MUSEUM RIGHTS VS. INDIAN RIGHTS: GUIDELINES FOR ASSESSING COMPETING LEGAL INTERESTS IN NATIVE CULTURAL RESOURCES

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INTRODUCTION

The manner in which state and federal museums acquire and display collections for public viewing reflects American law and social policy relating to cultural resources and historic preservation. Since their inception, museums in the United States have had a relationship with Native Americans that has been both beneficial and antagonistic.[1] This paper examines the legal history of that relationship. The issue presented is whether museums can effectively convey to the public a portrait of Native Americans that does not violate or offend their religious beliefs or cultural integrity. The principal focus of this article is on property rights, as other literature extensively examines applicable free exercise of religion issues.[2]

As is true of other distinct cultural groups which make up the social fabric of the United States, Native Americans are the exclusive owners of unique traditions and values. The first amendment of the United States Con-

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1. *See, e.g.*, Lurie, *American Indians and Museums: A Love-Hate Relationship*, in 2 THE OLD NORTHWEST 235 (1976).

2. *See infra* note 8.

stitution accords Native Americans the right to enjoy their uniqueness and to be secure in their right to be Indian. The overriding national interest in protecting this fundamental liberty was aptly described in a case which upheld the first amendment right of Navajo Indians to use peyote, a stimulant drug, in religious ceremonies of the Native American Church:

> [T]he right to free religious expression embodies a precious heritage of our history. In mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an older religion in using peyote one night at a meeting in a desert hogan near Needles, California.[3]

Unfortunately, recognition of the fundamental liberties of Native Americans has not always characterized the historical relationship between the United States and Indian Tribes.[4] Active suppression of Indian religion and culture is well-documented and has only recently been acknowledged by the federal government.[5] Museums played a vital role in the preservation of Native American culture during crisis periods in which the federal government actively sought to assimilate the Indian into the mainstream of American society.

> 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.[6]

Today, these collections provide a means for all Americans to better un-

3. People v. Woody, 61 Cal. 2d 716, 727-728, 394 P.2d 813, 821-822, 40 Cal. Rptr. 69, 77-78 (1964).

4. *See generally* Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1 (1982).

5. *See* FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (Aug. 1979) [hereinafter cited as AIRFA Report].

6. Lurie, *supra* note 1, at 239. Of course, sacred objects also left Indian hands in other ways. Some were stolen, others sold by Indians who did not have title; some were taken by the government as spoils of war, others illegally expropriated by non-Indians from federal lands. *See* AIRFA Report, *supra* note 5, at 77-78.

derstand, appreciate, and respect past and present day American Indians. As pointed out by several commentators, the unique perspectives of Native culture, based in large part on the North American environment, have much to offer to the dominant society which, due to increasing awareness of environmental problems, is now in the process of rethinking its relationship to the environment.[7] Museums have played, and can continue to play a role as a bridge between cultures.

I
MUSEUM MISUSE OF NATIVE AMERICAN ARTIFACTS

The relationship between museums and Indians has not always lived up to its fullest potential. Recent literature has documented numerous existing problems in various parts of the country.[8] Most significant are the findings contained in a report submitted to Congress in 1979, pursuant to Section Two of the American Indian Religious Freedom Act of 1978 (AIRFA).[9] Section One of the Act provides:

> On or after August 11, 1978, 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 ceremonials and traditional rites.[10]

To carry out that policy, Section Two of AIRFA directed the President to evaluate all federal policies and procedures in consultation with native traditional religious leaders in order to determine how best to preserve Native American religious cultural practices.[11] The President was also directed to report the results of his evaluation to Congress, including any changes which were made in administrative policies and procedures, and any recommendations for legislative action.[12] While few, if any, of the AIRFA Report recommendations have been implemented,[13] the findings and recommendations of that Report cast a useful perspective on the scope and nature of the problems that this paper addresses.

The appendices of the AIRFA Report contain examples of specific problems regarding the handling by museums of Native artifacts. They in-

7. *See, e.g.*, Suagee, *supra* note 4.

8. *See, e.g.*, Blair, *American Indians v. American Museums, A Matter of Religious Freedom*, 5 AM. INDIAN J. 5-6 (1979); Davies, *Indian Religious Artifacts: The Curator's Moral Dilemma*, 2 INDIAN L. SUPPORT CENTER REP. 1 (1980); Note, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125 (1979).

9. Partially codified at 42 U.S.C. § 1996 (1981).

10. *Id.* (emphasis added).

11. *Id.* (historical note).

12. *Id.*

13. *See* Suagee, *supra* note 4, at 2 n.6.

clude museum display of skeletons, improper display or handling of sacred artifacts, possession of stolen items, and requests for the return of ceremonial objects. The Report analyzed these problems and developed administrative recommendations that could be implemented by the federal museums under existing statutory authority.[14] These recommendations have potential nationwide application for federal museums; they can also serve as standards for non-federal museums. The recommendations direct that:

> a. Federal museums should decline to acquire for their collections objects known to be of current religious significance to American Indian, Aleut, Eskimo or Native Hawaiian traditional religions, and should inform such Native American tribal and religious leaders of the presence on the market or in non-Native hands of such objects as come to their attention.
> b. Federal museums should return to the tribe of origin objects in the museum's possession, as to which unconsenting third parties assert no ownership interest, that were used or valued for religious purposes at the time of their loss from an American Indian tribe or Native American community, and were alienated from that community contrary to standards for disposition of such objects then prevailing in that community, provided that the successor or modern tribe or community requests them as needed for current religious practice.
> c. Federal museums should consult traditional Native religious leaders for guidance as to the museums' practices regarding exhibition and labeling, conservation, and storage of Indian, Eskimo, Aleut and Hawaiian sacred objects in their possession.
> d. Federal museums should facilitate periodic ritual treatment by appropriate religious practitioners of sacred objects in their possession, at the request of such practitioners.[15]

These recommendations are consistent with the law discussed in the following sections of this article.

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14. *See* AIRFA Report, *supra* note 5, at 76-81. The Report was primarily concerned with federal museums, such as the Smithsonian Institution, which are administered by various federal agencies, as opposed to state, local, or privately operated museums. Interestingly, the Smithsonian Institution which, according to some estimates, possesses the skeletal remains of at least 14,000 Indians, see Letter from Acting Director of the Smithsonian's National Museum of Natural History to National Congress of American Indians (Aug. 29, 1985), refused to participate in the AIRFA Federal Agencies Task Force or adopt its recommendations. AIRFA Report, *supra* note 5, at 19-25. The Smithsonian claimed that because it was created by Congress, it was not one of the "federal departments, agencies and other instrumentalities" subject to Section 2 of the AIRFA. The failure of the Smithsonian to review its policies is disturbing not only because of its extensive Native holdings, but also because it controls the actions of many other museums under the Antiquities Act of 1907, 16 U.S.C. § 431 (1971), and various regulations promulgated thereunder, such as 43 C.F.R. § 3.8. (1985) *See* Blair, *supra* note 8, at 21. Hence, the extent to which the Smithsonian will abide by the AIRFA recommendations is unresolved.

15. AIRFA Report, *supra* note 5, at 81.

II
THE DEVELOPMENT OF THE LAW AS IT RELATES TO INDIANS AND MUSEUMS

Each problem identified in the AIRFA Report raises a unique set of rights, responsibilities, and liabilities. Since these legal relationships are still evolving, it is useful to review the history of their development in order to evaluate the rights that are at stake. This section attempts to provide the background information necessary for museums and Indians to assess their legal interests in ownership disputes over Native cultural property.

A. Acquisition of Objects that were Sold by Individual Indians

Museum accession records show that some Native cultural property was sold by its original owners. Typically, these objects were passed through the possession of a number of buyers prior to being acquired by museums. Museums claim title to the cultural property by virtue of purchase or gift. Nonetheless, it is improper for museums to reject Indian claims on that basis alone, particularly where Indian tribes seek to reclaim artifacts alleged to be communal tribal property.

In resolving property disputes of this nature it is important to be mindful of the following provision of the United States Code:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possesion or ownership.[16]

Indian tribes, as well as individuals, benefit from this statute in suits against non-Indian individuals, corporations, partnerships, or societies.[17] Museums must, therefore, carry the burden of producing evidence to sustain their ownership claims. Specifically, they must prove that the Indians who originally sold the object had valid title. American property law provides that a purchaser of property acquires no title if the seller has none to convey.[18] For example, in *Seneca Nation of Indians v. Hammond*,[19] the New York Supreme Court held that defendant non-Indian purchasers of a quantity of hemlock

16. 25 U.S.C.A. § 194 (West 1983).

17. *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979). However, the statute does not generally apply to disputes involving states. *Id.* at 667-68.

18. The general rule was stated in 1850 by the New York Court of Appeals in Silsbury v. McCoon, 3 N.Y. 379, 381-84 (1850):

> It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking .... And, if the wrongdoer sells the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser has none to give.

19. 3 Thompson & Cook 347 (N.Y. 1874).

bark bought from individual Indians acquired no title, because the property belonged to the Seneca Nation as a whole. The Court stated:

> The bark in question . . . was the property of the plaintiffs. Those who purchased it from individual Indians got no title, and they could confer none on the defendants. Everybody who meddled with the bark became a trespasser. It is no defense that the defendants acted for others in buying the bark, or that they purchased it without notice that their vendors had no title; or that their acts, of which the plaintiffs complain, were done in good faith.[20]

In the area of federal Indian law, the courts have long distinguished individual from communal Indian property. Individual tribal members have no title to communally owned property held for the common use by the tribe.[21] Museums should be aware of that property distinction, as explained in *Journeycake v. Cherokee Nation*:[22]

> 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.[23]

Moreover, while it is no defense that a museum purchased an object in good faith without knowledge that a seller did not possess title, the museum does have a remedy against the seller to recover the purchase price under the theory of breach of implied warranty of title.[24]

The above rules have particular application to property disputes between museums and Indians. For example, *Onondaga Nation v. Thatcher*[25] involved a dispute between the Onondaga Nation and a non-Indian who had purchased wampum belts from an individual Onondaga Indian. The Tribe claimed that the wampum belts were important communal property of the Six Nations

20. *Id.* at 349.

21. *See* United States v. Jim, 409 U.S. 80, 82 (1972) (no individual title to unallotted tribal lands); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1292 (7th Cir. 1974) (treaty hunting and fishing rights belong to the Tribe as a whole and not to any one indiviudal); Whitefoot v. United States, 243 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) (no individual property rights in tribal fishing place); United States v. Felter, 546 F. Supp. 1002, 1021 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985) (tribal rights in property are owned by the tribal entity, and not as a tenancy in common of the individual members).

22. 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894).

23. *Id.* at 302.

24. *See, e.g.*, Menzel v. List, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

25. 29 Misc. 428, 61 N.Y.S. 1027 (Sup. Ct. Onondaga Cty. 1899).

Confederacy, and that the sale was unauthorized.[26] The court found, however, that the Six Nations Confederacy had ceased to exist by 1891, the date of the sale, and that the wampum belts were relics owned by the individual Indian seller.[27] Nonetheless, if the Tribe had proved its claims in *Onondaga Nation*, a different holding may have been reached. More recent cases provide guidelines for evaluating Indian property claims.

The property rights of Indians who reside in Indian Country are governed by the laws and customs of the Tribe.[28] Hence, museums look to tribal law and custom to determine whether an Indian seller conveys good title. Ethnologists can often provide assistance in these inquiries.[29]

In other cases, either direct reference to tribal law is required or a tribal court must resolve the dispute. For example, in *Johnson v. Chilkat Indian Village*,[30] a suit was brought by a Tlingit Indian against the Tlingit Tribal Village Council to determine the title to tribal artifacts that were over one hundred years old that were significant to the culture and heritage of the tribe. The plaintiff claimed ownership to the artifacts under Tlingit tribal law and custom, and had contracted to sell them to art dealers in the State of Washington. The Village Council disputed that claim, asserting that ceremonial objects are held in common by all members under Tlingit tribal law and custom. When the Council passed an ordinance prohibiting removal of the artifacts, the member sued the Council and other individuals who sought to prevent her from removing the artifacts. The federal court dismissed all claims against the Council on sovereign immunity grounds. It also dismissed the claims against the individuals, stating:

> The "property" interests of the villagers and the efforts of the Village government to preserve its heritage are so entwined that any decision by this court as to the interest of the plaintiff would prejudice the Chilkat Indian Village Council . . . . This Court sees no reason to regard potential damage to a Village's heritage and culture as less important than a Tribe's interest in developing a coal mine or a residential subdivision."[31]

The federal court referred the dispute to the tribal court, noting that under a long line of Supreme Court decisions, Indian tribes possess the power to regulate their internal and social relations,[32] and to make their own laws of inheritance.[33]

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26. *Id.* at 1028.
27. *Id.* at 1032.
28. *See, e.g.*, Wear v. Sanger, 2 S.W. 307 (Mo. 1886).
29. *See, e.g.*, Beaglehole, *Ownership and Inheritance In An American Indian Tribe*, 20 IOWA L. REV. 304 (1934-35).
30. 457 F. Supp. 384 (D. Alaska 1978).
31. *Id.* at 388.
32. *Id.* at 389 (quoting United States v. Kagama, 118 U.S. 375, 381-382 (1886), and citing United States v. Wheeler, 435 U.S. 313 (1978)).
33. *See, e.g.*, Jones v. Meehan, 175 U.S. 1 (1899). Even states which possess some civil

The court also noted the importance of allowing tribal courts to resolve disputes of this nature:

> When it is considered that there are present in this case complexities of Tlingit law in the area of descent and distribution, property concepts and language foreign to Anglo-American courts and that there are claims that these ceremonial objects are of vital importance to the heritage of the Village, it would be hard to imagine a more appropriate situation to apply the "well-established rule that courts will not interfere with the internal workings of Indian tribes."[34]

Hence, museums 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 tribal property, the Indian claimants have a legal right to demand the return of the property regardless of the date of the unauthorized sale.[35] These legal guidelines fully support the recommendation of the AIRFA Report that museums should return religious property that was alienated from the Native communities "contrary to standards then prevailing in that community."[36]

Although there are no recently reported cases that involve competing museum and Indian ownership claims, tribal claims to communal property presently in the possession of museums may make up the largest single category of potential claims.

B. Acquisition of Objects that were Stolen from Indians

The AIRFA Report determined that many museums may have in good faith acquired cultural artifacts which were originally stolen.[37] However, museums cannot validly claim title to Native cultural property so obtained.[38]

Applicable United States law defines theft as any knowing possession of property belonging to any Indian tribal organization.[39] Federal criminal stat-

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jurisdiction over disputes between Indians are required to give full force and effect to tribal customs and ordinances adopted by tribes that are not inconsistent with applicable state law. 28 U.S.C.A. § 1360 (West 1976 & Supp. 1985).

34. *Johnson*, 457 F. Supp. at 389 (citations omitted).

35. Neither the United States nor Indian tribes are subject to state statutes of limitations which generally require that lawsuits be filed fairly shortly after the complained-of conduct arose. Moreover, under 28 U.S.C.A. § 2415(a) (West Supp. 1985), neither the United States nor Indian tribes are barred by the federal statute of limitations from bringing suit for damages on behalf of individual Indians. Thus, in Oneida v. Oneida Indian Nation, 105 S. Ct. 1245 (1985), the U.S. Supreme Court permitted an Indian tribe to enforce property rights to real property that had been illegally taken in 1795.

36. AIRFA Report, *supra* note 5, at 81.

37. *Id.* at 77.

38. *See generally* Davies, *supra* note 8.

39. 18 U.S.C.A. § 1163 (West 1984).

utes make it illegal to knowingly receive or possess such property.[40] The courts have held that affected Indian tribes have an implied private cause of action for damages in federal district court.[41]

The well-publicized Zuni War God controversy[42] offers a good illustration of the manner in which museums acquire stolen Native American objects. The Denver Art Museum received the gift of a sacred war god statue from a non-Indian donor. It was not disputed that the statue was communally owned by the Zuni Tribe of New Mexico and possessed great religious significance. Any removal of that statue from its original shrine on the reservation was known by the museum to be unauthorized and illegal.

In response to various arguments raised by the museum in opposition to returning the stolen object, the Colorado Attorney General issued an opinion holding that the museum had no interest, as a public trustee, in asserting a claim to stolen objects.[43] It was only then that the museum returned the statue to Zuni tribal officials.

Where it is clear that native sacred material was stolen, a museum must return the property unconditionally. While the exact extent of this problem is unclear, the AIRFA Report indicates that museum possession of stolen Native religious proerty is "widespread."[44] Museums should adhere to AIRFA guidelines regarding accession and deaccession to this category of artifacts.

C. Acquisition of Objects Obtained by Excavation on Private Lands

In general, museums should decline to accept tribal religious objects without careful scrutiny and should notify tribal religious leaders when they are offered a chance to acquire such objects. Until recently, the law appeared to favor museum title to Native cultural material obtained through excavation from privately owned lands over those of Native American tribes. American property law generally vests ownership of all artifacts or objects found on private land in the landowner.[45] Consequently, landowners could usually sell such artifacts to museums under this premise. Those objects include skeletal remains, burial goods, and other Native cultural resources embedded in soil.[46]

Both older[47] and more recent[48] federal legislation regulate the excavation of cultural resources on federal and Indian lands. Some states strictly regulate

40. *Id.*

41. Cheyenne-Arapaho Tribes of Oklahoma v. Beard, 554 F. Supp. 1, 4 (W.D. Okla. 1980).

42. *See* Davies, *supra* note 8; Blair, *supra* note 8.

43. *See* Davies, *supra* note 8, at 2-3. Indeed, museums may not even have an "insurable interest" in stolen objects, Treit v. Oregon Automobile Ins. Co., 262 Or. 549, 550 n.2, 499 P.2d 335, 336 n.2 (1972), nor may they have standing in some states to maintain suit for damage to stolen goods or wrongful taking of them, Annot., 150 A.L.R. 163-254 (1944).

44. *See* AIRFA Report, *supra* note 5, at 77-78.

45. *See* Blair, *supra* note 8, at 17; Wilson & Zingg, *What Is America's Heritage? Historic Preservation and American Indian Culture*, 22 KANSAS L. REV. 413, 421 (1973-74).

46. *See generally* Annot., 170 A.L.R. 707 (1947).

47. 16 U.S.C.A. § 473 (West 1985).

excavation on state or private lands—including Indian graves and sacred sites.[49] However, this is not done in a majority of the states. The paucity of such regulation presents serious problems for Native claims to artifacts obtained from state or private lands. The vast majority of Indian tribes were involuntarily removed from their ancestral homelands by the federal government and placed on reservations that were, in many instances, hundreds of miles away.[50] Private owners have subsequently acquired these lands, and, under American property law, were historically free to unearth, sell, or destroy the remains left behind by the original landowners.

The propriety of the excavation of former Indian lands has always raised fundamental conflicts between Indian people and amateur or professional archaeologists.[51] These conflicts are based largely on the disparate world views between Native people, who believe that disturbance of the dead and their burial goods should be avoided because it is offensive to religious belief, and archaeologists who claim a birthright to excavate in the name of science and education.[52]

The fundamental conflict between Native religious beliefs and the views of the dominant society is illustrated in *Newman v. State*.[53] In that case, Arnold Newman's friends discovered the opened coffin of a Seminole Indian, two years deceased, in the Florida Everglades. The skull was found lying on the ground a few feet from the coffin. Newman and his girlfriend subsequently went to the site in order to photograph it. Newman removed the skull, claiming that he thought it was abandoned, and was convicted under Florida criminal law for maliciously removing the skull.

On appeal, Newman's conviction was reversed on the ground that the state failed to present sufficient proof that Newman had acted with the requisite malicious intent.[54] The defendant's conduct was excused on the basis of character evidence that Newman "was a serious minded boy" who "liked to

48. Archaeological Resource Protection Act of 1979, 16 U.S.C.A. §§ 470aa-ll (West 1985).

49. *See, e.g.*, CAL. PUB. RES. CODE §§ 5097.9-5097.99 (West 1984) (no one may use a state permit to damage Indian cemeteries or sacred sites; reinterment procedures provided; possession of Indian remains or grave artifacts prohibited after Jan. 1, 1984); WASH. REV. CODE ANN. § 27.44.010-020 (West Supp. 1986) (limitations placed on removal of Indian grave offerings); IOWA CODE ANN. § 305 A.7 (West Supp. 1975) (state archaeologist may reinter ancient human remains over 150 years old).

50. *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); United States v. Michigan, 471 F. Supp. 192, 207-16 (W.D. Mich. 1979), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

51. *See generally* Higginbotham, *Native Americans Versus Archeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91 (1982). There is presently no consensus among the professional archaeologists on these issues. *See* King, *Professional Responsibility In Public Archeology*, 12 ANN. REV. ANTHROPOLOGY 143 (1983); *The Question of Reburial: Archeologists Debate The Handling Of Prehistoric Human Skeletal Remains*, EARLY MAN, Autumn 1981, at 25. Moreover, the legal issues remain largely unresolved. *See* Higginbotham, *supra*.

52. *See supra* note 51.

53. 174 So. 2d 479 (Fla. Dist. Ct. App. 1965).

54. *Id.* at 484.

tramp through the woods."[55] Insensitivity to the Native Americans' respect for the dead was evident in the court's inability to find that the act of removing the skull was malicious conduct *per se*—as would be likely had Newman's conduct occurred within a cemetery. The court accepted Newman's defense that he thought the skull was abandoned, apparently because of the unusual nature of Seminole Indian burial customs: "We have here an unusual situation which concerns unfamiliar and secret tribal burial customs involving as the setting a scene of disarray in a wild sawgrass and cypress swamp."[56] Thus because the general public was unfamiliar with Indian burial customs, the criminal laws of Florida did not protect the sanctity of a Seminole Indian grave. The court gave only lip service to the general notion that the sanctity of Indian burials should be given the same respect accorded to graves of other races.[57]

Although it is unclear whether the grave was located on private or state land, *Newman* illustrates problems which Native Americans have in securing legal protection in this area due to differences in cultural outlooks, the general lack of understanding of tribal burial practices, and callous disregard of the sanctity of Indian graves.

However, museums should be held to a stricter standard than the public. Museums are familiar with the potential harm caused by acquisition of objects obtained by excavation; thus, they must carefully assess the background title of Native skeleton remains and burial goods collected from private lands and offered for sale.

Charrier v. Bell[58] is a recent case which illustrates this point. In 1970, Leonard Charrier attempted to sell two and one-half tons of burial goods taken from 150 Tunica Indian graves, which he excavated from private land in Louisiana, to the Peabody Museum at Harvard University. On receipt of the burial goods, the Peabody Museum questioned Charrier's ability to convey legal title. This eventually led Charrier to start proceedings for quiet title, in which he asserted ownership under state law as the finder of abandoned property. The Tunica Indians intervened in the case, claiming title to their ancestors' burial goods. The court found that the burial goods had not been abandoned by the Tunica Indians—although the tribal burial ground was privately owned and bore no physical resemblance to a cemetery:

> It is generally accepted by the historians and urged here by the Tunicas that the latter's ancestors were interred with their earthly possessions for use in the spiritual hereafter . . . . They were burial goods then and they remain burial goods today, whether they are referred to as artifacts, funerary offerings or the "Tunica Treasure"

55. *Id.* at 482.
56. *Id.* at 483.
57. *Id.* at 484.
58. Civ. No. 5,552 (20th Jud. Dist. La., Mar. 18, 1985), *appeal pending*, No. 85-0867 (filed Aug. 30, 1985).

> . . . . [W]e cannot agree that ownership of such objects may be acquired by reducing them to possession and over the objections of the descendants of the persons with whom the objects were buried. Reason dictates that these objects, when and if removed, rightfully belong to the descendants if they be known and for such disposition as the descendants may deem proper. We hold accordingly.[59]

The court did consider competing scientific and religious interests: "In some quarters, Charrier's discovery is viewed as an archaeological find of considerable significance. To others it is viewed as the systematic despoilation of . . . [the Tunicas] ancestral burial grounds. While we can fully appreciate the former view, it cannot override the equally considerable merit we find in the latter view."[60]

The *Charrier* decision addresses a serious gap in the development of the law and social policy of this country. If human remains and burial offerings of Native people are so easily desecrated and removed, wherever located, while the sanctity of the final resting place of other races is strictly protected, it is obvious that Native burial practices and associated beliefs were never considered during the development of the American law of property and the law of sepulcher. Yet, these *sui generis* beliefs and practices must be recognized more widely and accorded adequate legal protection if the law is to realistically and fairly protect the society which it is intended to serve. At least one court recognized this interest in the context of burial goods that were removed from private lands.

D. Acquisition of Objects Obtained by Excavation on Public Lands

Historically, Native cultural resources have been excavated from federal and Indian lands either by persons possessing permits under various federal statutes or by pot hunters who illegally expropriated those resources in violation of federal law.[61] Much has been written about the federal laws which protect cultural resources and govern excavation on public lands.[62] This section focuses on the legal avenues under which museums have historically acquired cultural resources.

The commentators agree that applicable federal legislation favors museums, which are entrusted with Native cultural resources excavated under federal permits. The Antiquities Act of 1906,[63] for example, allows properly qualified institutions to obtain permits for excavations, "subject to such rules and regulations" promulgated under the Act. Excavations must be "under-

59. *Id.* at 11, 12-13.

60. *Id.* at 14.

61. *See, e.g.*, AIRFA Report, *supra* note 5, at 77-78.

62. *See, e.g.*, Cooper, *Constitutional Law: Preserving Native American Cultural and Archeological Artifacts*, 4 INDIAN L. REP. 93, 103 (1976); Wilson & Zingg, *supra* note 45; Suagee, *supra* note 4.

63. 16 U.S.C.A. § 432 (West 1974).

taken for the benefit of reputable museums" and the "gatherings shall be made for permanent preservation in public museums."[64] Any other type of excavation on public lands without permission is illegal. The underlying assumption of the Antiquities Act is that all "cultural resources" located on federal land "belong" to the United States, and can be excavated only for the benefit of public museums. There are no provisions for Native ownership or disposition.

The Smithsonian Institution purportedly reviews and makes recommendations on all Antiquity Act permit applications.[65] Collections obtained under these permits cannot be removed from public museums without the written authority of the Smithsonian.[66] If a public museum with such holdings ceases to exist, then the collection reverts back to "national collections and [shall] be placed in the proper national depository."[67] Hence, the Smithsonian has far-reaching authority over Native cultural resources under the Antiquities Act.[68]

The Antiquities Act not only fails to make any provision for Native interests in cultural resources; its criminal provisions have historically been ineffective. It was not until 1973, when the Act was almost seventy years old, that the first prosecution under its auspices was reported.[69] However, the criminal enforcement provisions of the Act were declared unconstitutionally vague, and the conviction was reversed.[70]

Though never formally repealed, the Antiquities Act has been largely superseded by the Archaeological Resources Protection Act of 1979 (ARPA),[71] and its uniform regulations.[72] ARPA covers only "archaeological resources"—any material remains of human life, including human remains, which are at least one hundred years old.[73]

The significant differences between the Antiquities Act and ARPA is that the latter cures the constitutional defects of the Antiquities Act, upgrades the criminal and civil sanctions, and expressly protects Native interests in cultural resources located on Indian land and, to a lesser degree, federal lands.[74] ARPA additionally requires that the uniform rules necessary to carry out its

64. *Id.*

65. 43 C.F.R. § 3.8 (1985).

66. 43 C.F.R. § 3.17 (1985).

67. *Id.*

68. *See* Blair, *supra* note 8, at 21.

69. *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).

70. In *Diaz* the government sought unsuccessfully to prosecute a pothunter who stole 22 Apache religious objects from a medicine man's cave located on the San Carlos Reservation.

71. 16 U.S.C.A. §§ 470aa-ll (West 1985) [hereinafter referred to as ARPA].

72. *See* 36 C.F.R. § 296.1 *et seq.* (1985) (regulations for the Dept. of Agriculture); 32 C.F.R. § 229.1 *et seq.* (1985) (regulations for the Secretary of Defense); 43 C.F.R. § 7.1 *et seq.* (1985) (regulations for the Secretary of the Interior); 18 C.F.R. § 1312.1 *et seq.* (1985) (regulations for Tennessee Valley Auth.). For an overview of ARPA, see Suagee, *supra* note 4.

73. *See* 16 U.S.C.A. § 470bb(1) (West 1985); 43 C.F.R. § 7.3(a) (1985).

74. Although all Antiquity Act permits that were issued prior to ARPA remain in effect, no further Antiquities Act permits are required for activities subject to ARPA provisions. 16 U.S.C.A. § 470cc(h) (West 1985).

provisions be promulgated, "only after consideration of the provisions of the American Indian Religious Freedom Act."[75]

ARPA reinforces the policy that archeological resources which are removed from public lands remain the property of the United States and will be preserved by a suitable museum.[76] However, a permit cannot be granted under ARPA for excavation on Indian lands without the consent of the Indian landowner or Indian tribe with jurisdiction over the lands.[77] The ultimate disposition of resources from those lands is subject to the consent of such Indian or tribe.[78] As to public lands not owned by Indians, ARPA requires that Indian tribes must be given notice of any permit which might result in harm to religious or cultural sites.[79] However, the Secretary of the Interior may regulate the manner in which archaeological resources removed from such lands shall be disposed.[80] Both the Antiquities Act and ARPA plainly state that excavation on public or Indian lands without a permit is illegal, and cultural resources obtained in that manner are subject to seizure.[81] Moreover, resources obtained without permits cannot be exchanged or possessed by anyone.[82]

Although no reported decisions exists, there is a potential dispute between the United States and Indian tribes over ownership of archaeological resources located on public lands. As the custodians of such resources, museums could be caught in the middle of such disputes. Tribes have vital cultural and religious interests in their historic artifacts.[83] Where human remains are at issue, generally only the next of kin has standing to exercise control[84] over the body.[85] However, where that right has been neglected,[86] more distant kin,[87] voluntary associations,[88] or courts of equity[89] have been held to possess the authority to protect bodies from unnecessary removal. Hence, some tribes may have standing to assert control over the ultimate disposition of the remains and burial goods of their ancestors found on public lands. Such claims might be particularly strong where the tribes did not voluntarily abandon their burial grounds,[90] and where the federal government treats those remains dif-

75. 16 U.S.C.A. § 470ii (West 1985).
76. 16 U.S.C.A. § 470cc(b)(4) (West 1985).
77. 16 U.S.C.A. § 470cc(g)(2) (West 1985).
78. 16 U.S.C.A. § 470dd (West 1985).
79. 16 U.S.C.A. § 470cc(c) (West 1985).
80. 16 U.S.C.A. § 470dd (West 1985).
81. 43 C.F.R. § 3.16 (1985).
82. 43 C.F.R. § 7.4 (1985).
83. *See Johnson*, 457 F. Supp. 384.
84. *See* Charrier v. Bell, Civ. No. 5,552 (20th Jud. Dist. La., Mar. 18, 1985), *appeal pending*, No. 85-0867 (filed Aug. 30, 1985).
85. *See, e.g.*, Anderson v. Acheson, 132 Iowa 744, 110 N.W. 335 (1907).
86. Larson v. Chase, 47 Minn. 307, 50 N.W. 238 (1891).
87. Codell Constr. Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394 (1947).
88. Beatty v. Kurtz, 27 U.S. (2 Pet.) 566 (1829).
89. *See id.*; *Larson*, 47 Minn. 307, 50 N.W. 238.
90. In Frost v. Columbia Clay Co., 130 S.C. 72, 124 S.E. 767 (1924), the court held that a burial place can be abandoned by the mere removal of remains to a more suitable location.

ferently than the remains of other races.[91] Since the constitutionality of the ARPA ownership provisions and discriminatory treatment of Native skeletal remains are currently unresolved, it is important for museums to be aware of these issues.

III
HANDLING AND REPATRIATION OF NATIVE RELIGIOUS PROPERTY

Since the passage of AIRFA, more attention has been given to issues relating to the handling and repatriation of sacred objects.[92] However, no lawsuits have been filed against museums under AIRFA, and Native Americans have not used the Act to make an *en masse* run on museum collections, as curators originally feared. Nor has the Act been the panacea for resolving infringements on Native religious freedom, as traditional Native religious practitioners initially hoped.[93] Nevertheless, federal museums are subject to the AIRFA policy to protect free exercise of Native religion, including the "use and possession of sacred objects."[94] Arguably, the same is true for non-federal museums which receive federal funds or possess collections under federal permits. While that policy does not dictate the unconditional return of sacred objects, nor mandate the handling and display of sacred objects in a particular way, the museum guidelines of the AIRFA Report merit careful review by all affected parties.[95]

Current literature reviews the various positions advanced by Indians and museums with regard to repatriation issues.[96] While the positions sometimes conflict, there are ways to successfully accommodate competing interests in

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While the *Frost* standard may not constitute the weight of authority, it cannot be said that many tribes, forcibly driven from their aboriginal homelands, voluntarily abandoned the burial grounds of their ancestors. *See, e.g.*, Wichita Indian Tribe v. United States, 696 F.2d 1378, 1380-84 (Fed. Cir. 1983). Merely moving a village site because of pressure from other Indian tribes does not constitute abandonment. Moreover, under federal law, a right or property is not abandoned unless there is intentional relinquishment. Edwards v. Arizona, 451 U.S. 477, 482-83 (1981).

91. In *Sequoyah*, 620 F.2d 1159, *cert. denied*, 449 U.S. 953, the Cherokee tribe claimed that the TVA's action in excavating and removing Cherokee bodies for study was discriminatory where TVA also moved Caucasian and Black bodies, but reinterred the latter. Inexplicably, the court did not rule on the Cherokee's equal protection claim, and that issue therefore remains unresolved. However, in Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955), Justice Black recognized in his dissent that unequal treatment of human remains by the government can raise serious questions "concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 80 (Black, J., dissenting).

92. *See supra* note 8.

93. *See generally* Echo-Hawk, *Natural Resource Development On Public Lands: Strategies For Protection Of First Amendment Rights*, 6 INDIAN L. SUPPORT CENTER REP. 10 (Oct. 1983); Michaelson, *"We Also Have A Religion" The Free Exercise Of Religion Among Native Americans*, AM. INDIAN Q. (Summer 1983).

94. 42 U.S.C.A. § 1996 (West 1981).

95. *See supra* note 10 and accompanying text.

96. *See supra* note 8.

Native sacred objects.[97] The AIRFA guidelines rightfully provide that those sacred objects alienated from the tribes contrary to then prevailing tribal law or standards should be returned on request when needed for current religious practices. Many federal[98] and non-federal[99] museums have already followed those guidelines.

Although AIRFA does not impose any additional substantive religious rights beyond those already within the ambit of the free exercise clause of the first amendment, the courts have held that the Act does impose a *procedural* requirement to consider the impact of administrative actions on Native religious belief and practice.[100] Regardless of whether AIRFA applies to them, museums benefit from consulting with the relevant community on issues of repatriation and general handling of Native sacred objects.[101]

Moreover, AIRFA serves to clarify the legal capacity of state institutions to actively assist in preserving living Native communities. The courts have long held that the federal government has a trust duty to preserve native communities "as distinct cultural entities."[102] A state museum program which directly advances that federal trust duty is therefore lawful and constitutional.[103] This is also true for those museums that function under state laws that typically provide for a state interest in promoting and preserving the traditions and history of Indian tribes.

CONCLUSION

From society's standpoint it is important to preserve not only Native religious property, but also the irreplaceable Native beliefs and practices associated with that property. United States museums need not violate the religious and cultural traditions of the Native cultures which they seek to preserve.

97. *See* Hill, *Reclaiming Cultural Artifacts*, MUSEUM NEWS, May-June 1977, at 43-46.

98. AIRFA Report, *supra* note 5, at 78, noted that the museums of the Department of the Army, Navy and Air Force are reviewing their collections for objects that may have religious significance, and will notify appropriate Native religious leaders and invite them to discuss the "return, long-term loans and/or care and handling" of those objects.

99. *See* Blair, *supra* note 8 (such as the Heard Museum in Phoenix, and Wheelwright Museum in Santa Fe); Davies, *supra* note 8 (Denver Art Museum); Hill, *supra* note 97 (Buffalo and Erie County Historical Society); E. Childs, Repatriation and the American Indian: A Museum Dilemma (Dec. 1979) (unpublished manuscript) (available at Columbia University) (Museum of the American Indian-Heye Foundation at New York City, and Brooklyn Museum).

100. *See* Wilson v. Block, 708 F.2d 735, 745-46 (D.C. Cir. 1983), *cert. denied sub. nom.* Navajo Medicinemen's Ass'n v. Block, 464 U.S. 1056 (1984); New Mexico Navajo Ranchers Ass'n. v. Interstate Commerce Comm'n, 702 F.2d 227 (D.C. Cir. 1983); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 597-98 (N.D. Cal. 1983) *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985).

101. *See* Hill, *supra* note 97.

102. *See, e.g.*, Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979) (citations omitted). That federal duty is made plain by the terms of AIRFA. Peyote Way Church of God v. Smith, 556 F. Supp. 632, 639-40 (N.D. Tex. 1983); Frank v. Alaska, 604 P.2d 1068, 1073 n.9 (Alaska 1979).

103. *Smith*, 556 F. Supp. 632; Livingston v. Ewing, 455 F. Supp. 825, 831 (D.N.M. 1978), *aff'd*, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979).

Problems concerning property ownership, handling, and repatriation of Native cultural resources exist. Many of these problems can be resolved by acceptance of the simple notion that Indian peoples are members of living cultures that are entitled to respect and dignity in the eyes of the law. Certainly law and social policy is evolving in that direction.[104] By adopting the AIRFA Report standards, museums could play a leading role in this movement. Hopefully, this article provides a useful background for developing the special relationship between America's museums and Native Americans. Both parties, as well as the general public, have much to gain from developing that relationship.

104. The increasing need to evaluate historic properties under the National Historic Preservation Act, 16 U.S.C.A. §§ 470aa-ll (West 1985), for their importance to living, on-going, Native societies has been recognized by the Advisory Council on Historic Preservation. *See* Guidelines for Consideration of Traditional Cultural Values in HISTORIC PRESERVATION REVIEW (Draft) (Aug. 1985).