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INDIAN RIGHTS: NATIVE AMERICANS VERSUS AMERICAN MUSEUMS—A BATTLE FOR ARTIFACTS†

Bowen Blair*

Introduction

The degradation of American Indian culture is a familiar feature in United States history. By depriving Indians of artifacts which possess special religious and ceremonial significance, American museums are contributing to this cultural debasement. Several Indian groups have initiated formal, yet nonlegal, requests for the return of these relics. However, museums, often relying upon solid legal and practical grounds, have typically ignored these requests.

An analysis of two confrontations between Indians and museums, concerning Zuni War Gods and Iroquois wampum belts, clarifies the legal and moral issues involved. A further examination of the federal Antiquities Act¹ and its proposed replacement,² the first amendment to the United States Constitution,³ and a recent Public Law,⁴ reveals legal solutions available to assist Native American attempts to protect undiscovered artifacts and to reclaim those artifacts presently held by museums.

Case Studies

In the late sixteenth century,⁵ members of the Iroquois Nation's Onondaga Tribe fashioned belts from purple and white clam and conch shells.⁶ These wampum belts were an integral part of the Iroquois culture. Symbols woven into the belts constituted the Onondagas' only recorded history.⁷ Furthermore, ac-

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1. 16 U.S.C. § 431 (1976).

2. H.R. REP. No. 1825, 96th Cong., 1st Sess. (1979).

3. U.S. CONST. amend. I.

4. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469.

5. Akwesasne Notes, May 1970, at 1, col. 4. For historical account of the Iroquois wampum, see A. MOLLOY, WAMPUM (1977).

6. N.Y. Times, Mar. 11, 1971, at 44, col. 6.

7. ARTS ADVOCATE, Jan. 1975, at 1, col. 1.

according to Chief Irving Powless, the belts "are our religion and our law combined."⁸

In 1898, under questionable circumstances,⁹ the New York State Museum at Albany obtained twenty-six of the Onondagas' wampum belts. Among these belts was perhaps the Iroquois' most famous, the Hiawatha belt.¹⁰ Although the Onondaga refuse to attach a price to the wampum belt, experts estimate its art value at \$280,000.¹¹

The Onondaga later demanded the return of the belts. Each demand was refused by the state museum. In 1971, public pressure resulted in the passage of an act¹² which provided for the return of five wampum belts to the Onondaga. However, this return was conditional. The first condition stipulated that facsimiles of the belts had to be displayed at the state museum, to replace the genuine articles.¹³ The second prerequisite required the Indians to build an "appropriate," "fireproof" facility on their reservation to house the wampum belts.¹⁴ The adequacy of the housing would be determined by the museum's council on the arts,¹⁵ which also retained the power to institute a "special proceeding" to compel the return of the wampum belts should the Onondaga fail to comply with the Act's provisions.¹⁶ This second prerequisite was a practical impossibility.¹⁷

The twin War Gods, Masewi and Oyoyewi,¹⁸ like the Iroquois wampum belts, play an essential role in Zuni culture and religion. The War Gods symbolize courage, strength, and virtue.¹⁹ The cult of the War Gods, or *A'hayuta*, is delegated to the bow priests in the Zuni Tribe,²⁰ who also constitute the executive arm of the Zuni religious hierarchy.²¹ The annual ceremony of the

8. N.Y. Times, Mar. 11, 1971, at 44, col. 6.

9. See discussion in text at note 58, *infra*.

10. N.Y. Times, Apr. 17, 1970, at 40, col. 2.

11. *Id.* The Iroquois analogize the pricing of the wampum belts with Anglo-Americans setting a price on the Declaration of Independence. See ARTS ADVOCATE, *supra* note 7, at 2, col. 3.

12. N.Y. INDIAN LAW § 27 (McKinney).

13. *Id.* at (2).

14. *Id.*

15. *Id.*

16. *Id.*

17. This requirement has to date remained unfulfilled. See note 34, *infra*.

18. 47 U.S. BUREAU OF ETHNOLOGY ANN. REPORTS 64 (1932).

19. *Id.*

20. *Id.* at 525.

21. *Id.* at 562.

bow priests is held at the winter solstice,²² and six days after the announcement of this solstice, men from the Deer and Bear clans start creating the images of the War Gods.²³ These images, known to the art world as actual War Gods, are wooden, pole-like carvings, frequently adorned with eagle feathers. The War Gods are used in Zuni kivas, sacred ceremonial chambers closed to non-Zunis.²⁴ After the ceremonies, the War Gods are placed on specific mountain peaks on Zuni land, where they continue to serve a religious purpose.²⁵

The Zuni are currently negotiating with at least two museums, the Smithsonian Institute and the Denver Art Museum, for the return of War Gods stolen from the Zuni reservation at the turn of the century.²⁶ Neither museum has been receptive to the Zuni requests. The Smithsonian, following the lead of the New York State Museum, has offered to return the images if the Zuni will build an adequate museum.²⁷

To fully appreciate the American Indians' desire for the return of these and similar artifacts, an understanding of Native American culture and religion is essential. However, that analysis exceeds the scope of this note, and a generalization must suffice: religion pervades every aspect of Indian life, particularly Indian art. Chief Oren Lyons of the Onondaga succinctly articulated this tenet; "Religion, as it has been and is still practiced today on the reservation, permeates all aspects of tribal society. The language makes no distinction between religion, government, or law. Tribal customs and religious ordinances are synonymous. All aspects of life are tied in to one totality."²⁸ Indian artifacts, therefore, can rarely be separated from Indian religion. Wampum, for instance, is art as well as religion; it also represents Iroquois culture, history, and current existence. Zuni religious leaders concur with the appraisal, and describe their artifacts as "the essence of our Zuni culture."²⁹ Moreover, the loss of these artifacts to museums has created for the Zuni "an imbalance in

22. *Id.* at 526.

23. *Id.*

24. *Id.* at 527.

25. *Id.*

26. Telephone conversation with Bryant Rogers, Director, Zuni Legal Aid, Aug. 8, 1978. *See also* Letter from Indian Pueblo Legal Services, Inc., to Bowen Blair, Oct. 2, 1978.

27. Telephone conversation with Bryant Rogers, *supra* note 26.

28. ARTS ADVOCATE, *supra* note 7, at 2, col. 4.

29. *See* Appendix A, at item 1, Statement of Religious Leaders.

the spiritual world,"³⁰ which can be rectified only by the return of the artifacts.

The Museum Position

The issue of Indian reclamation of Indian artifacts from museums is an extremely difficult one to resolve. Both sides possess cogent moral and legal arguments. Museums generally rely on four persuasive points: (1) their public responsibility to preserve and exhibit the artifacts for the benefit of all Americans; (2) their doubt as to specific Indian ownership; (3) their unwillingness to establish a precedent of returning a part of their collections to original owners; and (4) their legal claims to the artifacts.

The reason most cited by museums for refusing to return the Indian artifacts concerns their presumed public responsibility to preserve and exhibit the artifacts for the benefit of all Americans, not just the Indians.³¹ The requisite corollary which follows this justification—that Indian tribal museums have inadequate facilities to similarly care for the objects—is largely true.³² According to Martin Link, the director of the Navajos' excellent tribal museum for eighteen years, "there is not a single tribe, including the Navajo, that is properly equipped to take care of any large collections."³³ Museums also cite the poor locations of the reservation tribal museums as a reason to refuse Indian requests. These locations are considered to be inconvenient for the average visitor.³⁴

There are several persuasive counter-arguments to museum assertions that they provide the best places to preserve and exhibit the Indian artifacts. Basically, Indians contend that because museums do not share the Indians' religious concern and

30. *Id.* at 2.

31. See generally MUSEUM NEWS, Mar. 1973, at 22.

32. Reservation Indians are not wealthy. Disease, poverty, and substandard education are realities in their life. The thought of raising enough money to build an "adequate" Tribal Museum, especially during a period when private funding is unable to support the larger, more affluent white museums must seem ludicrous to the Indians. (See generally MUSEUM NEWS, Mar. 1973, at 22).

33. Letter from Martin Link to Bowen Blair, Aug. 26, 1978.

34. N.Y. Times, Mar. 11, 1971, at 44, col. 5. "In the early 1970's, museums arrived at an ingenious solution to the problem of Indian requests for artifacts. Exemplified by the New York State Museum and Smithsonian actions, museums offered to return part of their collections to the Indians, if the Indians would build adequate housing for the artifacts. These acts bolstered the museums' images as concerned humanitarians, ensured the preservation of the artifacts, and effectively negated the Indians' reclamation attempts."

knowledge for these objects, the artifacts are not well cared for. The Zuni, for example, claim museums should not house the War Gods because the gods' proper religious location is on mountain-tops.³⁵ Since the museums do possess the War Gods, however, the Zuni argue that the gods should be properly preserved. To them, proper preservation does not mean an annual lacquering of the War Gods, as might be correct with other museum collections, but involves leaving the War Gods completely untouched.³⁶ The gods are supposed to reside on mountain peaks, totally exposed to the elements. This idea of purposeful deterioration is alien to most museums, and Zuni efforts to prevent the unnatural preservation of their War Gods have been ignored.³⁷

Indians are also worried that their sacred objects will be indiscriminately deaccessioned to private collectors or foreign countries. In 1975 the Iroquois discovered that the director of the Museum of the American Indian-Heye Foundation, Dr. Dockstader, who was apparently low on museum funds,³⁸ had "exchanged" two of the Iroquois' wampum belts for other items.³⁹ A few months later, the museum's deaccessioning policy was revealed in *Lefkowitz v. Museum of the American Indian-Heye Foundation*.⁴⁰ A trustee of this museum had become suspicious when an art dealer offered to sell him several artifacts which were listed in the museum's inventory.⁴¹ The trustee soon discovered that "deaccessioning was almost entirely handled by the director, Dr. Dockstader, without comparative valuations, committee approval or consultation with the trustees."⁴² The anxiety felt by many Native Americans regarding this type of indiscriminate deaccessioning was articulated by Iroquois Chief Oren Lyons: "Just because the museums happen to be having a financial crisis doesn't give them the right to sell and barter our sacred objects. We're having a survival crisis. Those belts are our history, our identity. They are beyond price."⁴³ Despite the superior facilities of the larger museums, therefore, Indian artifacts may be better preserved by Indians.

35. 47 U.S. BUREAU OF ETHNOLOGY ANN. REPORTS 527 (1932).

36. Telephone conversation with Bryant Rogers, *supra* note 26.

37. *Id.*

38. ARTS ADVOCATE, *supra* note 7, at 3, col. 1.

39. *Id.*

40. C.A. No. 41416/75 (D.N.Y. 1975). See also L. DUBOFF, THE DESKBOOK OF ART LAW 887 (1977) [hereinafter cited as DUBOFF].

41. C.A. No. 41416/75 (D.N.Y. 1975).

42. DUBOFF, *supra* note 40, at 887.

43. ARTS ADVOCATE, *supra* note 7, at 3, col. 1.

The second major argument used by museums to support their retention of Indian artifacts concerns the museums' uncertainty as to the identity of the legitimate Indian owners. The various tribal laws regarding private ownership of art objects are complex, especially to non-Indians. Hopi law is one of the clearest on this subject. Generally, the personal goods of a Hopi man are inherited by his sisters, brothers, and clanspeople.⁴⁴ Art objects and artifacts, such as ancient masks, medicine bundles, and animal figurines are clan property, usually controlled by the senior male of the clan.⁴⁵ After the passage of several generations, artifacts may change clans, may be claimed by several clans, or may be claimed by several members within the same clan—all of which raises difficult ownership questions.

Norman Ritchie, the chief ranger of the Navajo National Monument, was involved in a complicated situation concerning conflicting Indian ownership claims several years ago. The Monument had been displaying a Navajo medicine bundle which was claimed by a relative of the original owner. Ritchie was prepared to relinquish the bundle until several other relatives appeared and also claimed it. According to Ritchie: "As it stands now, we have the bundle, but the families involved have not determined to our satisfaction who actually should get the bundle. We have the bundle in safe storage, and will not exhibit it, and would be willing to return it, but heirship in cases like this, when it has once been sold, traded or given away becomes an interesting point in Navajo law."⁴⁶

It is important to realize that the ownership question does not appear in all, or even most, Indian reclamation attempts. For instance, neither the New York State Museum nor the Smithsonian could justifiably plead unknown or conflicting ownership of the wampum belts and War Gods because these artifacts were indisputably created by the respective tribes, and the entire tribes—not individual members—are seeking reclamation. Furthermore, Zuni law is somewhat unusual in that very few religious artifacts are privately or clan-owned.⁴⁷ Therefore, conflicting claims of ownership among individual Zuni would be rare.

The third argument frequently presented by museums is that even a single return of an artifact would create a dangerous

44. Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304, 307 (1934).

45. *Id.* at 308.

46. Letter from Norman Ritchie to Bowen Blair, July 13, 1978.

47. See Appendix A at item 2, Statement of Religious Leaders.

precedent which could lead to the depletion of the museums' collections.⁴⁸ This reasoning, which is valid to an extent, seems to underlie every Native American reclamation attempt.

Undoubtedly, successful tribal suits would encourage other Indian tribes to initiate their own actions. Perhaps those suits possessing similar factual and legal bases would also succeed, which might reduce the holdings of certain museums, particularly those specializing in Indian collections. In any case, museums should not fear Indian successes spreading to other minorities. A victorious suit would probably be grounded upon the Indians' religious ties to these objects,⁴⁹ and few minorities possess similar art/religion connections. Furthermore, Native Americans have a more acute need for their artifacts than do other minorities because unlike these groups (with the exception of Mormons), Native Americans cannot return to the "old country" to regain sacred artifacts and lost religious traditions. American Indians have only the United States. Thus, despite the setting of precedent, the detrimental effects on Native Americans from not being able to worship and conduct their religion as in centuries past would seem to outweigh the occasional loss of artifacts by museums.

The fourth major argument proposed by museums is that they possess valid legal title to the artifacts. Certainly American property law, which confers ownership of all artifacts or objects found on private land in the landowners,⁵⁰ favors museums. The landowner may sell, destroy, or exploit any such object, regardless of who the original owner was.⁵¹

However, all museum property does not derive from private ownership. Much is illegally expropriated from public land, or land owned by Native Americans.⁵² Clemency Coggins, a noted art historian, described a common museum attitude toward artifacts discovered on Indian land: "As far as many American museums are concerned, a bird in the hand is worth everything. Museum people are schooled in the acquisition, conservation, and practical esthetics of objects in relation to museum collections. They believe that any object which is acquired by a

48. Akwasasne Notes, *supra* note 5, at 1, col. 4. This argument was proposed by the New York State Museum, among others.

49. See discussion in text at note 99, *infra*.

50. Annot., 170 A.L.R. 708 (1947).

51. *Id.*

52. See generally 36 AM. ANTIQUITIES 374 (1971), for a discussion of the illegal antiquities trade.

museum is necessarily in a better place than it was before. . . ."⁵³ Zuni religious leaders believe this attitude is directly responsible for the theft of their artifacts: "The thefts and illegal selling of these Zuni religious items and artifacts is based primarily on the practice and willingness of museums, both private and public, . . . to pay high prices for these items."⁵⁴

Indian "gifts" to museums also should be scrutinized. For instance, according to the New York act which concerned the wampum belt return, the Iroquois in 1898 "duly elected" the University of the State of New York "to the office of wampum keeper."⁵⁵ Closer inspection invites skepticism regarding this "election."

At the end of the nineteenth century, the Regents of the New York State Museum, apprehensive that the Iroquois tribes were breaking up and would take the valuable wampum belts out of New York, elected Harriet Maxwell Converse promoter of a drive to "rescue" as much wampum as possible.⁵⁶ Despite the obvious conflict of interests, Mrs. Converse persuaded the Onondaga chiefs to appoint her their attorney in their efforts to reclaim wampum held by John Thatcher, the mayor of Albany.⁵⁷ She next convinced the chiefs their case would be improved if they elected the Board of Regents "wampum-keeper with full power to get possession and safely keep forever all wampums of the Onondaga and Five Nations."⁵⁸

In the ensuing court battle against Thatcher, commenced in 1898—only eight years after the battle of Wounded Knee, when anti-Indian feelings inflamed the country—the Iroquois failed to regain their wampum.⁵⁹ The court also ruled that the university had never been selected wampum keeper.⁶⁰ The 1971 New York legislature's actions declaring the "election" of the university to "wampum keeper," therefore, appear inexplicable.

Considering the time period in which many museums received Indian artifacts, and the continuing existence of prejudice against Indians in parts of the United States, no museum's assertion of

53. Coggins, *Archeology and the Art Market*, 175 SCIENCE 263, 264 (1972).

54. See Appendix A, at item 4, Statement of Religious Leaders.

55. N.Y. INDIAN LAW § 27(1) (McKinney).

56. ARTS ADVOCATE, *supra* note 7, at 2, col. 2.

57. *Id.*

58. *Id.*

59. *Onondaga Nation v. Thatcher*, 29 Misc. 428, 61 N.Y.S. 1027, 169 N.Y. Rep. 584 (1901).

60. *Id.*

valid legal title should be accepted without suspicion. Kenneth Hopkins, the director of Olympia's State Capitol Museum, concurs with this postulate:

As for materials that were not "stolen," I doubt their existence. The legalisms that confound the picture of Indian dispersal apply as well to Indian cultural relics. Here in our Northwest, we live on land "legally" acquired from the Indians. Yet as the history of the acquisition falls under scrutiny, we in local history find ourselves in the awkward position of trying to interpret events that we would prefer not to have to interpret.⁶¹

It should not be inferred, however, that all, or even the majority, of museums are unethical or refuse to entertain serious Indian requests for sacred artifacts. For instance, when Hopi elders demanded the return of deeply religious kiva masks on exhibit in Phoenix's Heard Museum, the director willingly complied.⁶² Another encouraging incident occurred in Santa Fe in 1977, when the Wheelwright Museum returned eleven sacred medicine bundles to four Navajo medicine men.⁶³ Overall, the brightest future for Native American reclamation attempts rests upon the beliefs of men like Olympia's Director Hopkins, who declared, "Indian material belongs with Indians. I draw no lines around this, set up no perimeters, fall back on no qualifications. Indian material to Indians. Nothing less."⁶⁴ Because museums are generally not as cooperative as these southwestern ones, and their directors not as obliging as Hopkins, Native Americans must rely upon other methods to protect and procure their religious artifacts. United States laws provide some hope.

Pertinent Laws

The best way for Indians to secure their artifacts is to prevent their removal from Indian lands. The Antiquities Act of 1906⁶⁵ attempts to accomplish this. The third section⁶⁶ of this Act imposes a

61. MUSEUM NEWS, Mar. 1973, at 23.

62. ART NEWS, Dec. 1977, at 94.

63. Letter from Susan McGreevy, Director of the Wheelwright Museum, to Bowen Blair, July 14, 1978.

64. MUSEUM NEWS, Mar. 1973, at 23.

65. 16 U.S.C. § 431 (1976).

66. "Any person who shall appropriate, excavate, injure, or destroy 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, without the permission of the Secretary

\$500 fine and/or ninety days imprisonment on anyone appropriating an "object of antiquity"⁶⁷ from federal land without permission. Since many remaining Indian sites existed on land in the public domain and within the purview of this Act,⁶⁸ the Antiquities Act seemed an ideal mechanism to protect Indian artifacts.

Unfortunately, the Act contains two major limitations. First, the Act does not protect artifacts from museums; in fact, it encourages museum exploitation. Permits will be granted "for examination of ruins, . . . excavation, . . . and the gathering of objects of antiquity"⁶⁹ upon these lands, "Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, . . . with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums."⁷⁰

Any "reputable" museum can acquire a permit through the Antiquities Act to collect sacred artifacts from federal land. The "reputable" restriction represents no consolation for Indians who have witnessed museums such as the Smithsonian appropriate artifacts from their lands.⁷¹ The Act nevertheless does vicariously af-

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 \$500 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." 16 U.S.C. § 433 (1976).

67. *Id.*

68. See Wilson & Zingg, *What is America's Heritage? Historic Preservation and American Indian Culture*, 22 KAN. L. REV. 413, 422 (1974).

69. 16 U.S.C. § 432 (1976).

70. *Id.*

71. Few, if any, tribes in the Southwest have escaped serious damage from the "pothunters" who roam tribal and federal lands seeking Indian relics. The size and organization of these illegal groups vary as much as their motives; the groups range from heavily armed, high-profit squads equipped with bulldozers and four-wheel drive vehicles, to the single tourist bumbling for an authentic souvenir of his vacation. The destruction wrought by the larger groups is particularly severe. Since a premium is placed upon speed in order to avoid detection, broken pots and crushed artifacts are the inevitable consequences of these well-organized raids. According to art historian Clemency Coggins, a more subtle yet equally pernicious damage accompanies the pothunters' incursions: "Once a site has been worked over by looters in order to remove a few salable objects, the fragile fabric of its history is largely destroyed. Changes in soil color, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation between one object and another, and the position of a skeleton—all of these sources of fugitive information are ignored and obliterated by archeological looters." Coggins, *Archeology and the Art Market*, 175 SCIENCE 263 (1972).

Illegal pothunting and the resultant destruction of sites and artifacts has increased significantly the past few years [see 125 CONG. REC. E427 (daily ed. Feb. 8, 1979) (remarks of Rep. Udall)]; see also ARIZONA REPUBLIC, Mar. 6, 1978]. A Tucson art dealer

fect museums by prohibiting excavations conducted by unscrupulous "pothunters,"⁷² who frequently sell their illegal booty to museums.⁷³ Moreover, regulations adopted after the enactment of the Antiquities Act have attempted to restrict this liberal permit system.⁷⁴ For instance, permits may be granted only after obtaining the consent of Indian landowners, who may prescribe special conditions for the digging.⁷⁵ The concurrence of the Bureau of Indian Affairs official having jurisdiction over the property also is required.⁷⁶ Furthermore, once the permit has been issued and the excavation completed, the permittee must restore the land to the satisfaction of the individual Indian and the Bureau of Indian Affairs.⁷⁷

The second and most serious limitations apparent in the Antiquities Act involves its failure to define what constitutes an "object of antiquity." Specifically, how old must an artifact be before it is included in this definition? The sparse legislative history supporting the Act⁷⁸ does not clarify this uncertainty. For instance, the Act's sponsor in the House, Congressman Lacey, declared the purpose of the Antiquities Act was to "cover the cave dwellers and cliff dwellers . . . [and] to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest."⁷⁹ Cases which interpret the Act are more illuminating with respect to this "object of antiquity" standard.

estimates that 80 percent of the Hopi pots presently being traded were illegally excavated on public lands [Hochfield, *Plundering Our Heritage*, ART NEWS, Summer, 1975, at 31]. Some experts recognize pothunting as the major cause of site destruction in the Southwest [*Id.*]. There seems to be no single basis for this pothunting proliferation. Several factors, including increased outdoor recreation by Americans, a new awareness and appreciation for Indian culture with a concomitant rise in the price of Indian art, and a greater availability of technically sophisticated machinery, such as metal detectors and four-wheel drive vehicles, probably have contributed. For a good article which discusses the problems created by pothunters, see Hochfield, *supra*.

72. Hochfield, *supra* note 71, at 30.

73. See 43 C.F.R. §§ 3.1-3.17 (1978), which details what applications for permits must specify; i.e., time, place, persons involved, etc.

74. 25 C.F.R. § 132.2 (1977).

75. *Id.*

76. *Id.* at § 132.5.

77. Telephone conversation with Bryant Rogers, *supra* note 26. See also Letter from Indian Pueblo Legal Services, Inc. to Bowen Blair, Oct. 2, 1978.

78. H.R. REP. NO. 2224, 59th Cong., 1st Sess. 3 (1906); S. REP. NO. 3797, 59th Cong., 1st Sess. (1906). For a more detailed discussion of the congressional intent behind the Antiquities Act, see Cooper, *Constitutional Law: Preserving Native American Cultural and Archeological Artifacts*, 4 AM. INDIAN L. REV. 99, 100 (1976).

79. 40 CONG. REC. 7888 (1906).

The first criminal case to deal with this standard, *United States v. Diaz*,⁸⁰ represented a major setback for Indians' efforts to protect their buried artifacts. A United States magistrate convicted defendant Diaz of stealing Apache religious artifacts—"approximately twenty-two face masks, headdresses, ocotillo sticks, bull-roarers, fetishes and muddogs,"⁸¹ from a medicine man's cave on the San Carlos Reservation, and fined him five hundred dollars.⁸² On appeal, Diaz argued that since the artifacts were less than five years old, they did not constitute "object[s] of antiquity."⁸³ The appellate court, however, upheld the lower court's decision,⁸⁴ concluding: "The determination [of the meaning of 'object of antiquity'] can be made only after taking into consideration the object or objects in question, the significance, if any, of the object and the importance the object plays in a cultural heritage."⁸⁵

This definition, because it accounts for the artifacts' cultural and religious value to the Indians, would have been ideal for Native Americans living on federal land. Unfortunately, in Diaz's second appeal,⁸⁶ the Ninth Circuit Court of Appeals reversed his conviction.⁸⁷ The court decided that the Antiquities Act, because it failed to define "ruin," "monument," or "object of antiquity," was unconstitutionally vague.⁸⁸

The Ninth Circuit's decision was extended to an even more frustrating conclusion in *United States v. Jones*.⁸⁹ Jones allegedly violated the Antiquities Act, but the prosecutors, realizing that no conviction in the Ninth Circuit under the unconstitutional Act was possible, instead indicted him for violations of theft and malicious mischief statutes. The court dismissed the charges, holding it was Congress' intent that the Antiquities Act be the exclusive means through which the government could prosecute a defendant for activities encompassed by the Act, even though other statutes covered the same activities.⁹⁰

As will be discussed,⁹¹ Congress is presently attempting to cor-

80. 499 F.2d 113 (9th Cir. 1974).

81. *United States v. Diaz*, 368 F. Supp. 856, 857 (D. Ariz. 1973).

82. *Id.*

83. *Id.*

84. *Id.* at 859.

85. *Id.* at 858.

86. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

87. *Id.* at 115.

88. *Id.*

89. 449 F. Supp. 42 (D. Ariz. 1978).

90. *Id.* at 46.

91. See discussion in text at notes 120-144, *infra*.

rect this unfortunate hiatus. Several western states⁹² and Indian nations,⁹³ moreover, have anteceded congressional action by enacting their own antiquities acts which generally provide clearer definitions of "object of antiquity," promulgate stronger penalties for violations, and pertain to nonfederal land.

Despite the Ninth Circuit decisions, the Antiquities Act is not impotent. Other circuits are not bound by the Ninth. The Tenth Circuit,⁹⁴ for instance, has upheld the constitutionality of the Antiquities Act in cases involving Mimbres Indian artifacts.⁹⁵ These

92. For instance, Colorado defines an "object of antiquity" as "any historical, prehistorical, or archeological resource" [COLO. REV. STAT. ANN. § 24-80-409 (1973)], whereas New Mexico's definition includes "any object of historical, archeological, architectural or scientific value" [N.M. STAT. ANN. § 4-27-11 (1953)]. South Dakota promulgates the strictest penalty for violations of its antiquities act—a \$1,000 fine and/or six months' imprisonment, in addition to forfeiture of all appropriated materials [S.D. COMP. LAWS ANN. § 1-20-35].

93. See Appendix B for the Navajo Antiquities Act. The reason for the Act's lenient penalties involves limitations to tribal jurisdiction, not a lack of desire by the Navajo to punish pothunters. The Hopi probably possess the most effective "antiquities act"; after a series of particularly devastating artifact losses, they simply closed their reservations to non-Hopis. See Hochfield, *supra* note 71, at 32.

94. The Tenth Circuit, which includes New Mexico, Colorado, Utah, Oklahoma, Kansas, and Wyoming, contains numerous and exceptionally valuable Indian sites and artifacts. This circuit is matched only by the Ninth, which includes California, Nevada, Idaho, Oregon, Washington, and Montana.

95. In October of 1975, three brothers were arrested by Forest Service officers while illegally excavating a Mimbres Indian ruin. [United States v. Quarrell, C.A. No. 76-4 (D.N.M. 1976) (criminal complaint)]. The artifacts in the Quarrell brothers' possession included "two metates, two grooved stone axes, other miscellaneous stone tools, three nearly complete Mimbres bowls, and a quantity of assorted sherds." [Collins, *A Proposal to Modernize the American Antiquities Act*, 202 SCIENCE 1055, 1057 (1978)] Trial testimony established the age of the pottery at between eight and nine hundred years. The court decided these artifacts qualified as "object[s] of antiquity," upheld the constitutionality of the Antiquities Act, and found the defendants guilty. For stealing these artifacts, worth approximately \$2,700, and for causing irreparable damage to a rare Mimbres archeological site, two of the Quarrells were sentenced to one year of supervised probation, and required to perform forty hours of community service.

Two years after the *Quarrell* case, another Mimbres Indian ruin, this one in the Gila National Forest in Gila, New Mexico, was looted by pothunters [United States v. Smyer & May, C.A. No. 77-284 (D.N.M. 1977) (criminal complaint)]. The damage at this site was extensive; Forest Service officers found 800 sherds, an abundance of chipped stone artifacts, and severely damaged skeletal remains. Defendants May and Smyer admitted responsibility and confessed selling two of the bowls discovered at the ruin for \$4,000. A search of the defendants' residences uncovered over 30 Mimbres black-on-white bowls, in addition to numerous other artifacts.

Smyer and May were charged with eleven counts of violating the Antiquities Act. The court decided the eight- to nine-hundred-year-old artifacts were protected by the Antiquities Act, and that the Act was constitutional. Judge Bratton elaborated: "While it may

courts ecided that the Act's "object of antiquity" standard was sufficiently precise for cases dealing with 800- to 900-year-old artifacts.⁹⁶ Even if the majority of courts were to uphold the constitutionality of the Antiquities Act, however, the Act applies exclusively to uncollected artifacts. For laws which would aid Indians in reclaiming artifacts held by museums, one must look elsewhere.

The first amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁹⁷ This amendment is binding on the states through the fourteenth amendment's due process clause,⁹⁸ and is also applicable to the states through their own constitutions.

Case law has extended this religious protection. In *Sherbert v. Verner*,⁹⁹ a Seventh Day Adventist was denied unemployment compensation because she refused, for religious reasons, to take jobs which would require her to work on Saturday.¹⁰⁰ In a landmark decision, the Supreme Court upheld her right to compensation and declared that the first amendment's free exercise clause protects religious practice, as well as religious belief.¹⁰¹ In *Sherbert*, the Court also instituted a balancing test which weighed an individual's right to the free exercise of the practices of his chosen religion, against any compelling state interest in regulation of these practices.¹⁰²

In *People v. Woody*,¹⁰³ the Supreme Court of California applied the *Sherbert* holding to a fact situation involving Navajo Indians. The *Woody* court dealt with the use of peyote in Navajo religious ceremonies.¹⁰⁴ The *Sherbert* test balanced the Navajos'

not be possible to state in the abstract a precise number of years that must pass before something becomes an 'object of antiquity,' such exactitude is not required. . . . The Antiquities Act must necessarily use words 'marked by flexibility and reasonable breadth, rather than meticulous specificity,' in order to accomplish its purposes." [Citations omitted.] *Id.* The Judge then sentenced Smyer and May to imprisonment for ninety days on each of the eleven counts, the terms to run concurrently. *Id.* The case is presently being appealed.

96. See discussion at note 95, *supra*.

97. U.S. CONST. amend. 1.

98. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

99. 374 U.S. 398 (1963).

100. *Id.* at 399.

101. *Id.* at 404.

102. *Id.* at 406-409.

103. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

104. *Id.*

right to practice their religion, of which peyote is an integral part, with the state's interest in prohibiting the use of hallucinogenic drugs. The decision of the court to protect the Navajos' rights hinged upon the importance of peyote consumption to the Navajos' religion as practiced in the Native American Church: "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost."¹⁰⁵

Just as the Navajos' peyote does, wampum and War Gods constitute "object[s] of worship" to the Iroquois and Zuni. As explained earlier,¹⁰⁶ these artifacts represent the essence of Iroquois and Zuni life. Moreover, because of Native Americans' unique fusion of art and religion, a great percentage of Indian artifacts currently held by museums would be included as "object[s] of worship." By retaining these sacred artifacts, museums are, in effect, interfering with the Indians' right to practice their religion, as guaranteed by *Sherbert*.

To determine whether this first amendment protection should apply to the Indian artifact situation, the interests of both the Indians and the museums must be balanced within the context of the *Sherbert* test. For the Indians, the artifacts are needed to practice their religion, to rectify "an imbalance in the spiritual world."¹⁰⁷ Iroquois and Zuni religion without wampum and War Gods would be similar to Navajo religion without peyote.

The contravening "compelling state interest"¹⁰⁸ exists in the museums' reasons for retaining the artifacts: (1) their public responsibility to preserve and exhibit the artifacts for the benefit of all Americans; (2) their doubt as to specific Indian ownership; (3) their unwillingness to establish a precedent of returning a part of their collections to original owners; and (4) their legal claims to the artifacts. As explained earlier, all of these justifications have been at least partially eroded by a closer examination of their foundations.¹⁰⁹ Furthermore, assuming these assertions were valid, it is doubtful whether they would outweigh the Indians' right to practice their religion.

105. *Id.* at 721, 394 P.2d 813, 40 Cal. Rptr. 69 at 817.

106. See discussion in text at notes 29-36, *supra*.

107. See Appendix A at item 2, Statement of Religious Leaders.

108. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

109. See discussion in text at notes 32-64 *supra*.

In *Woody*, prohibition of peyote did not constitute a "compelling state interest," despite the drug's possible "deleterious effects upon the Indian community, and even more basically, in the infringement such practice [peyote use] would place upon the enforcement of the narcotic laws" ¹¹⁰ If museums were forced to relinquish a few holdings, the effect on the community would be considerably less grave than the potential effects of the *Woody* decision. No possibility of flagrant disregard of drug laws, or a drug overdose epidemic, would exist. Actual physical harm is not involved. Therefore, it seems the state's interests in protecting its citizens are significantly less compelling in the Indian artifacts situation than in a situation such as that in the *Woody* case.

Furthermore, should the religious practices and the "compelling state interest" ever assume equal weight in the balancing test, the court must rule in favor of religious practices. ¹¹¹ Once a plaintiff demonstrates that a statute imposes a burden on his religious practice, this showing brings him within the purview of the first amendment, ¹¹² "and entitles his religious freedom to a 'preferred position' on the scales of the balance. This 'preferred position' rebuts the normal presumption in favor of the constitutionality of statutes. Moreover, it erects a contrary presumption in its place—a presumption favoring religious freedom." ¹¹³

The problem with applying a first amendment solution to an Indian artifacts situation is that neither Congress nor the states have enacted many laws directly abridging Indian religious practices. One notable exception is the New York law which refuses to relinquish the wampum belts until the Iroquois build an "adequate" shelter to house the belts. ¹¹⁴ Since this law seriously interferes with the Iroquois' first amendment freedom to practice their religion, and because the counter-balancing "compelling state interest" is slight, an argument can be made that the New York law should be declared unconstitutional.

One museum which occupies a central position in the Indian artifacts controversy, and which may be more vulnerable to a first amendment attack, is the Smithsonian Institute. In addition

110. *People v. Woody*, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964).

111. Breslin, *Recent Developments: Statute Prohibiting Use of Peyote Unconstitutional as Applied to Religious Users*, 17 STAN. L. REV. 494 (1965).

112. *Id.* at 498.

113. *Id.*

114. N.Y. INDIAN LAW § 27 (McKinney).

to possessing numerous essential Indian artifacts,¹¹⁵ the Smithsonian controls the actions of many other museums in this field. For instance, all museum applications for excavation permits on federal land must be referred to the Smithsonian for recommendation.¹¹⁶ Of greater consequence, no Indian artifacts collected under the auspices of the Antiquities Act can be removed from a public museum without the written permission of the Smithsonian's Secretary.¹¹⁷ Because Congress created the Smithsonian,¹¹⁸ and it is controlled by members of Congress,¹¹⁹ Congress should be held accountable for the Smithsonian's actions. Smithsonian acquisition policies which infringe upon Indians' religious practices are in this sense directed by Congress and thus are subject to first amendment attack. Considering the Institute's prestigious and authoritative position among American museums, even a partial relinquishment of its Indian artifact collection would establish a particularly persuasive precedent for other museums to follow.

Even where Congress and the states have enacted no laws directly abridging Indian religious practices, the first amendment serves as a solid foundation for a viable policy argument. Freedom of religion is perhaps the most important tenet supporting United States society. Museums should not be permitted to erode this doctrine by acquiring and retaining artifacts of fundamental religious significance to Native American people.

Recent Laws

Two recent actions by Congress should aid Native American attempts to protect or regain their artifacts from museums. Congress has recently passed the Archeological Resources Protection Act of 1979,¹²⁰ which modifies the Antiquities Act. This modification significantly strengthens the Act and should correct its constitutional deficiencies. The second congressional action produced Public Law 95-341 on American Indian Religious

115. Telephone conversation with Bryant Rogers, *supra* note 26. See also Letter from Indian Pueblo Legal Services, Inc. to Bowen Blair, *supra* note 26.

116. 43 C.F.R. § 3.8 (1977).

117. *Id.* at § 3.17.

118. 20 U.S.C. § 41 (1974).

119. *Id.* at § 42.

120. Pub. L. 96-95 (approved Oct. 31, 1979). To date this law is unpublished. However, the final text may be found at H.R. 1825, 96th Cong., 1st Sess., 125 CONG. REC. S14719-S14721 (daily ed. Oct. 17, 1979). For the original version, see H.R. 1825, 96th Cong., 1st Sess. (1979); the Senate version is S. 490, 96th Cong., 1st Sess. (1979).

Freedom,¹²¹ which represents a crucial governmental policy shift toward the rights of Native Americans regarding the practice of their religions.

The Archeological Resources Protection Act, sponsored in the House by Congressman Udall¹²² and in the Senate by Senators Domenici and Goldwater,¹²³ was formulated by the archeological community and Departments of Interior and Agriculture.¹²⁴ This bill should benefit Native Americans who seek to protect their artifacts in three important respects. First, the bill corrects the Antiquities Act's constitutional defect by clarifying the "object of antiquity" standard. The Archeological Resources Protection Act substitutes the term "archeological resource"¹²⁵ for "object of antiquity," and, unlike the Antiquities Act, proceeds to define "archeological resources":

The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this Act. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.¹²⁶

The particularity of this definition should satisfy the vagueness problem enunciated in the *Diaz* case.¹²⁷ Instead of being confronted with the nebulous "object of antiquity" standard, judges would be able to resort to the Archeological Resources Protection

121. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469.

122. 125 CONG. REC. H433 (daily ed. Feb. 1, 1979) (remarks of Rep. Udall).

123. 125 CONG. REC. S1798 (daily ed. Feb. 26, 1979) (remarks of Sen. Domenici).

124. Letter from Charles McKinney (Consulting Archeologist for the Department of the Interior's Office of Archeology and Historic Preservation) to Bowen Blair, Feb. 28, 1979.

125. Pub. L. 96-95 § 3(1) (1979), H.R. 1825, 96th Cong., 1st Sess., 96 CONG. REC. S.14719 § 3(1) (1979).

126. *Id.*

127. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

Act's practically conclusive list and easily determine whether the particular artifact was included in the provision.

Although solving the vagueness problem, the bill's "archeological resource" standard contains a major drawback for Native Americans. Only objects "which are at least one hundred years of age"¹²⁸ are protected. Thus, a sacred Zuni War God, carved only forty years ago, could be essential to Zuni religion but would not be safeguarded by the act. In order to fully protect Native American culture, this arbitrary age criterion should be eliminated and a standard which emphasizes the cultural value of the artifact to its creators substituted.¹²⁹ Even with this limitation, however, the Archeological Resources Protection Act's "archeological resource" standard represents a notable improvement over the Antiquities Act.

The second major revision of the Antiquities Act contained in the Archeological Resources Protection Act concerns penalties for violators of the Act. The Antiquities Act's 73-year-old penalty provision—a \$500 fine and/or 90 days' imprisonment, constitutes little more than a business expense for the modern pothunter¹³⁰ receiving up to thousands of dollars for a single pot.¹³¹

The Act advances two types of sanctions. For the occasional violator of this legislation, such as the "unwary tourist,"¹³² the Federal Land Manager who oversees the applicable land may levy a civil penalty.¹³³ This penalty shall take into account: "(A) the archaeological or commercial value of the archaeological resource involved, and (B) the cost of restoration and repair of the resource and the archaeological site involved."¹³⁴ Should the same person again violate this legislation, similar computations would be made, but the fine could be doubled.¹³⁵

128. *Id.* The 100-year limitation can be traced to an earlier proposal, 43 Fed. Reg. 14,975 (1978). This proposal, submitted by the Heritage Conservation and Recreation Service also concerned the revision of the Antiquities Act's "object of antiquity" standard, and suggested that protection should be given to artifacts which were older than a hundred years (*id.* at 14,976). The original bill before the House set the limit at fifty years. H.R. 1825, 96th Cong., 1st Sess., 125 CONG. REC. H433 (daily ed. Feb. 1, 1979).

129. A good example of such a standard was enunciated by the trial court in *United States v. Diaz*, 368 F. Supp. 856, 858 (D. Ariz. 1973). See quotation in text at note 85.

130. See generally 125 CONG. REC. H433 (daily ed. Feb. 1, 1979) (remarks of Rep. Udall).

131. Hochfield, *supra* note 71, at 31.

132. 125 CONG. REC. H433 (daily ed. Feb. 1, 1979) (remarks of Rep. Udall).

133. Pub. L. 96-95 § 7(a)(1).

134. *Id.* at § 7(a)(2).

135. *Id.*

The Archeological Resources Protection Act also contains criminal penalties which are more appropriate for modern pothunters than the 1906 Antiquities Act. Any person who knowingly violates the new law will be subject to a \$10,000 fine and/or one year imprisonment.¹³⁶ However, "if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of \$5,000," the offender will be subject to a fine of not more than \$20,000 and/or two years' imprisonment.¹³⁷ Repeat offenders are susceptible to a fine not to exceed \$100,000 and/or imprisonment not to exceed five years.¹³⁸ Certainly these new provisions provide a greater deterrent to pothunters than the Antiquities Act's \$500 fine and/or 90 days' imprisonment condition.¹³⁹ As mentioned earlier,¹⁴⁰ once pothunters are deterred, many less scrupulous museums will lose their sources for Indian artifacts. Thus, while not directly pertaining to museums, the Act's stricter penalties should vicariously affect museum acquisitions.

The third significant modification of the Antiquities Act proposed by this bill entails an expansion of prohibited conduct. The Antiquities Act forbids the appropriation, excavation, injury to or destruction of any "object of antiquity,"¹⁴¹ whereas the Act would, in addition, outlaw the selling, purchasing, exchanging, transporting, receiving, or offering to sell, purchase, or exchange any such objects.¹⁴² This new addition is especially important because it would directly encompass those museums obtaining artifacts from pothunters. Moreover, all museums would be forced to scrutinize the origins of their Indian pieces acquired after the effective date of this Act, and relinquish those artifacts of questionable origin in order to avoid the possibility of harsh punishment under the Archeological Resources Protection Act.

The second recent congressional action which will have a dramatic effect on Indian efforts to reclaim artifacts, Public Law 95-341 on American Indian Religious Freedom,¹⁴³ was passed August 11, 1978. This law clarifies the Indians' first amendment

136. *Id.* at § 6(d).

137. *Id.*

138. *Id.*

139. 16 U.S.C. § 433 (1976).

140. See discussion in text at notes 65-71.

141. 16 U.S.C. § 433 (1976).

142. Pub. L. 96-95 § 5(b) (1979).

143. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469.

right to freedom of religion. Most importantly, the law does not seek to correct any express federal policy which infringes upon Indians' religious practices. Instead, it attempts to rectify injustices which occurred from a lack of federal policy.¹⁴⁴ As discussed *supra*, the first amendment protects Indians from laws which directly infringe upon their religious practices; this law protects these activities even when the infringement does not result from a specific law. Therefore, Public Law 93-341 is particularly beneficial with respect to Indian reclamation attempts, where the retention of the artifacts by museums is often not supported by laws susceptible to a first amendment attack.

The new law declares: "That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, . . . including but not limited to access to sites, use and possession of sacred objects . . ."¹⁴⁵ To ensure compliance with this policy, "federal executive agencies are directed to evaluate their policies and procedures in consultation with Native religious leaders in order to determine appropriate changes which may be necessary to protect and preserve American Indian religious cultural rights and practices."¹⁴⁶ Furthermore, the law requires an annual presidential report to Congress detailing the determinations, administrative changes, and future recommendations made in conjunction with this new policy.¹⁴⁷

In Public Law 95-341 the phrase, "use and possession of sacred artifacts" is most pertinent to the Indian-museum confrontation. The Chairman of the Senate Select Committee on Indian Affairs which recommended passage of this law, Senator Abourezk, described the Indians' relationship to the type of objects this law was meant to address: "To the Indians, these natural objects have religious significance because they are sacred, they have power. . . , they are necessary to the exercise of rites of religion, they are necessary to the cultural integrity of the tribe and, therefore, religious survival."¹⁴⁸ The Committee also accepted testimony from Lee Lyons, a member of the Onondaga Nation, regarding the New York State Museum's retention of the

144. *Id.*

145. *Id.*

146. *Id.* at § 2, 92 Stat. 470.

147. *Id.*

148. *Hearings on S.J.R. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 235, (1978) (Report to accompany S.J.R. 102).

Iroquois wampum belts.¹⁴⁹ This testimony further established the relationship between Indian artifacts and religion: "[The wampum] represents [the Iroquois'] way of life. It represents their religion. It represents their culture, and their language, their way."¹⁵⁰

Because this law is so new, its effect on museums is unclear. Certainly, it does not mandate wholesale surrender of the artifacts to the Indians. This law should demonstrate its greatest strength in the area of federal funding of museums. Federal agencies are required to "evaluate their policies and procedures"¹⁵¹ in order to implement changes necessary to protect American Indian religious practices.¹⁵² Many museums that hold religious artifacts, thereby interfering with the Indians' "use and possession of sacred artifacts," are at least partially financed by the federal government. The Smithsonian Institute, for instance, is completely federally subsidized.¹⁵³ Numerous museums also have obtained federal tax-exempt status.¹⁵⁴ Federal agencies, in accordance with this law, should withhold funds and remove tax exemptions from museums that possess sacred artifacts to which Indians have valid claims. Once the artifacts are returned, the exemptions and special status could be restored. When confronted with the choice of losing substantial federal subsidies and benefits, or yielding a small part of their collection, museums would presumably select the latter.

Public Law 95-341 does not represent the pinnacle of legislative concern regarding Indian reclamation attempts. California, for instance, which Senator Abourezk called "light years ahead of the Federal Government,"¹⁵⁵ has an exceptionally progressive statute. This statute states:

No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, shall in any manner whatsoever interfere with the free expression or exercise of Native American religion

149. *Id.* at 115.

150. *Id.*

151. Act of Aug. 11, 1978, Pub. L. No. 95-341, § 2, 92 Stat. 470.

152. *Id.*

153. 20 U.S.C. §§ 54, 55 (1974).

154. DUBOFF, *supra* note 40, at 874.

155. *Hearings on S.J.R. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 235 (1978).

as provided in the United States Constitution and the California Constitution.¹⁵⁶

Public museums, or private museums with public connections, which retain sacred Indian artifacts, are affected by this statute.¹⁵⁷ The museums' retention of these artifacts certainly would be encompassed by the statute's "in any manner whatsoever interfere with the free expression or exercise of Native American religion" clause,¹⁵⁸ and thus would be outlawed.

An amendment to this statute,¹⁵⁹ proposed by California's Office of Planning and Research, would immensely aid Indian efforts to control their artifacts. This amendment would assign California Indian artifacts discovered on public property to local Indian cultural groups or to a public trust administered by the Native American Heritage Commission.¹⁶⁰ The Commission consists of nine members appointed by the governor, the majority of whom must be "elders, traditional people, or spiritual leaders of Californian Native American tribes."¹⁶¹

The importance of this amendment derives from its specific determination as to the ownership of the discovered Indian artifact, an issue which currently puzzles American museums.¹⁶² The amendment declares:

In making such determination [regarding Indian ownership of the artifacts] the Commission shall consider and base its decision on the following factors: (i) the relationship of a proposed recipient to the creator of the artifact; and (ii) the ability of a proposed recipient to preserve the artifact from destruction or deterioration. In determining to which descendants a cultural artifact should be returned, the Commission shall give first preference to any descendants who reside in the locality where

156. CAL. PUB. RES. CODE § 5097.9 (West 1971). This statute is not as broad as it seems. Its major limitation is that "The public property of all cities, counties, and city and county located within the limits of the city, county, and city and county, except for all parklands in excess of 100 acres, shall be exempt from the provisions of this chapter." *Id.*

157. *Id.* Private museums with public connections include museums located on public property or those which have public leases. However, the limitations set out in note 156 must also be considered.

158. *Id.*

159. Cal. Proposal OPR—78-04. See also *Hearings on S.J.R. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 218 (1978).

160. *Id.*

161. CAL. PUB. RES. CODE § 5097.92 (West 1972).

162. See discussion in text at notes 44-47.

the artifact was discovered; second preference to any descendants who are residents of that state; and, third preference to other California Indians.¹⁶³

Should no descendants of the artifact's creator be located, or should the descendants not want the artifact, it would be placed under the control of the Commission.¹⁶⁴ The Commission would preserve the artifact, occasionally lend it out, and return it to the descendants should they be located and desire the artifact.¹⁶⁵ Thus, the amendment not only requires ownership of Indian artifacts to be placed with the Indians instead of museums, but it clearly sets out the procedure through which this transfer will be effectuated.

Conclusion

Many American Indians rely today upon sacred artifacts created by their ancestors. By withholding these artifacts, American museums are disrupting essential Indian religious practices.

Indians have achieved little success in their efforts to reclaim these artifacts.¹⁶⁶ This is often because museums possess solid legal and practical grounds for retaining their collections. Recent legislative actions, however, have strengthened the Indians' position.

The Archeological Resources Protection Act represents a tremendous improvement over the Antiquities Act, and should discourage illicit museum appropriations of Indian artifacts. Public Law 95-341, the most progressive enactment regarding Indian religious freedom, was not passed until August of 1978. These laws, combined with older rights, such as the first amendment's freedom of religion clause, equip Indians with persuasive legal arguments to employ against museums. The future,

163. Cal. Proposal OPR—78-04. See also *Hearings on S.J.R. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 218 (1978).

164. *Id.*

165. *Id.*

166. According to James Nason, a member of UCLA's Department of Anthropology, these efforts will continue, as well as increase: "[Indian reclamation attempts are] not a fad so much as a representative facet of the growing interest of American Indians in their own cultural heritage and in their identity as contemporary residents of this country. Museum specimens are not only the physical representations of this heritage and identity, but also the symbols of the loss of American Indian autonomy and culture by military, legal and demographic processes." MUSEUM NEWS, March, 1973, at 20.

therefore, should reveal legal challenges brought by Indians against museums, greater Indian success, and a concomitant heightening of museum awareness and understanding for the religious needs of Native American people.

APPENDIX A

ZUNI TRIBAL COUNCIL ZUNI, NEW MEXICO RESOLUTION NO. M70-78-991

WHEREAS, the Zuni Tribal Council consisting of the Governor, Lieutenant Governor and six Tenientes, is declared to be the legislative authority of the Pueblo of Zuni by Article V, Section 1 of the Constitution of the Zuni Tribe; and,

WHEREAS, the Zuni Tribal Council is authorized by Article VI, Section 1, (d) of the Constitution and to act in all matters that concern the welfare of the tribe; and,

WHEREAS, The Zuni Tribal Council has for several years been aware of the increasing problems posed for the Zuni people by the loss, theft or unauthorized removal from Zuni lands of items of *sacred religious* significance to the Zuni people; and,

WHEREAS, on May 30, 1978, the Tribal Council initiated a formal process by which this problem and the related problem of securing proper care for and/or return of such items as may now be in possession of museums or other third parties might be addressed and resolved; and,

WHEREAS, it is recognized and stated by the Tribal Council in its May 30th memorandum that "because this effort ultimately involves protection and return of objects which are intimately bound up with the traditional religious practices and doctrines of the Zuni Tribe, the appropriate tribal religious leaders should have final control over the process of policy making and decision making in this matter"; and,

WHEREAS, the Zuni Religious leaders have thoroughly considered this problem in their religious councils of which detailed transcripts in the Zuni language have been prepared and from which the official Tribal Translator has abstracted a brief formal statement in the English language of the position of these religious leaders on this matter, said statement being attached hereto and dated September 20, 1978; and

NOW, THEREFORE, BE IT RESOLVED, that the Zuni Tribal Council does hereby formally adopt the attached statement

of the Zuni religious leaders as the official position of the Zuni Tribe on this matter, and does hereby reiterate the Council's full support of the Zuni Religious leaders in their efforts to protect and to secure proper care for or return of items of religious significance to the Zuni people; and,

BE IT FURTHER RESOLVED, that the Zuni Tribal Council hereby request that all museums and other third parties as appropriate work with the Zuni Tribe to resolve the problems identified in this resolution by implementation of the recommendations attached hereto and dated September 21, 1978.

[Signed by]

Zuni Tribal Council:

Dorson Zunie, Lt. Governor

Virgil Wyaco, Teniente

Fred Bowannie, Sr., Teniente

Chester Mahooty, Teniente

Lowell Panteah, Teniente

Chauncey Simplicio, Teniente

Certification

I hereby certify that the foregoing resolution was duly considered by the Zuni Tribal Council at a duly called meeting at Zuni, New Mexico at which a quorum was present and that the same was approved by a vote of 7 in favor and 0 opposed on Sept. 23, 1978,

Edison Laselute, Governor

Pueblo of Zuni

Approved by

Edison Laselute, Governor Sept. 23, 1978

Statement Of
Religious Leaders of the Pueblo of Zuni
Concerning Sacred Zuni Religious Items/Artifacts

Prepared By
Wilfred Eriacho, Official Tribal Translator,
From a Written Transcript in the Zuni Language of
A Meeting of the Religious Leaders of
The Pueblo of Zuni
Held on May 9, 1978

September 20, 1978

We the Religious and Civil leaders of the Zuni people hereby develop this statement based on six basic premises/components/cultural ways, of the Zuni culture.

1. The Zuni religion originated with the creation of the world, and exists to protect all beings on the earth, and to provide fertility and abundance of goodness for the Zuni people and their neighbors throughout the world. Our priests and religious leaders take on responsibility for carrying out the intricate rituals and ceremonies that are the framework of our religion only after years of preparation and training. Dedication and seriousness of action is required by all involved in the Zuni religion to ensure its beneficial effects.

2. All religious items/artifacts/objects, no matter how insignificant it/they may seem to non-Zunis, are of very high/great religious value. They are in fact, the essence of our Zuni culture.

3. Very few items/artifacts of religious significance are created by knowledge and skill of any one individual. The majority of these items/artifacts were created by groups of religious orders, each having skill or expertise in a specific fact/aspect of the Zuni religious culture.

4. Very few items/artifacts of religious significance are privately/individually owned. The majority of these items/artifacts have been created for the benefit of all the Zuni people, and are communally owned.

5. No one individual or a group(s) of individual(s) has/have the right to remove communally owned religious items/artifacts from the Zuni land for any purpose/reason whatsoever. This is illegal according to traditional Zuni Law, and to do so is tantamount to theft. Privately owned religious items/artifacts can be sold by their owners although we call this selling your life and do not condone it.

6. The historical disruption of the Zuni religion by first the Spanish colonial government and later by the United States government; and by the theft and removal of sacred items/artifacts by museums and private collectors, has created an imbalance in the spiritual world. In order to restore harmony to all living things, this balance needs to be restored.

Meetings of and by the religious and civil leaders of the Zuni Tribe have identified the following problems as being very detrimental to the well being of the Zuni people. The foremost problem, the one that distresses the Zuni people the most is the removal of religious items/artifacts from the Zuni land. It hurts us that throughout the whole world, religious items/artifacts belonging to the Zuni people are displayed in museums, both public and private, and in private collections. These display places are far removed from Zuni land, for whose benefit these items/artifacts were created.

When a Zuni religious item is made/created, many religious orders participate in its creation. Every step of its creation is accomplished with prayer and instruction for the purpose. Its general purpose is to provide both a beneficial psychological and physical environment for the Zuni people. An environment that will cause the Zuni people to prosper in products, wisdom, skill, and all good things. Even though these items are created/constructed out of inanimate articles such as wood, leather, rock, and other such things, it is with and through religious prayers and instructions during the construction that it gains/achieves spiritual life to perform the benefits for the Zuni people. Thus each and every Zuni religious item is greeted/addressed as being one's father or mother, or child. The purpose of these religious items/artifacts has been defeated/destroyed by their removal from the Zuni land. Any beneficial qualities that they were to bestow upon their Zuni people, and, by extension, the whole world through their innate wisdom have been destroyed. Adverse effects have developed.

The theft/stealing of religious items/artifacts from their sacred places in and around Zuni land has diminished their effectiveness. Because of our cultural beliefs, many of these items/artifacts are not to be locked up but are to be placed at various locations in and around Zuni lands if they are to fulfill their purpose. These locations were determined in Ancient times. The thefts and illegal selling of these Zuni religious items and artifacts is based primarily on the practice and willingness of museums, both private and public, and private collectors to pay high prices

for these items. The placing of monetary value on religious items/artifacts leads to theft of more religious items/artifacts for sale on world art markets. The display or storage of religious items/artifacts as art objects or ethnological curiosities helps to foster and sustain the market demand for religious items/artifacts.

Because of the many adverse effects and conditions that have been experienced by the Zuni people, we have made a decision to respectfully request the return of all our communal religious items/artifacts currently on display or in storage in the world museums and to try to stop the theft and sale of sacred Zuni religious items/artifacts. This decision is based on our desires to perpetuate our Zuni culture in its full/total context/totality with the blessing from our spiritual fathers, mothers, and children which are rightfully ours. In order to accomplish this very essential goal, we need your assistance and directions/instructions. We ask for your assistance in achieving this goal.

APPENDIX B

Resolution of the Navajo Tribal Council
ENACTING AN ANTIQUITIES PRESERVATION LAW
Passed January 27, 1972
(59 in favor: 0 opposed)

WHEREAS:

1. The Navajo Nation contains many ruins and excavation of Archaeological sites and objects of antiquity or general scientific interest, and

2. These sites and objects are irreplaceable and invaluable in the study of the history and preservation of the cultural background of the Navajo Nation, and

3. Large quantities of rare objects, pottery, petrified wood, fossils and artifacts have been sold to tourists and traders and these pieces of Navajo history and culture have been irretrievably lost to the detriment of the Navajo Nation as a whole.

NOW THEREFORE BE IT RESOLVED THAT:

1. After the date of this resolution, any Indian who shall intentionally appropriate, excavate, injure or destroy any object of historic, archaeological, paleontological, or scientific value, or any Indian who shall hold or offer for sale any historic or pre-historic object of archaeological, paleontological, or scientific value, without permission from the Navajo Tribal Council as

provided in Navajo Tribal Council Resolution CF-22-58 (16 NTC 233), shall be guilty of an offense and if convicted, punished by labor for not more than one month or a fine of not more than \$500, or both.

2. After the date of this resolution the unauthorized buying, holding for sale or encouraging of illicit trade of objects of historical, archaeological, paleontological, or scientific value by any person or employee shall be good cause for withdrawing a business privilege pursuant to Navajo Tribal Council Resolution CMY-33-70 (5 NTC 51) or terminating a lease pursuant to Navajo Tribal Council Resolution CJ-38-54 (5 NTC 77 (b))

3. After the date of this resolution any non-Indian who shall intentionally appropriate, injure, destroy, buy, hold or offer for sale or encourage illicit trade of objects of historical, archaeological, paleontological, or scientific value may be excluded from Tribal land subject to the jurisdiction of the Navajo Tribe in accordance with procedures set forth in Navajo Tribal Council Resolution CN-60-56 and Resolution CN-64-60 and found in 17 NTC 971-976.

4. The Navajo Tribe's Department of Parks and Recreation and Navajo Tribal Museum shall be the lawful repository for and guardians of Navajo Tribal property of historical, archaeological, paleontological or scientific value.

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