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DANCE OF THE DEAD: A LEGAL TANGO FOR CONTROL OF NATIVE AMERICAN SKELETAL REMAINS

*John E. Peterson II**

Introduction

The conflict over whether to retain or return archeologically excavated human skeletal materials and associated grave items of Native American origin is a topic of intense debate. It involves a host of participants, and the heart of the issue involves a conflict of values. As such, it is an issue that challenges resolution because it requires an understanding of cultural perspectives that, at times, seem to be diametrically opposed.

The dispute is complex. It pits a variety of parties that are knowledgeable, interested, and sensitive to Native American culture and history against one another. The primary participants are archeologists, physical anthropologists, museums, and Indian groups and their supporters. Although these parties share a common interest in the appreciation of Indian heritage, there is great division both within and between these groups over the treatment of skeletal remains ancestral to living Native American populations.

In light of this mix of interests, it is not surprising that the issues are multifaceted and extend along the entire range of situations affecting skeletal remains. At the outset, there is the question: Should Native American grave sites be archeologically excavated, or should they remain undisturbed? If remains are excavated should they be allowed to be placed on public display? Should scientific analysis be conducted? And ultimately, should the remains be retained in perpetuity by an agency or institution, or should they be returned to living Indian groups for reburial?

These questions arise in many contexts, and possible solutions are as varied as the perspectives of the participants. To some, most notably members of the anthropological and museum professions, the dilemma is primarily within the realm of

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professional ethics.¹ Native Americans, on the other hand, frequently view the problem from the perspective of religion.² Still others have attempted to reconcile ethical and religious values from a more general philosophical perspective.³ Finally in the end, when all other forms of problem resolution fail, the issues become legal—to be resolved in either a judicial or legislative framework.⁴

This article examines the legal issues related to protecting burial sites and returning excavated skeletal material for reburial. In order to frame the issues within a meaningful context, the cultural perspective or world view of the various participants are first examined. Next, legal approaches for resolving the problem are assessed. Finally, some pragmatic solutions are offered and conclusions are presented.

World View

The conflict over Native American skeletal material and associated grave items is largely the result of disparate world view.⁵ The term "world view" has been defined as "[t]he view of life and the total environment that an individual holds or that is characteristic of the members of society It is the human being's inside view, colored, shaped, and rearranged

1. See, e.g., Johnson, *Professional Responsibility and the American Indian*, 38 AM. ANTIQUITY 129 (1973). See also Bahm, *Skeletons in the Cupboard*, NEW SCIENTIST, Nov. 13, 1986; Mulvaney, *Archeological Retrospect* 9, 60 ANTIQUITY 96 (1986); Webb, *Reburying Australian Skeletons*, 61 ANTIQUITY 292 (1987); Zimmerman, *Webb on Reburial: A North American Perspective*, 61 ANTIQUITY 462 (1987) (discussion of ethical concerns about the treatment of skeletal remains from indigenous populations in other countries, e.g., Australia, Egypt, and Israel).

2. See, e.g., Grimes, *Desecration of the Dead: An Inter-religious Controversy*, 305 AM. INDIAN Q. 10 (1986).

3. See, e.g., Bahn, *Do Not Disturb? Archaeology and the Rights of the Dead*, 213 J. APPLIED PHIL. 1 (1984).

4. See Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986); Higginbotham, *Native Americans Versus Archaeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91 (1982); Note, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM INDIAN L. REV. 125 (1979) (authored by Bowen Blair); Rosen, *The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility*, 82 AM. ANTHROPOLOGIST 5 (1980); Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1 (1982); Wilson and Zingg, *What is America's Heritage? Historic Preservation and American Indian Culture*, 22 U. KAN. L. REV. 413 (1974).

5. Echo-Hawk, *supra* note 4, at 446.

according to his cultural preconceptions."⁶ Therefore, in order to fully understand the nature of the problem, it is necessary to understand how the problem is viewed by the various participants.

Anthropological Perspective

Anthropology is a broad field of social science dedicated to the study of the human animal.⁷ This area of study is divided into four major subdisciplines: cultural anthropology, archeology, physical anthropology, and linguistics.⁸ The subdisciplines predominately associated with the recovery, treatment, and study of skeletal materials are archeology and physical anthropology. As such, the practitioners in these fields have become the most vocal members of the anthropological community to respond to Native American grievances and concerns.⁹

In general, the archeologists' frame of reference is science.¹⁰ Although the methodology of archeology is science, the objectives are anthropological.¹¹ Archeology is the study of past cultures and has as its objectives the development of cultural chronologies, reconstruction of extinct lifeways, and the understanding of cultural processes.¹² As anthropologists, archeologists have excavated Indian burials in order to better understand human development in North America.¹³ Through investigation of human skeletal material valuable information is obtained about "the relations between diet, disease, ecology, and social arrangements as they affect mankind at present as well as in the past."¹⁴

6. E. HOBEL, *ANTHROPOLOGY* 491 (1966).

7. See generally D. BIDNEY, *THEORETICAL ANTHROPOLOGY* (1967); M. HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY* (1968); L. LANGNESS, *THE STUDY OF CULTURE* (1974) for an overview of the theoretical underpinnings of anthropology.

8. See generally C. EMBER & M. EMBER, *ANTHROPOLOGY* (5th ed. 1988); C. KOTTAKE, *ANTHROPOLOGY: THE EXPLORATION OF HUMAN DIVERSITY* (4th ed. 1987).

9. See L. ZIMMERMAN & K. ZIMMERMAN, *AN ANNOTATED BIBLIOGRAPHY OF THE REBURIAL ISSUE* (1987). This bibliography is a very useful tool for exploring the diverse perspectives that have been presented in the anthropological literature.

10. See W. TAYLOR, *A STUDY OF ARCHAEOLOGY* (1948).

11. See G. WILLEY & P. PHILLIPS, *METHOD AND THEORY IN AMERICAN ARCHAEOLOGY* (1955).

12. See Binford, *Archeological Perspectives*, in *NEW PERSPECTIVES IN ARCHEOLOGY* 5 (1968).

13. See G. WILLEY & J. SABLOFF, *A HISTORY OF AMERICAN ARCHAEOLOGY* (1975).

14. Rosen, *supra* note 4, at 6.

Archeologists are not in agreement about how the wishes of Indians are to be addressed.¹⁵ Although many archeologists are sensitive to Native American concerns, many archeologists have reacted with fear and anger to the increased vocalism of Indians and their supporters.¹⁶ In contrast, other archeologists are willing to work with Indian groups and have devised compromises that have resulted in the reburial of skeletal material.¹⁷

The perspective of physical anthropologists is more sharply focused than that of the archeologists. Unlike the archeologist, the physical anthropologist has a greater stake in the dispute. The subject matter of the physical anthropologist is the study of human bones.

A frequently asked question is, "Why study bones?" John W. Powell, founder of the Bureau of American Ethnology, provides an eloquent statement about the mystery revealed in these studies:

These materials constitute something more than a record of quaint customs and abhorrent rites in which morbid curiosity may reveal. In them we find the evidence of traits of character and lines of thought that yet exist and profoundly influence civilization. Passions in the highest culture deemed most sacred — the love of husband and wife, parent and child, and kith and kin, tempering, beautifying, and purifying social life and culminating at death, have their origin far back in the early history of the race and leaven of the society of savagery and civilization alike. At either end of the line bereavement by death tears the heart and mortuary customs are symbols of mourning. The mystery which broods over the abbey where lie the bones of king and bishop, gathers over the ossuary where lie the bones of chief and shaman; for the same longing to solve the mysteries of life and death, the same yearning for a future life, the same awe of powers more than human, exist alike in the mind of the savage and the sage.¹⁸

15. Sprague, *American Indians and American Archaeology*, 39 AM. ANTIQUITY 1 (1974).

16. See e.g., Meighan, *Archaeology: Science or Sacrilege?*, in ETHICS & VALUES IN ARCHAEOLOGY; Dragoo, *Human Remains and Voodoo Archaeology*, 26 CHESOPLEAN 31 (1988).

17. See e.g., Anderson, *Reburial is it Reasonable?* 38 ARCHAEOLOGY 48 (1985); Cheek & Keel, *Value Conflicts in Osteo-Archaeology*, in ETHICS & VALUES IN ARCHAEOLOGY; Zimmerman, "Tell them About Suicide": A Review of Recent Materials on the Reburial of Prehistoric Native American Skeletons, 10 NAT. AM. Q. 333 (1986).

18. Powell, *Annual Report of the Director*, 1 BUREAU OF AM. ETHNOLOGY ANN. REP. xxvi-xxvii (1881).

Stated in less philosophical terms, the study of bones provides a wealth of information about humans in general and the physical attributes of individuals and groups in particular.¹⁹ The major reasons for studying human skeletal materials have been delimited in the classic work *Human Osteology* by William M. Bass:²⁰

1. They constitute the evidence for the study of fossil man.
2. They are the basis of racial classification in prehistory.
3. They are the means of biological comparison of prehistoric peoples with the present living descendants.
4. They bear witness to burial patterns and thus give evidence of culture and world view of the people studied.
5. They form the major source of information about ancient diseases and often give clues as to the causes of death.
6. Their identification often helps solve forensic cases.²¹

Because human skeletal material is the subject of study, physical anthropologists are very reluctant to see its reburial. One physical anthropologist has described the information lost as a result of reburial in graphic terms: "It is disturbing to see skeletal . . . material reburied. From the viewpoint of a skeletal biologist this is similar to burning the books in our libraries."²²

Although physical anthropologists may have had an opportunity to study skeletal materials from collections, they are reluctant to see the materials reburied because it forecloses any opportunity for later reanalysis. Specifically, it is recognized that not all useful information has been extracted from existing skeletal collections.²³ Both new research questions and techniques for analysis are being developed, and the study of human bones has yet to exhaust the wealth of knowledge that can be obtained.²⁴

Native American Perspective

As between Indians and anthropologists, many Native Americans have come to view archeological excavation, scientific

19. See, e.g., D. BROTHWELL, *DIGGING UP BONES* (1965).

20. W. BASS, *HUMAN OSTEOLOGY: A LABORATORY AND FIELD MANUAL OF THE HUMAN SKELETON* 1 (1971).

21. *Id.* at 1.

22. Bass, *Skeletal Biology on the United States Great Plains: A History and Personal Narrative*, 17 *PLAINS ANTHROPOLOGIST MEMOIR* 3 (1981).

23. See Buikstra, *A Specialist in Ancient Cemetery Studies Looks at the Reburial Issue*, 3 *EARLY MAN* 26 (1981).

24. See, e.g., P. KEY, *CRANIOMETRIC RELATIONSHIPS AMONG PLAINS INDIANS* (1983).

analysis, and museum display of human skeletal materials as a form of spiritual desecration. In their view, the graves of ancestors, through whom they claim biological, cultural, and spiritual affiliation, are being disturbed in the name of a dispassionate science.²⁵ Indians have long been subjected to discriminatory practices and science has come to represent another form of overt discrimination.²⁶

It is difficult to summarize a world view for all Native Americans. One commentator, however, offers a useful generalization of that perspective:

Presumably, a generally accepted position would be that human remains and religious artifacts of Native Americans should be given the same respect accorded to the human remains and religious artifacts of other Americans, and that the disturbance of the dead or of religious objects, alters, destroys, or desecrates some relationship with the spirit world. Therefore, the dead should not be disturbed even if knowledge of the past could be gained thereby.²⁷

In sum, many Native Americans believe that disturbance of the dead and their burial goods should be avoided because it is offensive to religious beliefs.²⁸

Although generalizations are useful for explaining the ignorance and insensitivity to Indian religious values, the limitations inherent in generalizations must be recognized.²⁹ First, fundamental differences must be recognized between traditional tribal religions and the religious tradition of American society. Second, although members of Indian groups may share a common cultural perspective, a diversity of religious values exist within groups, reflecting both traditional religious values and the enculturating influences of Euro-American religions. Finally, and most importantly, there are substantial differences among the various tribal religions.³⁰

The core of the conflict that exists between Indians and archeologists is largely the result of disparate world views. Native Americans believe that disturbance of the dead and their burial goods should be avoided because it is offensive to their

25. Rosen, *supra* note 4, at 6.

26. See, e.g., D. BROWN, *BURY MY HEART AT WOUNDED KNEE* (1971).

27. Higginbotham, *supra* note 4, at 92.

28. Echo-Hawk, *supra* note 4, at 446.

29. Suagee, *supra* note 4, at 9.

30. See Religion, *Handbook of American Indians North of Mexico*, 30 BUREAU OF AM. ETHNOLOGY 365 (Vol. II 1910).

religious beliefs. Archeologists have come to symbolically represent the source of evils associated with the desecration of burials.³¹ In this role, archeologists are seen as having asserted a claim to a right to excavate, study, and retain skeletal material in the name of science and education.³² In the words of one commentator:

There is a basic conflict between archaeologists and traditional Indians. Many Indians have a fundamental belief that interred human remains and associated grave offerings must not be disturbed. Archeologists tend to regard human remains and grave offerings as a source material from which knowledge of prehistory can be gained that cannot be gained from other sources, and that they have fundamental beliefs about "the sanctity of [this] scientific data, and the inappropriateness of destroying it, or destroying potential access to it." Thus when conflicts of this nature arise, each side sees its fundamental beliefs challenged. Archaeologists may be willing to mitigate the damage that would result from their excavation of a cemetery, and some may be agreeable to reinterment of human remains after they have been studied. To many traditional Indians, there is no way that the damage can be lessened—the graves must be left undisturbed.³³

While archeologists are typically the focal point for Native American concerns, museums have become the latest battlefield in the dispute for control over Indian skeletal materials and associated grave items.³⁴ Many state, federal, and private museums house numerous skeletal remains and artifacts obtained as a result of archeological excavations, public donations, and contributions by Indians. Estimates of the number of skeletons in collections range from 300,000 to 600,00.³⁵ The Smithsonian Institution alone is estimated to contain skeletal remains of at least 14,000 Indians.³⁶

31. See V. DELORIA, *GOD IS RED* 39 (1973).

32. Echo-Hawk, *supra* note 4, at 446; see also Higginbotham, *supra* note 4.

33. Suagee, *supra* note 4, at 52.

34. See e.g., Baker, *Indian Artifacts and Museums: A Question of Ownership*, 40 HIST. NEWS 14 (1985); Floyd, *The Repatriation Blues* 40 HIST. NEWS 6 (1985); Dill, *Reinterment of Prehistoric Human Remains: A Discussion Paper* (unpublished manuscript, State Historical Society of North Dakota 1986).

35. Moore, *Federal Indian Burial Policy: Historical Anachronism or Contemporary Reality?*, 12 NATIVE AM. RIGHTS FUND LEGAL REV. 1 (1987).

36. Echo-Hawk, *supra* note 4, at 440.

The source of animosity towards museums is diverse. First and foremost, many museums have placed human remains on display as part of their educational function.³⁷ Although this practice has been largely discontinued, many Native Americans find it offensive to have Indian skeletons and grave goods placed on public display. In addition, there is a perception that the artifacts are not well cared for because museums do not share the Indians' religious concern and knowledge about the objects.³⁸ Finally, Native Americans are concerned that sacred objects will be indiscriminately deaccessioned and sold to either private collectors or foreign countries.³⁹

Irony of the Conflict

The clash of world views is not without its irony.⁴⁰ Anthropologists in general have probably done more to preserve a record of Native American cultures than any other entity in American society.⁴¹ The anthropological record provides a holistic impression of extinct and changing lifeways. It is a source of knowledge for both scholars and Indians alike, and it provides a means to dispel misconceptions about Native American culture and history.⁴²

Many anthropologists and archeologists were drawn into their professions out of regard for, and sensitivity toward, Indians and their past.⁴³ Practitioners of these professions are for the most part located in either government agencies or academic institutions. Both settings provide an ideal location from which to influence how people view and treat Native American issues. Those in government are able to apply their academic training to influence policy and decision making, ensuring that the views of Indians are considered.⁴⁴ Academicians influence succeeding generations of students by providing a frame of reference with which to view other cultures; by teaching subject areas such as cultural anthropology, Indian studies, and prehistory. In short, anthropologists frequently

37. Rosen, *supra* note 4, at 6.

38. Note, *supra* note 4, at 128; see also Echo-Hawk, *supra* note 4, at 438.

39. *Id.*

40. See Echo-Hawk, *supra* note 4; Higginbotham, *supra* note 4; Suagee, *supra* note 4.

41. Higginbotham, *supra* note 4, at 93.

42. *Id.*

43. *Id.*

44. Suagee, *supra* note 4, at 17.

serve as intermediaries between two world views—the larger American society and Native Americans.⁴⁵

Museums are a bridge between Indian and contemporary American culture.⁴⁶ They contain the physical manifestations of past and present Indian culture and provide a way for all people to better understand Native Americans. They also play a vital role in preserving religious material culture, i.e., artifact such as sacred objects, from both the effects of governmental intervention and cultural disintegration.⁴⁷

Instances occurred throughout the country in which owners or custodians of such materials [sacred objects] turned them over to museums and provided the collector with the accompanying history, legends, songs, and ceremonies because there were no interested successors to receive them and continue traditional knowledge. Museums were seen as places of safe-keeping in the face of zealous missionaries, abetted by the Indian Bureau, who confiscated and destroyed symbols of Indian “heathenism.” The in-roads of Christianity prompted some converts to destroy their sacred paraphernalia unless a museum curator managed to intervene in time with an offer to purchase medicine bags, drums or whatever.⁴⁸

Without the museum, many ordinary and ceremonial objects would not be available for rediscovery by Indians as they continue to search for, revitalize, and reinvent their cultural identity.

Although anthropologists and museums share much in common with Native Americans, strains have developed recently in the relationship. As the two sides have become increasingly acrimonious, the situation has moved progressively beyond the realm of compromise and toward the setting of the legal arena. The discussion that follows examines the judicial and legislative frameworks affecting the treatment of skeletal remains.

Judicial Framework

At the societal level, the conflict of world views is illustrated in *Newman v. State*.⁴⁹ The case involved the removal of a skull

45. *Id.*

46. Echo-Hawk, *supra* note 4, at 439.

47. *Id.*

48. Lurie, *American Indians and Museums: A Love-Hate Relationship*, 2 THE OLD NORTHWEST 235, 239 (1976), *quoted in* Echo-Hawk, *supra* note 4, at 438.

49. 174 So.2d 479 (Fla. Dist. Ct. App. 1965).

from a coffin of a Seminole Indian, located in the Florida Everglades. The defendant was convicted under state criminal law for maliciously removing the skull, but the decision was reversed on appeal. The court reversed because the state failed to prove that the defendant acted with the requisite malicious intent. In reversing, the court accepted the defense that the defendant thought that the skull was abandoned and was unaware of the nature of Seminole burial customs. This case is an example of the problem that Native Americans have in obtaining legal protection for burials and burial practices due to different cultural outlooks.

Standing

A threshold issue is the question of standing to sue. Standing is the procedural device used to control the types of issues that may be brought before courts. In order to have standing, it is necessary for the plaintiff to show:

1. that the challenged conduct has caused injury in fact, and
2. that the interest sought to be protected is within the zone of interests to be protected or regulated by the statutory or constitutional guarantee in question.⁵⁰

Thus, without standing Native Americans will not be able to obtain judicial remedies for causes of action involving burial sites, human skeletal material, and grave goods.

Historically, in order to either disinter or prevent disinterment one must establish legal standing to sue.⁵¹ Courts have traditionally recognized standing in certain classes of plaintiffs. First, decedent's heirs have standing to either affect or prevent disinterment.⁵² Second, the holder of title or the person in possession of land containing a burial has standing to affect the removal of a grave.⁵³ Finally, some courts allow friends, distant relatives, and organizations to maintain an action for the preservation of the grave of another.⁵⁴

Frequently, it is difficult for Native Americans to establish a relationship to an archaeologically discovered burial. The likelihood for success is greatest if the grave is attributable to

50. J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE 327 (1985).

51. See 14 AM. JUR. 2D *Cemeteries* 697-754.

52. *Id.*

53. *Id.*

54. *Id.*

a known individual. When an individual is unknown, a connection can be established based on common kinship or tribal affiliation if the grave is of recent historical origin and is associated with an identifiable Indian community that has continued to live in the locality of the burial. However, if the grave is of ancient origin, or if the associated Indian community has not lived in the area for a considerable period of time, it is more difficult to make the connection necessary to establish standing.⁵⁵

In view of these difficulties, several arguments could be raised by Indians to expand their prospects for achieving standing. When archeological investigation is contemplated, a Native American could argue that he has standing under administrative procedure to challenge, at a public hearing, a state or federally issued permit for the excavation and removal of known Indian remains.⁵⁶

Alternatively, an argument could be made that a court should apply its powers of equity. Courts of equity have traditionally addressed burial, disinterment, and removal of the dead.⁵⁷ In addition, an argument could be made that the Indians that had originally occupied the area had been involuntarily removed; and that but for that action, they would have been able to retain knowledge of and attachment to the burial sites of their ancestors.⁵⁸

Finally, one could argue the decedent has a right to be left alone. The problem with this latter argument is that a cause of action for invasion of privacy does not survive death.⁵⁹

In sum, a liberal standard for standing generally is used when a claim is asserted for the protection or management of a grave site. However, the traditional approach has been for courts only to recognize in heirs or closely connected individuals or organizations the right to protect graves. To recognize standing in Native Americans, with regard to ancient graves, would represent an expansion beyond current common law.⁶⁰ Assuming, however, that standing could be achieved, several lines of argument are available under the United States Constitution, common law remedies, and state and federal legislation.

55. Rosen, *supra* note 4, at 9.

56. *Id.*

57. See 22 AM. JUR. 2D *Dead Bodies* 583.

58. Echo-Hawk, *supra* note 4, at 450; Rosen, *supra* note 4, at 9.

59. Rosen, *supra* note 4, at 10.

60. Higginbotham, *supra* note 4, at 103-04.

Constitutional Issues

The constitutionality of the treatment of Native American skeletal remains and artifacts is currently unresolved.⁶¹ Since both religious freedom and discriminatory treatment are issues at the heart of this conflict, two constitutional arguments could be raised. The applicable constitutional provisions for framing Native American arguments are the first and fourteenth amendments to the United States Constitution.

First Amendment

The first amendment provides Native Americans with the right to free religious expression and to be secure in their right to be Indian.⁶² The amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁶³ The amendment is a recognition that freedom of religion is an important tenet supporting American society.⁶⁴ Therefore, it could be argued that archeologists and museums should not be permitted to erode this doctrine by excavating and retaining remains and artifacts of fundamental religious significance to Native American people.⁶⁵

There is an inherent problem with applying a first amendment argument to the situation involving Indian skeletal remains and artifacts.⁶⁶ Of primary concern is the fact that neither Congress nor the states have enacted any laws abridging Native American religious practices.⁶⁷ Without an overt legislative act which impinges upon the religious freedom of Native Americans there may be little basis for mounting a constitutional challenge. Therefore, the framing of a first amendment argument probably will not be successful, unless framed within a very narrow context.

One commentator has suggested that the Smithsonian Institution is within the narrow context that would be vulnerable to a first amendment attack.⁶⁸ The argument goes that the Smithsonian was created by Congress, and it is Congress that

61. See Echo-Hawk, *supra* note 4; Higginbotham, *supra* note 4; Note, *supra* note 4.

62. Echo-Hawk, *supra* note 4, at 438.

63. U.S. CONST. amend. I.

64. In 1968 Congress passed the Indian Civil Rights Act, providing many of the Bill of Rights provisions to tribal government. 25 U.S.C. § 1302.

65. Note, *supra* note 4, at 141.

66. See Higginbotham, *supra* note 4; Note, *supra* note 4.

67. Note, *supra* note 4, at 140.

68. *Id.* at 140-41.

controls the institution. Since the Smithsonian's acquisition and retention policies are directed by Congress, the institution should be susceptible to a first amendment challenge when those policies infringe upon Native American religious values.⁶⁹ The paucity of this argument, however, has yet to be tested.

Fourteenth Amendment

Another source for a constitutional challenge is the fourteenth amendment of the United States Constitution. Specifically, Indians could challenge government sponsored, licensed or funded excavation of burial sites under the equal protection clause. The thrust of an argument has been outlined by a commentator:

The basic argument would be that the remains and artifacts of Native Americans are unfairly discriminated against to the detriment of fundamental rights of living Native Americans. As a factual matter, only the burial and religious sites of Native Americans are regularly subjected to archaeological excavation and study in the United States. Therefore, because race is a suspect classification, the differential treatment of Native American remains by governmental authorities can only be justified by a compelling governmental interest. In practice this is an almost impossible burden for the government to bear.⁷⁰

The equal protection clause of the fourteenth amendment provides a powerful tool against unequal treatment of racial and minority groups.⁷¹ The fourteenth amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law."⁷² The amendment refers specifically to states and does not apply to the federal government. However, it has been held that the guarantee of equal protection applies to the federal government by way of the due process clause of the fifth amendment.⁷³

The constitutionality of discriminatory treatment of Native American skeletal remains is presently unresolved.⁷⁴ On two

69. *Id.* at 141.

70. Higginbotham, *supra* note 4, at 99-100.

71. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969).

72. U.S. CONST. amend. XIV.

73. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 992 (1978).

74. See *Echo-Hawk*, *supra* note 4, at 451.

occasions the United States Supreme Court has declined the opportunity to comment directly on this issue. In *Rice v. Sioux City Memorial Park Cemetery*, Justice Black recognized in his dissent that unequal treatment of Indian remains can raise a question "concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment."⁷⁵ The case involved an action for damages against a private cemetery for refusing to allow the burial of a Winnebago Indian.

In *Sequoyah v. Tennessee Valley Auth.*, the Cherokee claimed that the TVA's excavation and removal of Cherokee bodies for study was discriminatory.⁷⁶ During construction of Tellico Dam the TVA moved and reinterred Caucasian and Black bodies, but did not reinter Indian skeletal materials. The court affirmed the dismissal of the Cherokee's first amendment claim, but did not rule on the equal protection claim.

In summary, a foundation for a constitutional challenge based on either religious freedom or discriminatory treatment may be present in a dispute involving Indian skeletal material. However, these issues have not been addressed by a court, and their legal status is at present unresolved.

Common Law Remedies

Common law remedies related to cemeteries and property may provide a basis for Native American claims against both archeologists and museums.

Cemetery Law

A cemetery is defined as a place set aside for the interment of the dead.⁷⁷ Recognized as such, it is afforded the protection of law. Abandoned cemeteries, however, do not receive the same level of protection that is provided to recognized cemeteries. A cemetery will not be considered to be abandoned if either it is preserved in a manner to indicate the existence of graves, or as long as the public recognizes it as a cemetery.⁷⁸ The task then, for Native Americans and their supporters, is to convince the public that both historic and prehistoric period Indian burial sites should be accorded the status of a cemetery.⁷⁹

75. 349 U.S. 70, 80 (1955) (Black J., dissenting).

76. 620 F.2d 1159, cert. denied, 449 U.S. 953 (1980).

77. See Cemeteries, *supra* note 51.

78. Rosen, *supra* note 4, at 7.

79. *Id.*

Indian burial sites often fall short of the definition of cemetery when they are evaluated from the perspective of contemporary American burial standards.⁸⁰ Several factors are attributed to this shortcoming.⁸¹ First, Indian burial customs varied widely over both time and space, and it was not uncommon for the dead to be placed in locations not specifically set aside for that purpose. Second, Indians often relied on natural features and oral tradition to denote burial locations rather than using specialized grave markers. Third, Indians often lost track of specific burial grounds because they were forced to relocate in response to, or under pressure from, government policy and Euro-American settlement. Finally, when a grave predates the historic period, there is a question of relationship between those remains and contemporary Indian groups.

Taken together, these factors frequently make it difficult to get a court to recognize Indian burial sites as cemeteries. A key to resolving this problem could be locating and recording burial sites, thus ensuring their recognition as a cemetery. It has been suggested that once a burial site is recognized by either Euro-American or Indian standards, a court will be hesitant to allow skeletal materials to be indiscriminately exhumed.⁸²

Ascertaining the location of burial sites is an objective that could be accomplished through the combined use of Indian oral tradition, historical and archival research, and archeological investigation. The tautology inherent in using archeological investigation to locate burial sites in order to prevent additional unauthorized excavation is a problem more grounded in logic than practicality. The greatest limiting factor for the recognition of early historic and prehistoric Indian burial sites is the problem of establishing the location and boundary of a site. Once located, additional problems are inherent, including: placement of the site within a cultural and historical context, and the assessment of biological and cultural relationships with past and present Indian groups.

These data are necessary in order to argue persuasively for recognition as a cemetery. And the bulk of this information can only be provided by the archeologist and physical anthropologist. It should be noted that these specialists have a vested

80. See Mortuary Customs, *Handbook of American Indians North of Mexico*, 30 BUREAU OF AM. ETHNOLOGY 945 (Vol. 1 1906).

81. Rosen, *supra* note 4, at 7.

82. *Id.*

interest in the sites. Although they are interested in obtaining useful scientific data, many share a commitment in common with Native Americans toward the goal of preserving cultural resources. Providing a sound basis for recognizing the legal status of Indian burial sites as cemeteries ensures that sites will be afforded the protection of law, thereby ameliorating the destructive effects of modern development and uncontrolled excavation.

Property Law

In general, traditional property law offers little protection for cultural resources.⁸³ However, property law may be useful for Indian issues if a distinction is made between burial sites with artifacts still located in the ground and those materials that have been excavated. At common law an owner of real property is the owner of subsurface objects. The owner is free to pass good title to any objects found during excavation. This rule, however, has not been extended to recognized human burial sites.

Traditionally, grave sites are exempt from property law because of their importance. A purchaser of property containing a cemetery is not allowed to disturb graves. If graves are to be relocated a property owner generally must receive permission from either the decedent's relatives or a court. As noted previously, if an ancient grave is not recognized as a cemetery, fewer restrictions on disinterment are apparent. However, an unresolved question remains: In who's interest does the property rights to excavate skeletal remains and associated artifacts vest?

A recent focal point for Native Americans has been the confrontation for control, possession, and ownership of Indian sacred or ceremonial artifacts.⁸⁴ The dispute has centered principally on museum and archeological collections. Specifically, arguments are raised that challenge the validity of museum title to artifacts—those objects that have been acquired as a result of purchase, theft, or excavation.

The timeliness of Indian legal claims to enforce property rights is not a topic for debate. Neither the United States government nor Indian tribes are subject to state statute of limitations.⁸⁵ Furthermore, there is no federal statute of limi-

83. Wilson & Zingg, *supra* note 4, at 421.

84. See generally Echo-Hawk, *supra* note 4; Note, *supra* note 4.

85. 28 U.S.C. § 2415(a).

tations barring Indian tribes from bringing suit to enforce property rights.⁸⁶

Under federal Indian law, courts have distinguished between individual and communal or tribal property. Under this distinction an individual Indian does not have title to community property owned or held for common use by the tribe. The distinction between individual and community property was explained in *Journeycake v. Cherokee Nation*:⁸⁷

The distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the lands as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.⁸⁸

This distinction was applied in a confrontation involving the return of Iroquois wampum belts to tribal control.⁸⁹ The dispute involved the Onondaga Nation and a non-Indian who had obtained wampum belts from an individual Onondaga Indian for permanent retention in trust by a museum. After many years of unsuccessful attempts to obtain the artifacts, the Onondaga's right to possession were finally recognized by the New York legislature. Possession, however, was made conditional upon construction of a facility suitable for providing a stable environment sufficient for the long-term protection of the objects. An implication of this dispute has been summarized by a commentator:

[M]useums cannot assume that they have valid title to Indian cultural property merely because they are good faith purchasers of items originally sold by individual Indians. Where tribal law indicates that the individual Indian seller had no title to communal property, the Indian claimants have a legal right to demand return of the property regardless of the date of the unauthorized sale.⁹⁰

86. *Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

87. 28 Ct. Cl. 281 (1893), *aff'd*. 155 U.S. 196 (1894). See also *Echo-Hawk*, *supra* note 4, at 442.

88. 28 Ct. Cl. at 302.

89. See *supra* note 4.

90. *Echo-Hawk*, *supra* note 4, at 444.

Read more narrowly, the Onondaga wampum belt dispute could be interpreted to merely suggest that certain rights to Native American ceremonial objects will continue even after an object has been placed in a museum. When communal property is transferred to a museum for safekeeping, Indians associated with that ceremonial object may be able to re-acquire the object if certain conditions precedent are satisfied. Specifically, Indians may have the burden of demonstrating that they will undertake the steps necessary to ensure the long-term conservation of ceremonial objects before they will be relinquished by a museum. To relinquish without this requirement may result in a breach of the museum's trust duty to hold and preserve communal property for the long-term benefit of present and future generations of tribal members.

In addition, it has been argued that museums cannot claim valid title to stolen cultural property.⁹¹ The Zuni War God controversy is the best publicized example of a museum being required to return stolen sacred cultural material.⁹² The dispute involved a sacred war god statue that had been donated to the Denver Art Museum by a non-Indian donor. The object had been removed from a ceremonial location on a reservation and was known by the museum that it had been stolen. Colorado's Attorney General issued an opinion that the museum had no interest in asserting a claim to stolen property, and that the property had to be returned to the Indians unconditionally.

The precedential value of this controversy is questionable. Several commentators have heralded it as an indication of a shift in property law, with the trend being that Indians should be able to acquire objects from museums that have a less than certain chain of title.⁹³ A narrower reading, however, would suggest that valid title had not vested because the museum had not paid value, and that the donation had been accepted with knowledge of its ill-gotten means of acquisition.

Finally, there may be situations whereby Native Americans can assert a direct property claim against archaeologically recovered collections. Historically, museums have been able to obtain title to artifacts that have been archaeologically excavated and removed from private property. Under traditional concepts of American property law a landowner has property

91. *Id.*

92. *Id.* at 445; *See also* Note, *supra* note 4.

93. *Id.*

rights in all artifacts found on his property.⁹⁴ This concept was recently challenged in *Charrier v. Bell*.⁹⁵

Charrier, or the "Tunica Treasure" case, involves a history of protected litigation over ownership claims to an archeological collection. It began in 1970 when Leonard Charrier, an amateur archeologist, attempted to sell 2.5 tons of artifacts to the Peabody Museum, at Harvard University.⁹⁶ The material had been obtained from 150 burial sites located at Trudeau Plantation. Historical evidence supported a finding that the Tunica tribe resided at the plantation from 1731-1774.⁹⁷

Charrier's problems began in the late 1960s when he failed to obtain permission from the property owners prior to his excavation; subsequently, the Peabody Museum doubted his ability to convey legal title. In response, Charrier sued for quiet title, claiming ownership under state law as a finder of abandoned property. The state of Louisiana then intervened in the proceeding, asserting its "duty to protect its citizens in the absence of the lawful heirs of the artifacts."⁹⁸ In 1978 the state purchased the land and the artifacts from the land owners. The Tunica and Biloxi Indians were recognized by the United States Bureau of Indian Affairs in 1981. The Indians then intervened in the dispute, seeking title to the artifacts. Finally, in 1982 the state subordinated its claim of title to the artifacts in favor of the Tunicas.⁹⁹

The trial court held that the Tunica-Biloxi tribe was the lawful owner of the artifacts.¹⁰⁰ The Court of Appeals affirmed, holding that the common law doctrine of abandonment did not apply to the burial materials.

However, the fact that the descendants or fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the bodies of the deceased, does not result in a conclusion that the goods were abandoned. While the relinquishment of immediate possession may have been proved, an

94. See Echo-Hawk, *supra* note 4, at 445; Note, *supra* note 4, at 17; Wilson & Zingg, *supra* note 4, at 421.

95. 496 So.2d 601 (La. Ct. App. 1986), *cert. denied* 498 So.2d 753 (La. 1986).

96. The archeological assemblage consisted of historic period artifacts: "beads, European ceramics, stoneware, glass bottles; iron kettles, vessels and skillets; . . . crucifixes, rings and bracelets; and native pottery." *Id.* at 603.

97. *Id.* at 603-04.

98. *Id.* at 603.

99. *Id.*

100. *Id.*

objective viewing of the circumstances and intent of the relinquishment does not result in a finding of abandonment. Objects may be buried with a decedent for any number of reasons. The relinquishment of possession normally serves some spiritual, moral, or religious purpose of the decedent/owner, but is not intended as a means of relinquishing ownership to a stranger. Plaintiff's argument carried to its logical conclusion would render a grave subject to despoliation either immediately after interment or definitely after removal of the descendants of the deceased from the neighborhood of the cemetery.¹⁰¹

The decision in *Charrier* has received a great deal of attention from members of the Native American legal community as precedent for asserting property claims to all existing archeological material associated with burial sites.¹⁰² However, given the factual circumstances of the case, its precedential value may not be quite that broad. In particular, rather than viewing the case as an expansion of property law, it could be viewed instead as a narrow extension of property law within the context of cemetery law.

The factual circumstances suggest that a narrower interpretation is warranted. First and foremost, the artifacts were found in association with a known historic period site, and there was no dispute as to the relationship between the decedents and the descendants. Also, the state's involvement early in the dispute suggests that the 150 graves were recognized as a cemetery. In the absence of heirs, the state had a duty to intervene. A question of standing did not arise because a close historical affiliation could be demonstrated. Finally, the state had voluntarily subordinated its title to the property in favor of the tribe.

Given the factual pattern of *Charrier*, the case probably does not have broad implications for all existing archeological collections. However, it may have a profound precedential value in the narrower setting, involving early historic period collections excavated from private property. The case could be used to convince a court that artifacts excavated from historic period sites should be returned to representatives of tribal groups, when both biological and cultural affiliations are firmly established.

101. *Id.* at 604-05.

102. See Moore, *supra* note 35; Echo-Hawk, *supra* note 4.

In summary, the more recent the remains and greater degree of identification with known persons or groups, the greater the likelihood that judicial remedies will be available. However, establishing the necessary relationships is a burden that is difficult for Native Americans to independently establish. Rather than attempting to extend the case law dealing with constitutional issues, cemeteries, and property beyond its current boundaries, an alternative approach may be found in existing federal and state legislation.

Legislative Framework

Federal and state legislation provides an existing framework with which to address some of the concerns related to the treatment of burial sites, human skeletal remains, and artifacts.

Federal Approach

Federal historic preservation legislation provides an extensive body of law governing the treatment of cultural resources. Broadly defined, cultural resources include archeological sites, buildings and structures, ceremonial locations, and artifacts. Although this body of law has been utilized primarily by archeologists, it is applicable for use by Native Americans.

In general, this area of law represents a response to activities perceived to be threatening or endangering the nation's cultural heritage. It originated in the early twentieth century in order to preserve, protect, and manage cultural resources located on public and Indian lands. Subsequent developments have expanded the areas of federal involvement.¹⁰³

Although few Native Americans participated in the formation of federal preservation law, it provides a basis for Indians to protect burial sites and to influence the treatment of skeletal remains and artifacts.¹⁰⁴ Specifically, the federal statutes provide an administrative process for Native Americans and their supporters to influence federal decision making.¹⁰⁵

Federal recognition of Native American religious values has been codified in the American Indian Religious Freedom Act (AIRFA).¹⁰⁶ Enacted in 1978, the Act provides:

103. See Wilson & Zingg, *supra* note 4, at 422-440 for a history of the development of federal legislation. See also T. KING, P. HACKMAN, & G. BERG, *ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE'S CLUTTER* (1977).

104. Wilson & Zingg, *supra* note 4, at 440.

105. Suagee, *supra* note 4, at 105.

106. 42 U.S.C. § 1996. See also Native American Relationships Management Policy, 52 Fed. Reg. 35,674-53,678 (Sept. 22, 1987).

[H]enceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.¹⁰⁷

AIRFA does not create any substantive religious rights, but it does impose a procedural requirement on federal agencies to consider the impact of administrative actions on Native American religious belief and practice.¹⁰⁸

The availability of administrative procedure provides an alternative to litigation. It provides a way to ensure that Native American religious values are accommodated by the federal government without having to initially resort to judicial remedies. Should litigation become necessary, involvement in the administrative process both documents a history of involvement and provides a record sufficient for judicial review.¹⁰⁹

Antiquities Act

Enacted in 1906, the Antiquities Act set the stage for federal involvement in the preservation and study of archeological sites and artifacts.¹¹⁰ An underlying assumption of the Act is that all cultural resources located on federal land belong to the United States. The key elements of the Act revolve around permitting, retention of artifacts, and civil penalties.

A permit is required to excavate and study archeological sites located on land owned or controlled by the federal government.¹¹¹ Properly qualified institutions can obtain excavation permits, "subject to such rules and regulations" promulgated under the Act.¹¹² Excavations may be conducted by museums, universities, and scientific institutions, "with a view to increasing the knowledge of such objects."¹¹³ Any other type of excavation on public lands is illegal.¹¹⁴

107. 42 U.S.C. § 1996.

108. Echo-Hawk, *supra* note 4, at 452.

109. Suagee, *supra* note 4, at 7. See also Vizenor, *Bone Courts: The Rights and Narrative Representation of Tribal Bones*, 3 AM. INDIAN Q. 319 (1986). Vizenor argues for the creation of a federal court to hear reburial disputes.

110. 16 U.S.C. §§ 431-433 (1983).

111. *Id.* § 432.

112. *Id.*

113. *Id.*

114. *Id.* § 433.

The recovered artifacts "shall be made for permanent preservation in public museums."¹¹⁵ However, there is no provision for Native American ownership or disposition of recovered artifacts.¹¹⁶ Under the Act, artifacts are stored and maintained by both federal and nonfederal repositories. The Act's implementing regulations establish a procedure for the ultimate disposition of archeological collections:

Every collection made under the authority of the act and of this part shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum which is a depository of any collection made under the provisions of the act and this part, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.¹¹⁷

This regulation has been interpreted to suggest that an archeological collection, obtained pursuant to the Antiquities Act, "cannot be relinquished for any purpose other than continued preservation."¹¹⁸ By implication, then, Native Americans would be permitted to remove collections recovered under an antiquities permit if the artifacts would be curated in a public museum. However, removal of such material for reburial would not be permitted.

The Act provides a criminal penalty for the unauthorized appropriation, excavation, injury, or destruction of "any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States."¹¹⁹ Penalties under the Act are minimal by contemporary standards: fines are not to exceed \$500, or imprisonment for more than ninety days.¹²⁰ Enforcement of the criminal provisions, however, has proved to be ineffective.

115. *Id.* § 432.

116. See Echo-Hawk, *supra* note 4, at 448-49.

117. 43 C.F.R. § 3.17.

118. Memorandum to Assistant Secretaries, from Assistant Secretary for Fish and Wildlife and Parks, United States Department of Interior (Apr. 22, 1988).

119. 16 U.S.C. § 433.

120. *Id.*

In *United States v. Diaz*, section 433 of the Antiquities Act was declared to be unconstitutionally vague.¹²¹ This section of the Act provides criminal penalties for the removal or destruction of any "object of antiquity" located on property owned or controlled by the federal government. The case involved a defendant who had been prosecuted under the Act for illegally removing masks and other objects from a cave located on the San Carlos Apache Reservation. The objects had been placed in the cave several years earlier by Indians at the conclusion of a ceremony. In declaring this portion of the statute void for vagueness, the court held if objects several years old and qualified as an "object of antiquity" it would be impossible for an individual to know in advance whether he would be subject to criminal sanctions. The deficiencies of the Antiquities Act of 1906 were corrected by subsequent legislation.

Archeological Resources Protection Act

The Antiquities Act has been largely superseded by the Archeological Resources Protection Act of 1979 (ARPA).¹²² ARPA cures the constitutional deficiency of the Antiquities Act. It expressly recognizes Native American interests in cultural resources located on Indian lands, and it upgrades criminal and civil sanctions. ARPA requires that rules adopted under the Act be promulgated "only after consideration of the provisions of the American Indian Religious Freedom Act."¹²³

ARPA cured the vagueness problem by replacing the term "object of antiquity" with "archeological resource." An archeological resource must be at least 100 years of age and includes "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act."¹²⁴ Human graves and skeletal materials are specifically cited as examples of archeological resources.¹²⁵

The permitting process affords a greater role for Native Americans to control the treatment of archeological resources located on and excavated from Indian lands. Specifically, permits are required in order to excavate and remove any archeo-

121. 499 F.2d 113 (9th Cir. 1974).

122. 16 U.S.C. §§ 470aa-470ii (1983). Rules implementing ARPA have been promulgated at 43 C.F.R. §§ 7.1 to 7.37 (1988); 18 C.F.R. §§ 1312.1-9 (1989); 32 C.F.R. §§ 229.1-19 (1988).

123. 16 U.S.C. § 470ii.

124. *Id.* § 470bb(1).

125. *Id.*

logical resources located on either public or Indian lands.¹²⁶ Permits for excavation on Indian lands "may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands."¹²⁷ The permit is required to include "such terms and conditions as may be requested by such Indian or Indian tribe."¹²⁸ Thus, the permitting process affords an opportunity for Indians to become involved in deciding whether and under what conditions a permit should be granted.

ARPA continues the policy that archeological resources removed from public lands are the property of the United States and will be preserved in a suitable museum, university, or scientific institution.¹²⁹ The Secretary of the Interior is empowered to regulate the manner in which archeological resources removed from public land will be disposed.¹³⁰ However, the exchange or ultimate disposition of archeological resources excavated or removed from Indian lands is subject to Indian consent.¹³¹ On public land not owned by Indians, ARPA requires that Indian tribes must be given notice of any permits which might result in harm to religious or cultural sites.¹³²

ARPA delimits prohibited acts and provides for criminal penalties. It is illegal to "excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands," unless that activity is conducted in accordance with a permit.¹³³ Furthermore, it is illegal to "sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange" artifacts excavated or removed from public or Indian lands in violation of the ARPA.¹³⁴

Penalties under ARPA are stiff. Initial penalties begin with fines not to exceed \$10,000 or imprisonment of not more than one year, or both.¹³⁵ However, if the value of the archeological resource and cost of restoration exceeds \$5,000, fines are set

126. *Id.* § 470cc.

127. *Id.* § 470cc(g)(2).

128. *Id.*

129. *Id.* § 470cc(b)(4).

130. *Id.* § 470dd. See also Curation of Federally-Owned and Administered Archeological Collections, 52 Fed. Reg. 32,740-32,751 (Aug. 28, 1987) (proposed to be codified at 36 C.F.R. § 79).

131. 16 U.S.C. § 470dd.

132. *Id.* § 470cc(c).

133. *Id.* § 470ee(a).

134. *Id.* § 470ee(b).

135. *Id.* § 470ee(d).

at not more than \$20,000 or imprisonment for not more than two years, or both.¹³⁶ Second and subsequent violations result in even greater penalties, with fines not to exceed \$100,000, or imprisonment for not more than five years, or both.¹³⁷

It is suggested that the cost of reinterment of illegally excavated human remains is provided for in the penalty provisions of ARPA.¹³⁸ Civil penalties are assessed based on the archeological or commercial value of the resources, and the cost of restoring and repairing the site.¹³⁹ Included as part of the cost of restoration and repair is the cost of scientific analysis and reinterment of human remains.¹⁴⁰ Of interest, reinterment of human remains is to be conducted "in accordance with religious custom and State, local, or tribal law."¹⁴¹

In sum, ARPA provides a means for protecting archeological resources located on public and Indian lands. Its permitting process provides a means to control authorized excavation, and its penalties act as a deterrent to those who conduct unauthorized excavation. Under ARPA decisions affecting public lands are left with federal agencies, but Indians are left to make their own decisions about how cultural resources are to be addressed on Indian lands.

National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA), as amended, is a mandate for federal agencies to consider how agency actions and decisions affect cultural resources.¹⁴² NHPA contains a requirement that each federal agency "establish a program to locate, inventory, and nominate to the Secretary [of Interior] all properties under the agency's ownership or control . . . that appear to qualify for inclusion on the National Register [of Historic Places]."¹⁴³ Thus, NHPA provides a set of procedures for reviewing and balancing impacts to cultural resources.¹⁴⁴

136. *Id.*

137. *Id.*

138. Suagee, *supra* note 4, at 40.

139. 16 U.S.C. § 470ff(2).

140. 43 C.F.R. § 7.14.

141. *Id.* § 7.14(7).

142. 16 U.S.C. § 470-470w-6.

143. *Id.* § 470h-2(a)(2).

144. See Comment, *Archeological Preservation of Indian Lands: Conflicts and Dilemmas in Apply the National Historic Preservation Act*, 15 ENVTL L. 413 (1985) (authored by H. Barry Holt).

National Register criteria for eligibility are the basis for determining the importance or significance of a cultural resource.¹⁴⁵ Once a property is listed or determined eligible for inclusion on the National Register, Section 106 of NHPA requires that the Advisory Council on Historic Preservation be provided an opportunity to comment on any federal action that may adversely affect such a property.¹⁴⁶ This process is intended to ensure that significant cultural resources are considered early in the decision-making process, thereby providing a range of alternatives to either avoid or mitigate destructive impacts.

Native Americans may be able to protect and preserve burial sites and significant ceremonial sites through NHPA. Although NHPA does not provide an absolute form of protection, it does offer some protection from actions undertaken or controlled by the federal government. The advantages obtained by placing Native American sites on the National Register have been summarized:

Seeking to have a tribal religious or cultural site placed on or determined eligible for the National Register may not be the most appropriate way to protect such a site, especially if there is little threat of damage to such a site. However, if the threat of damage is a concern, the National Register offers two major benefits: first, there is an established process by which impacts on National Register listed or eligible properties are considered in the environmental review of proposed federal actions; and, second, the fact that federal agencies are authorized to withhold information regarding properties listed on or eligible for the National Register from disclosure pursuant to the Freedom of Information Act.¹⁴⁷

Several provisions of NHPA are useful for addressing Native American concerns. Specifically, criterion (d) may be applicable for listing tribal religious or cultural sites since these sites are likely to yield "information important in prehistory or history."¹⁴⁸ However, it should be noted that a cemetery is afforded protection under the NHPA only if it "derives its primary significance from graves of persons of transcendent

145. 16 U.S.C. § 470-1.

146. *Id.* § 470f (implemented through 36 C.F.R. § 800).

147. Suagee, *supra* note 4, at 41.

148. 36 C.F.R. § 60.4 (1988) (parks, forests and public property).

importance, from age, from distinctive features, or from association with historic events."¹⁴⁹

In sum, cultural resources listed or determined eligible for the National Register are afforded a greater level of protection. Although these provisions have been seldom used by Native Americans, they provide an additional means to protect sacred or ceremonial sites.¹⁵⁰ Therefore, application of NHPA offers an additional avenue for addressing Indian values within the context of existing federal legislation.

Pending Federal Legislation

Recent bills introduced before Congress propose sweeping measures for the treatment of Native American burial remains. The 100th Congress saw the introduction of two bills in this regard: (1) Senate Bill 187, the Native American Museum Claims Act, sponsored by former Sen. John Melcher (D-Mont.), and (2) House bill 5411, the Indian Remains Reburial Act, sponsored by Rep. Byron Dorgan (D-N.D.). Sen. Melcher's bill would create a federal claims commission to adjudicate requests made for the repatriation of Native American skeletal remains and ceremonial artifacts held in museums.¹⁵¹ Rep. Dorgan's bill attempts to ensure that the Smithsonian Institution returns all Indian and native Hawaiian skeletal remains in its possession to requesting tribes. The bill would allow a two-year period of analysis before the remains would have to be returned.¹⁵²

Legislation before the 101th Congress both builds upon and expands earlier efforts. House Bill 1381, the Native American Burial Site Preservation Act, sponsored by Rep. Charles Bennett (D-Fla.), would prohibit the excavation of a burial site unless conducted under a state permit. Most recently, Rep. Morris Udall (D-Ariz.) has introduced House Bill 1646, the Native American Grave and Burial Protection Act. This bill is a broad attempt to enact measures affecting both the excavation and curation of skeletal remains and grave goods. A primary purpose of the bill is to prohibit the sale and transportation of skeletal remains and grave goods across state lines without the consent of either heirs or tribal representatives. The bill also proposes provisions for the repatriation of human skeletal remains and ceremonial objects

149. *Id.* § 800.10(b)(4).

150. Wilson & Zingg, *supra* at note 4, at 13.

151. See 11 ADVISO 1 (November, 1988).

152. *Id.*

from collections held by federal agencies and museums receiving federal funds.¹⁵³

Most recently, President Bush signed into law the National American Indian Museum Act.¹⁵⁴ This bill, sponsored by Rep. Ben Nighthorse Cambell (D.-Colo.) and Sen. Daniel Inouye (D.-Haw.) as House Bill 2668 and Senate Bill 978, provides for the creation of a new national museum devoted to American Indian culture. It also addresses the treatment of Native American skeletal remains held by the Smithsonian Institution. During negotiation, the Smithsonian Institution agree to establish procedures for the return of human skeletal remains and associated grave items to requesting tribes when a preponderance of evidence indicates that the remains are culturally affiliated with the requesting tribe. Although it is premature to assess whether this bill will result in a shift in federal policy, its enactment nonetheless signals that Indian concerns are being heard by members of Congress and a federal legislative solution to this issue may be forthcoming.

State Approach

State legislation frequently provides a means to protect Native American interests.¹⁵⁵ Existing state statutes generally establish a procedural framework for the treatment of cemeteries and dead bodies, and occasionally address Native American burials.¹⁵⁶ A central characteristic of state legislation is the variation and degree of protection, existing between states, that is afforded to Native American burial sites, skeletal remains, and associated grave items. Many of the more traditional statutes are premised on a distinction drawn between ancient and recent burial sites, with recent graves being afforded a greater degree of protection. More recent statutes, however, tend to offer equal protection to both historic and prehistoric Native American burials.

153. See 5 ADVISO 2 (May, 1989).

154. Pub. L. No. 101-185, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 1336.

155. See Echo-Hawk, *Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws*, 14 NATIVE AM. RIGHTS FUND LEGAL REV. 1 (1988), for an overview of recent legislative efforts to regulate the treatment of Native American skeletal remains.

156. See Rosen, *supra* note 4. Rosen provides a good, although somewhat dated, overview of legislative approaches to controlling archeological work on state and private lands. See also Talmage, *The Violation of Sepulture: Is it Legal to Excavate Human Burials?*, 35 ANTIQUITY 44 (1982).

State statutes that address the treatment of Native American remains can be grouped into three general categories.¹⁵⁷ The first category provides for the equal recognition and treatment of Indian and non-Indian graves.¹⁵⁸ These statutes are designed to offer the same level of protection to all recognized burial sites, but are noticeably silent about the ultimate disposition of Native American skeletal remains. It has been suggested that, even in the absence of a direct reference to Native American burial sites, the broad language and meaning of the word burial as found in many cemetery statutes could be applied:

Such a broad definition could easily include ancient Indian cemeteries. Only judicial interpretation or legislative clarification can determine what is actually meant by such language. Certainly, the sites of ancient cemeteries were not contemplated when such statutes were enacted, but that need not bar their possible inclusion within the scope of such acts. Creative legal arguments based on state burial statutes could be made in an effort to protect Indian burial grounds.¹⁵⁹

The second category of statutes represents an extension of the previous category.¹⁶⁰ Again, Native American burials are afforded

157. See Higginbotham, *supra* note 4, at 112-13. Higginbotham groups legislation into somewhat different categories: 1) historic preservation statutes; 2) cemetery and grave statutes; and 3) statutes that specifically address Indian burials.

158. See, e.g., WASH. REV. CODE §§ 27.44.010 to 27.44.020. (West 1988) (limitations are placed on the excavation of human remains and grave artifacts unless they will be preserved perpetually in a museum).

159. Higginbotham, *supra* note 4, at 112.

160. See, e.g., CAL. STAT. §§ 5097.9-99 (West 1988) (excavated human remains and grave items are to be reinterred, and it is illegal to possess skeletal remains and artifacts taken from a grave after Jan. 1, 1984); FLA. STAT. § 872.05 (1988) (scientifically significant remains will not be reinterred without analysis); IDAHO CODE §§ 18-7027 to -7028 (1988) (reinterment is required, and possession of artifacts taken from graves after Jan. 1, 1984 is prohibited); IOWA CODE §§ 305A.1 to A.10 (West 1988) (state archeologist has authority to reinter ancient remains over 150 years old); ME. REV. STAT. ANN. 22 § 4720 (West 1980) (after Oct. 3, 1973 all excavated skeletal remains are to be transferred to Indian tribes for reburial, following a one year period for analysis); MASS. GEN. L. 7 § 38A (West 1986) (excavated remains are to be considered on a case by case basis in consultation with Indian groups, but does not affect remains collected prior to 1983); MINN. STAT. § 307.08 (West 1987) (if tribal identity can be determined, remains will be turned over to contemporary leaders at the desecration of the state archeologist); MO. REV. STAT. §§ 194.400-410 (West 1988) (when ethnic affinity is established the State Historic Preservation Officer will consult with Indian groups to determine proper disposition, but analysis is required before reinterment of scientifically significant remains); N.H. REV. STAT. § 227-C:8 (West 1988) (following analysis, consultations with Indians is to be done in order to develop a plan for ultimate disposition); N.C. GEN.

the same level of protection as Euro-American historic graves, but excavated Indian skeletal remains and associated grave items are typically subject to reburial. Some acts provide for reinterment based on temporal period, degree of cultural affiliation, or defer the decision to Native American representatives. The statutes apply to materials excavated subsequent to enactment, and generally allow a reasonable period for analysis of recovered skeletal remains and artifacts. As would be expected. These statutes are more controversial:

[A]rchaeologists must surrender human skeletal remains to certain Indian representatives for reburial. These remains have traditionally been curated for purposes of future scientific study when new scientific procedures are developed. The archaeologists argue that reburial results in a loss of future scientific data, and is unacceptable to them. Indians, on the other hand, could argue that such statutes are compromises, because the statutes respect the interests of both Indians and archaeologists. This is so because archaeological study is expressly allowed for a reasonable period of time and Indian religious concerns are acknowledged by the required reburial.¹⁶¹

The final category extends the continuum by providing for the repatriation of skeletal material from existing collections. Statutes within this category are rare.¹⁶² The adoption of statutes providing for repatriation of existing human skeletal collection would have a pronounced impact on Indians, archeologists, and museums. They would be significant to native Americans because they could contain provisions for reburial of all existing skeletal collections in accordance with contemporary Native American religious values. The statutes would undoubtedly be viewed as very controversial by some members of the anthropological and museum

STAT. §§ 70-26 to -40 (1988) (consultations will be made with Indian groups for the treatment and ultimate disposition of analyzed excavated remains); 21 OKLA. STAT. §§ 1168-1168.6 (West 1987) (consultations are to be made with Indian groups); OR. REV. STAT. §§ 97.740-.760 (1987) (possession of human remains and artifacts removed from graves after Oct. 3, 1979 is prohibited, and the display of Indian remains is unlawful); WIS. STAT. § 157.70 (West 1988) (a reasonable period for analysis is provided for, and disposition is based on a series of priority classes).

161. Higginbotham, *supra* note 4, at 112-13.

162. See e.g., DEL. CODE ANN. tit. 54 §§ 5401-5411 (West 1987) (all excavated and previously curated skeletal material is to be reinterred within one year); Neb. L.B. 340 (May 1989) (state museums with human skeletal remains and grave items identified as being from a specific family or tribe are subject to reburial upon request).

professions.¹⁶³ Legislative sessions considering the passage of such acts would be expected to bring to the forefront a conflict of values.

The incompatible world views of Indians and archaeologists are unlikely to allow an easy resolution of the disagreements over these statutes. They are a significant departure from past state policies and will certainly continue to raise controversial issues of the religious rights of Indians and the legal limits of scientific inquiry.¹⁶⁴

Given the continuum of protection afforded by existing legislation, it would be expected that states will continue to adopt and revise legislation that addresses the treatment of human skeletal remains. Attempts to address repatriation of skeletal materials in the absence of a statutory framework have obtained mixed results.¹⁶⁵

In summary, legislative solutions provide a context in which compromises between all interested parties can be achieved. In general, legislation frequently provides a means for Native Americans and their supporters to enforce the preservation of burial sites. Where existing legislation is deficient, recent acts adopted by various states provide models for achieving balanced solutions. The legislative process provides a conduit for Indians, anthropologists, and museums to influence the long-term treatment of human remains and associated artifacts. As such, a recognized forum is provided for the discussion and consideration of diverse perspectives.

Pragmatic Solutions and Conclusions

Although legal remedies are available, nonjudicial solutions provide a means to amicably resolve or at least ameliorate the

163. See e.g., Omaha World-Herald, Dec. 19, at 19, col. 1. Nebraska State Historical Society Director J. Hanon expressed opposition to proposed Legislative Bill 612. The bill would have provided conditions for returning collections to native Americans.

164. Higginbotham, *supra* note 4, at 113.

165. See, e.g., Alex, *Archaeology Special—American Indian Skeletal Remains Reburied*, 1 HIST. NOTES 5 (1986). Alex describes the process used in South Dakota to analyze and ultimately reinter skeletal remains from existing archeological collections. The repatriation was undertaken in cooperation with Indian groups and did not arise as a result of either a judicial or legislative mandate. See also *Reburial Controversy* 5 PCNHD NEWSL. 3 (No. 1, 1988); and Omaha World-Herald, July 25, 1988 at 11, col. 1, for a contrasting result. Both articles describe the controversy that arose in North Dakota when the board of the State Historical Society voted to return all Native American remains and associated grave items to contemporary Indian representatives without scientific analysis. The repatriation was halted when a law suit brought a temporary restraining order.

dispute regarding human skeletal remains and grave items. Non-judicial solutions are particularly advantageous in that they do not involve the expenditure of vast amounts of time and money normally associated with litigation. Furthermore, they are more likely to bridge strained relationships, where legal disputes tend to polarize and entrench.

One approach frequently used by professional organizations to address this conflict is through passage of resolutions and codes of ethics.¹⁶⁶ However, resolutions and codes are not a panacea. They seldom tend to obtain tangible solutions that are amenable to all parties. It has been observed that:

Resolutions, if not so insipid as to be worthless, have a unique ability to alienate a portion of the membership while lulling the remainder into complacent self-satisfaction. At the same time, resolutions create serious doubts in the minds of the general public while not giving any real assurance to the subject population.¹⁶⁷

Therefore, as an alternative, better public relations may be a more practical method of resolving the conflict of values that is perceived to exist between archeologists and Indians.¹⁶⁸ Rather than passing resolutions at professional meetings, affirmative steps could be taken by archeologists to directly involve Indian groups in archeological projects. Over time, the interaction of the two groups would lend itself to a greater mutual understanding.

Several diverse steps could be taken. At the outset, before excavation is initiated at Native American sites, the archeologist could contact tribal organizations representing descendants of the group being investigated.¹⁶⁹ This is particularly important where an archeological site is located in close proximity to Indian lands. As another courtesy, publications and reports on the results of investigation could be presented to tribal or representative organizations.¹⁷⁰ This would not only provide Indians with additional

166. See Rosen, *supra* note 4, at 15-16. Rosen provides a good summary of the resolutions and codes of ethic adopted by professional organizations in response to Native American grievances. See also *Statement Concerning the Treatment of Human Remains*, 4 BULL. FOR THE SOC'Y FOR AM. ARCHAEOLOGY 7 (No. 3, 1986); *American Association of Museums Policy Regarding the Repatriation of Native American Ceremonial Objects and Human Remains*, 4 AVISO 4-5 (March 1988).

167. Sprague, *supra* note 15, at 1.

168. See Winter, *Indian Heritage Preservation and Archeologists*, 45 AM. ANTIQUITY 121 (1980).

169. Sprague, *supra* note 15, at 1.

170. *Id.*

information about their cultural heritage, but would also provide greater insights into the nature of archeological research. By doing so, the Native Americans could learn how information obtained is being used to address questions related to both prehistoric Indians and humankind in general.

If archeological work is to be conducted on Indian or adjacent land, preferential hiring of tribal members would further promote goodwill.¹⁷¹ Aside from providing employment, this would allow Indians to become informed participants, as opposed to skeptical bystanders. This would be of particular importance if human skeletal remains were encountered during the course of excavation; it would be one means to assure Native Americans that Indian remains are receiving care and respectful treatment.¹⁷²

The best way for Native Americans to preserve their cultural materials is to prevent them from being removed from Indian lands.¹⁷³ Federal regulations provide a variety of ways for Native Americans to exert control over the treatment of cultural resources. The policy expressed by federal legislation is a recognition of Indian interests in sacred and ceremonial locations and objects. Explicit procedures within the various federal acts provide a basis for direct Native American involvement.

Native American burial sites located on private property present greater problems. The options for dealing with human remains and artifacts from these sites are varied. First, efforts should be directed at keeping burial sites intact. This could be accomplished through judicial interpretation of existing state statutes dealing with cemeteries and dead bodies. Alternatively, legislation could be introduced that specifically provides for equal recognition and treatment of Indian burial sites.

Under a legislative framework, if preservation proved to be infeasible or undesirable, the remains could be removed by archeological excavation conducted in conjunction with Native Americans. This approach would take into account the values held by both archeologists and Indians. From an anthropological perspective, the best result would include a stipulation providing for the analysis of all excavated artifacts and skeletal remains of scientific importance. From the perspective of the Native Americans, the best solution would provide that, following a reasonable period for analysis, the skeletal material would be returned to a tribal organization for reburial with appropriate ceremony. This

171. *Id.*

172. *Id.* at 2.

173. Note, *supra* note 4, at 133.

compromise is probably adequate for most historic period burial sites, but it may not be sufficiently flexible for sites of greater antiquity or possessing significant scientific value.

As an alternative, a sliding scale could be used for deciding disputes on a case-by-case basis within a quasi-judicial or administrative setting.¹⁷⁴ Native American burial issues could be resolved by a board or commission created by statute. Ideally, the board would be composed of Native Americans, anthropologists, museum specialists and interested citizens, thus ensuring a representation of the range of perspectives. Its key functions would be to hear requests for disinterment, delimit conditions for scientific study, and consider claims made by tribal organizations for the return of skeletal remains and associated grave items for reburial. A central determinative element under this approach would be the degree of relationship between the remains and contemporary Indian groups. Resolving issues, then, would turn on who has the burden of proving a relationship or establishing scientific value.

A sliding scale approach addresses problems as they exist in four distinct contexts. First, recognized Indian burial sites, regardless of cultural or temporal association, would be presumed to warrant the same scope of protection that is provided other burial sites. If land disturbance is anticipated, the burden would be placed on the developer to demonstrate both the necessity for disinterment and methods for treating the remains. Preserving a burial site intact is the optimum solution, since it retains the integrity of the decedent's final resting place and avoids the problems associated with selecting the proper treatment of the remains.

Second, for historic period burials recovered during archeological excavation, it would be presumed that tribal groups known to have occupied the areas from which a skeleton was recovered would possess sufficient cultural or biological affiliation to establish a reburial claim. This presumption would be rebuttable if an archeologist or physical anthropologist could put forth sufficient evidence to establish either an absence of biological or cultural relationship with the claiming group or show that the remains or artifacts possess significant scientific value.

Third, for ancient burials or burials of unknown affiliation recovered during archeological excavation the presumption would

174. See, Rosen, *supra* note 4, at 118-19; Johnson, *The Care and Disposition of Archaeologically Excavated Human Osteological Remains*, 46 MINN. ARCHAEOLOGIST 47 (1987) (discussion of alternative sliding scale approaches).

be removed. The Native American would have the burden of establishing a biological or cultural affiliation. If this burden could not be met, the Native Americans should be able, in the alternative it show that retention of the remains or artifacts lacks a compelling scientific justification. Evidence supporting such a showing would include facts about the nature and extent of completed analysis and the degree of redundancy that exists with regard to existing collections.

Finally, for materials in existing museum collections, a presumption would exist that they possess a high level of scientific significance. In claims for the repatriation of either skeletal material or artifacts, a heavier burden would be placed on the Native Americans. The burden would be greatest for human skeletal remains of ancient or unknown affiliation, and less for remains from the historic period. This presumption is a recognition that extant collections have inherent value to present and future generations of Americans.

Under this approach a balance would be obtained. The collection and retention of Native American skeletal remains and grave items would be abated because it is anticipated that the preferable solution would be to preserve a burial site intact. If excavation should occur most skeletal remains and grave items would be returned to tribal groups after a reasonable period for scientific analysis. Finally, although many existing museum collections would remain in a static state of preservation, historic period and scientifically insignificant collections would be susceptible to repatriation claims.

This article has examined some of the legal, cultural, and ethical issues involved in the dispute over control of Indian skeletal remains and burial items. It has been shown that the dispute is complex and emotional. Like dancing partners, the interaction of Native Americans and anthropologists are intimately intertwined. Several legal remedies are available for Native Americans to protect burial remains. Alternative solutions are available either in a legislative framework or through cooperation. It is expected that these issues will not fade away in a whimper; rather, it is anticipated that confrontations will continue to arise across the nation on a state by state basis. In the end, even if solutions are obtained, each side of the dispute will feel that something important has been lost—such is the nature of deeply held values.