Peabody Essex Museum states “the reality is there’s been a shift in the equation. It’s a matter of basic human rights versus scientific rights, and in this new equation in many instances those scientific rights have been constrained, no doubt about it” (Morell, 1994: 20).

NAGPRA provisions gave tribal communities wide discretion in both the kinds of data that could be presented and the identification of the kinds of materials, that might be subject to repatriation. NAGPRA has prompted many tribal governments and museums as well as non-tribal institutions and scholars to consider more broadly the implications of cultural property and its control. NAGPRA establishes protections for cultural property and affiliations between tribal communities and traditional lands. With “victory” comes responsibility, and that responsibility is to construct a system of law within the structure of Native tribal government courts and legislative powers that will help all citizens fulfill the mandate of NAGPRA. NAGPRA is not self-actuating but requires that Native groups take action if its purposes are to be fulfilled (Strickland, 1992: 179). Native Americans have a degree of control over cultural materials through information retrieved from the inventories and summaries, the approval of excavation permits and most importantly the right of disposition.

Chapter Six

CONCLUDING REMARKS

The management of Native American heritage through the legislation of American Federal preservation acts has created a system of public history that has institutionally defined who has been allowed to collect most categories of objects, who may retain them and who may interpret them for the education of the general American public. In 1906, when the first general application archaeology and historic preservation statute in the US was enacted, the federal government legally preserved public lands with significant prehistoric, historic or material features. Although the *Antiquities Act* included a regulatory permit process of archaeological excavation, it also gave federal administrators a flexibility that no other piece of preservation legislation has allowed. The *Antiquities Act* required that all objects collected with a licensed permit would be permanently preserved in federal institutions in perpetuity. This established a significant obstacle for anyone wishing to retain cultural property that had been excavated or seek for the return of an object that was held in a federal institution. The *Antiquities Act* did, however, act as a minor deterrent for the flourishing black market in Native American artifacts. Objects were only collected by professionals with a legal permit and archaeological data would remain on American soil. This act limited the manner in which professionals could embark on archaeological investigations and collect objects or data but it also gave museums the primary authority by cementing their role as custodians for collection preservation for the general public.

The *National Historic Preservation Act* of 1966 further regulated the preservation “process” by including a National Register of actual places and locations that had been preserved. The act also established an Advisory Council with the authority to accept or deny applications for preservation based on a specific set of rules. These rules required the Council to exclude Native American religious or sacred sites. These rules also required the Council to exclude all applications that requested preservation for religious reasons or purposes. However, Native American sacred sites were more greatly affected. Often these sites were embedded with historic value, cultural importance and were sacred geographic areas more susceptible to private property encroachment, access road development (due to remote locations), resource development and in some cases recreational development. As many of the sites exist on land under federal jurisdiction, Native Americans did not have clear ownership in order to halt land usage or development projects.

The lack of Native American involvement in the preservation regulatory process resulted in what many Native American activists felt was a higher value placed upon scientific investigations than religious freedom, the collecting of religious artifacts and regulations/policies that did not respect Native American religious practices/activities. The academic discourse does not acknowledge or document Native American resistance to preservation legislation until the late 1960s. Native American political organizations were gaining national prominence and were becoming active in the civil rights

movement, the protests became constructively directed towards preservation acts and public history policies until the late 1970s.

The *American Indian Religious Freedom Act* of 1978, as I have previously articulated, did not have the impact that many Native Americans hoped it would have. The academic discourse surrounding this act during 1979 and beyond is quite prolific; discussions on its relevance, application and its subsequent impact. However, government policies and regulations were not altered to become AIRFA compliant nor had AIRFA proven to be the basis for a solid legal argument in the courts. AIRFA did help bring Native American religion to a national agenda. Dialogue surrounding the act and the Task Force report also highlighted the diversity and complexity of Native American religions. It became apparent that in order to rectify previous government action that had interfered with Native American religious activity and update current government practices, it would take a considerable amount of consultation with numerous different tribal entities. AIRFA had essentially mandated the protection and free practice of Native American religious activity as a single entity and did not offer recommendations on how government departments would address the diversity of Native American tribes and religious belief or practice.

The *Archaeological Resources Protection Act* of 1979 affirmed the basic preservation policies of previous acts and further established the federal government's role in preserving archaeological data and cultural property in permanent collections.

The *Antiquities Act* of 1906 was proven to be constitutionally vague and had little contemporary value in deterring the looting and black market artifact trade, therefore ARPA also addressed enforcement issues and deterrent values by increasing the fines and explicitly defining vocabulary used within the Act. ARPA further regularized the permit process and imposed more restrictions on archaeological and museum communities.

ARPA also extended the role that Native Americans played in the regulatory permit process – permission was required by Native Americans for excavations to occur on land under tribal jurisdiction. There was a transference of authority over disposition rights of cultural property excavated on tribal land; archaeological resources obtained in violation of ARPA had to be returned and cultural property uncovered may be retained by the tribe.

Although Congress granted tribal entities further control over cultural property found within their jurisdiction, there was strong opposition to ARPA as it directly violated AIRFA when it included skeletal remains in the potential artifact list covered by the act. At this time, Pan-Indian anti-grave desecration groups lobbied for federal grave protection legislation and the repatriation of human remains. Native American activist organizations and lawyers chose to use legal arguments based upon the Constitution to present their opposition to ARPA and public history methodology. Although these views had been a part of the academic discourse since 1979, the Senate Select Committee on Indian Affairs hearings brought many of these arguments into a public forum. This

represents an important shift in perspective and communication; everyone was now communicating in one language, the American legal language.

Considerations of traditional Native American mortuary practices – e.g. unmarked burial sites – presented new problems with which the established laws were ill equipped to deal. These laws have reflected a national policy that supported preservation but a form of preservation and protection that has placed museums and federal institutions in roles of authority. The legislative history does not support the repatriation of any remains or cultural property as preservation for perpetuity seems to have been the legislative goal. These laws have preserved objects or human remains primarily for the American public at large. Previous legislation regulated archaeological excavations for the preservation of heritage for the general public but they did not offer equal protection of burial sites for Native Americans. Archaeological data and cultural property were collected to be analyzed, documented, exhibited and retained in federal institutions. While this was done for the dissemination of knowledge to the general public, it left a gap in the protection and preservation of Native American material culture for the benefit of Native American communities.

In the late 1980s, the enactment of new preservation legislation became a discussion on conflicting ideologies and legal opinion. It would seem that Congress and members of the public could be persuaded by constitutional arguments about the equal protection of all citizens including religious freedom and sanctity of the dead. Native

American representatives were not asking for protection above and beyond that mandated for all US citizens, they were requesting that these rights and freedoms be equally applied. The application of human rights principles had a profound impact on the passage of NAGPRA as it was a logic that people could easily accept and understand.

When Congress enacted the NMAI Act it set a strong precedent for further repatriation legislation. The NMAI of 1989 legally freed the Smithsonian Institution from the *Antiquities Act* of 1906 responsibilities for permanently preserving Native American grave goods and human remains. Although deaccession policies had been in existence in several museums with large ethnographic collections, the Smithsonian Institution claimed strong fiduciary responsibilities as a national museum and center of research. Earlier laws viewed Native American remains and material as archaeological objects subject to federal control. NMAI and NAGPRA acknowledged for the first time that Native Americans are entitled to their ancestors' remains and objects that were buried with them. While AIRFA tried to determine whether or not Native Americans ought to have the right to use and possess sacred objects, NAGPRA specifically states that Native American tribal entities have the right of use and possession. NAGPRA and NMAI decentralized the preservation of Native American cultural property and placed Native Americans in a higher position of authority and control.

NAGPRA closes gaps in the application of American common law and guaranteed rights and freedoms under the Constitution. There is nothing profoundly new

in NAPGRA – the rights expressed in this legislation have always been there. NAGPRA establishes protection that has always been in existence but conflicted with the permit process of preservation laws. Therefore, NAGPRA eliminated gaps created by previous legislation.

The academic discourse on NAGPRA can be separated into two main categories: a discussion on the necessity for repatriation and Native American burial protection and an analysis of the definitions, procedures and implementation. There are gaps in the analysis of the process of NAGPRA and the impact the act had at the tribal level. With this analysis, I have positioned NAGPRA in the legislative history of preservation acts and provided a brief analysis of the process of NAPGRA's enactment. This analysis has included an investigation of the congressional dialogue and Hearing Report texts but I have tried to limit the scope to a narrow focus. Upon reflection, further research is required to compare the congressional dialogue to the ethnographic literature available. The congressional dialogue does not address notions of religious continuity and contemporary practice. Although there were witness representatives during the hearings on S411, S187 and S1980 that addressed cultural continuity and religious activity, the statements are very limited and do not reflect the diversity of Native American religious practice or contemporary circumstance. A survey of ethnographic literature and archival data could assess the change in religious practices and the impact this has had on burial practices and traditional definitions of sacred objects. The literature on NAGPRA does not address what tribal groups define as sacred through time to ascertain the necessity or

impact of NAGPRA in respect to this category of objects. Native American tribes have different definitions of what sacred objects are. Do all tribes have a traditional concept of sacredness? Is restricted access to knowledge or objects perceived as being a definition of sacredness? Who had a right to alienate material ten years ago and would it be the same person as 100 years ago?

The Native American population is highly diverse in both the past and the present with respect to the colonial and post-colonial experience, urban vs. rural population ratio, impact of Christianity and impact of the Pan-Indian movement on identity and religious observance. NAGPRA offers protection for Native American religions without a general definition of what it is that is being protected – what is Native American religion? Is this distinguished from conflicting ideologies and worldview, and if so, how is it articulated? NAGPRA also allows for the repatriation of sacred objects in an encompassing manner that does not address individual definitions and processes for what may have been sacred in the past versus what can be articulated as sacred since its enactment. These are issues that are relatively absent in the academic discourse.

Although my thesis ends with the passage of NAGPRA, it would be relevant to conduct further research to address whether or not NAGPRA has succeeded in satisfying tribal requests for control over the management of their cultural property and heritage. An analysis on the repatriation claims that have been processed would shed light on how tribal authorities are accessing the procedures of NAGPRA. Preliminary research shows

that human remains are the category of objects repatriated most frequently but this perhaps will change as Native American communities sift through the extensive inventories and summaries provided to them. What percentage of repatriated objects will be actively used in religious practices or ceremonies and how many will be included in cultural centres or tribal museums for the dissemination of heritage information? The academic discourse has strongly focused on the museum experience and the legal framework. What procedures and regulations have Native American tribes established for the management of cultural property? What traditions have been created for “reburial”? Some human remains were collected from battlefields and will be buried for the first time while others were collected from desecrated graves. Are there distinct ceremonies attached to these different categories of human remains? These are questions that largely remain unanswered. A survey of the impact of NAGPRA had at the tribal level would be required to truly assess whether NAGPRA has protected Native American religious practices.

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