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Five

Indigenous Rights and Archaeology

> America wanted museums. But they would be different from European ones. They would not, for instance, be stores of imperial plunder, like the British Museum or the Louvre. (Actually immense quantities of stuff were ripped off from the native Indians and the cultures south of the Rio Grande, but we call this anthropology, not plunder.) (Hughes 1992:23)[1]

The current dialogue between Native Americans and archaeologists concerning the appropriate treatment of Native American human remains and ancestral sites has many dimensions: ethical, moral, and legal. As a law professor, I would like to discuss the legal issues that surround this relationship and explain how those issues are interpreted by Native Americans. It would be ludicrous, however, to pretend that there is one Native American interpretation. There are as many interpretations as there are tribal governments, religious groups within tribes, and political movements among tribes. This chapter adopts one of those interpretations, which I shall call an indigenous rights perspective.

The indigenous rights perspective is founded on the contemporary political movement to reassert tribal sovereignty and self-determination and demand respect for indigenous rights to cultural survival (Morris 1992).[2] This political movement is national and international in scope, and is a response to several centuries of

European domination and forcible assimilation of indigenous peoples. In the international law context, indigenous rights, such as the right to cultural survival, are understood as normative precepts that are derivative of generally applicable human rights principles, such as the right to self-determination (Anaya 1996). However, as James Anaya notes, those broadly applicable human rights principles are "in themselves relevant to indigenous peoples' efforts to survive and flourish under conditions of equality" (Anaya 1996:73).

One important aspect of the fight for cultural survival is the issue of who has control over the past. As Rennard Strickland has noted, federal Indian policy has, with very few exceptions, "been premised on the assumption that the future for the Native American required the destruction of the past" (Strickland and Supernaw 1993:161). Thus, assimilationist federal policies have focused on erasing sacred tribal traditions and religions and inculcating Euroamerican Christian traditions. As Indian nations strive to overcome the legacy of these assimilationist policies, their future survival as distinct cultures rests to some extent on their ability to understand and protect their ancestral past.[3]

Thus, critical issues arise as we consider who has the right to control the past. Are the material remains of past cultures a "common good" or "public resource" for the people of the nation-state where they are found? Or do they represent cultural resources that belong to the descended cultures of contemporary indigenous America? In many ways, the federal cultural preservation statutes treat indigenous human remains and ancestral sites as public resources. This chapter will discuss the complex web of federal statutes that governs cultural preservation, including the Archaeological Resources Protection Act (ARPA), the National Historic Preservation Act (NHPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). Before examining these statutes in detail, however, I will examine the values and legal concepts that are triggered by these statutes and explain how these statutes can be interpreted from an indigenous rights perspective.

Native Americans and Archaeologists: The Duality of Values and Interests

Attitudes within archaeology are starting to reflect the postmodern influences of academia, including the commitment to understanding diverse perspectives and viewpoints through a dialogical process with others. Although there have been many changes in professional ethics and attitudes as a result of this process, Indian people's perceptions of archaeologists tend to be driven by their past experiences, which have been quite unpleasant for the most part. In particular, the relationship between Native Americans and archaeologists has been problematic because of the different values that each group holds about the past.

Archaeologists research the past, as do historians. However, the methodology of the archaeologist is much more invasive. Not content to study tribal oral histories or traditions, the archaeologist will often seek to excavate and appropriate the material remains of the past. Other times, the archaeologist will probe the spiritual and intangible aspects of the past in the quest for knowledge. The values that archaeologists seek to protect are those of science, of documenting "facts" about the past for the sake of knowing (Bowman 1989; Meighan 1993). Archaeologists argue that knowledge and research benefit all people. Until the relatively recent change in professional attitudes, archaeologists perceived ancient peoples as research specimens, like dinosaurs or fossils, and claimed that the codes of ethical behavior that governed European burials did not pertain to the treatment of ancient peoples.

Thus, archaeologists have often faced vehement opposition from Native Americans, who, for the most part, do not agree with any of these views. Although they believe in the importance of the past, most Native American peoples see the past as connected to the present in an unbroken continuum. The past is very real to contemporary Indian people and is preserved in oral histories and ongoing ceremonial practices and beliefs. Many native people dispute that science can tell them where they came from—they already know this from their origin stories, and they honor their ancestors regardless of how long ago they passed away (Bowman 1989). Furthermore, native people often see care of the past as a duty and responsibility; they have firm ideas as to what behavior is appropriate and believe that they should have the right to stop others from desecrating their ancestors.

I imagine that many would assert that the central legal issue at the heart of this debate between Native Americans and archaeologists is one of property law: that is, "who owns the past?" After all, legal scholars use the concept of "ownership" to designate legal rights to specific objects—such as the rights to possess, to control, to exclude, to include, and to alienate. To the extent that archaeologists assert a right to control and use material remains in their quest for knowledge, they are acting as property owners. Moreover, federal statutes, such as ARPA and NAGPRA, are largely phrased in the language of property rights. However, at a more fundamental level, the idea of human remains and funerary objects as "property" is odious, both to non-Indians and to Indians.

Under English common law, for example, dead bodies cannot be owned, and the removal of funerary objects from a burial site is considered a dreadful and abhorrent crime. In the old Anglo-Saxon tongue, a burial ground was referred to as "God's Acre," a sanctified resting place for the deceased (Trope and Echo-Hawk 1992). Because of these strong spiritual beliefs about the dead, English common law regards the next of kin as having only a limited or "quasi-property" interest in the body that entitles them to control the disposition of the deceased and allows them to obtain compensation in tort for any misconduct toward the remains (Bowman 1989). However, even the next of kin cannot "own" the dead. Therefore, property

law is, in many ways, completely unsuitable to address the legal rights of Indian people with regard to their ancestors.

From an indigenous rights perspective, it may be more accurate to argue that in seeking to protect their ancestors, Native Americans are attempting to secure recognition of basic human rights such as the right to religious and spiritual fulfillment, and the right to control burial sites on ancestral lands, which have been removed from native "ownership" through colonization and appropriation (Harjo 1992; Riding-In 1992; Trope and Echo-Hawk 1992).[4] The outrageous conduct that Euroamericans have displayed toward Native American remains, funerary objects, and sacred objects exemplifies a basic and ongoing disregard for Native American human rights. After all, the very first Pilgrim exploring party returned to the *Mayflower* with items taken from a very recent grave: "We brought sundry of the prettiest things away with us and covered up the corpse again," one member of the party later recalled (Trope and Echo-Hawk 1992:40). And this callous disregard turned into calculated evil with the genocidal military campaign conducted against Indians, which culminated with an 1868 U.S. Surgeon General's order directing army personnel to collect Indian crania and other body parts for the Army Medical Museum. Over the next few decades, that order resulted in the collection of more than 4,000 Indian heads from battlefields, burial grounds, hospitals, and POW camps (Trope and Echo-Hawk 1992). Importantly, this policy was accomplished in the name of "scientific research."

Professor James Riding-In links the rise of archaeology in the 1800s as a science to the spread of colonialism and the belief that Christianity and civilization offered justification for the study of "inferior" cultures, such as those of Africa and the Americas (Riding-In 1992). Riding-In points to the fact that the early science of "craniology" that inspired the infamous 1868 order was developed precisely to prove that inferiority. Thus, for Indian people the designation of "science" does not immunize a practice from pointed moral scrutiny. Nor, as amply shown by federal Indian policy as well as the history of slavery in America, does the designation of "law" insulate governmental policy from moral scrutiny, a scrutiny that examines whose values the law seeks to protect and how those values are enforced. Not surprisingly, both science and the law have come under attack as Indian people struggle to overcome the bitter legacy of colonialism and its disrespectful practices and to preserve their past in the ways that they see fit.

The Effect of Federal Historic and Cultural Preservation Statutes

Largely as a result of official policies encouraging the pursuit of "knowledge" about indigenous peoples through the study of anthropology and archaeology, which in

turn inspired a popular fascination with Native American "artifacts," artifact collecting and archaeological site desecration have been long-standing practices. The problems caused by artifact collecting and site desecration have been severe on both public lands and private lands, although for the most part federal regulation has attached to public lands (Hutt, Jones, and McAllister 1992).

Notably, however, the law as it relates to historical preservation and archaeological excavation has been consistent with the popular perception of Indian people as "historical resources" and as appropriate objects of scientific study. Thus, there is no real argument between the amateur pot hunter and the professional archaeologist as to the underlying values at stake; both agree that Indian remains are objects for non-Indian study and excavation. There is merely the argument of who is the appropriate party to conduct the investigation, and perhaps one as to the ultimate disposition of the remains: that is, are they to reside on permanent display in a museum or are they to be bought and sold on the market. The federal statutes attempt to define rights of access and control in a way that authorizes the activities of the professional archaeologist and attempts to punish the activities of the amateur pot hunter.

Antiquities Act of 1906

The Antiquities Act of 1906, which was intended to protect archaeological sites on federal and tribal lands from looters, defined dead Indians interred on federal lands as "archaeological resources," as "objects of historic or scientific interest," and treated these deceased persons as "federal property" (16 U.S.C. §§ 431–433). Thus, under federal law it was entirely permissible to disinter Indian bodies—provided that the necessary permits were secured—and deposit the bodies in permanent museum collections. The act recognized federal agencies as having the authority for the proper care and management of all archaeological resources on federal and tribal lands. Indeed, as of 1990, at least 14,500 Native American bodies were in the possession of various federal agencies, such as the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service (Trope and Echo-Hawk 1992).

Importantly, the Antiquities Act does not speak of tribal interests at all, nor does it give effect to tribal laws, customs, or beliefs as to the appropriate care of such sites. The act is thus completely unresponsive to tribal concerns and merely furthers the interests of professional archaeologists in having access to the sites unimpeded by amateur pot hunters and looters. For most purposes, of course, the Antiquities Act has been replaced by the Archaeological Resources Protection Act (16 U.S.C. § 470aa–mm).[5] However, ARPA does not represent a significant departure in terms of the values and interests it protects.

Archaeological Resources Protection Act of 1979

The stated purpose of ARPA is to protect irreplaceable archaeological resources on federal and Indian lands from individual and commercial interests and to foster the professional gathering of information for future benefit. ARPA considers "archaeological resources on public lands and Indian lands" to be "an accessible and irreplaceable part of the Nation's heritage." Thus, like the Antiquities Act, ARPA considers Native American remains and cultural items to be "archaeological resources"—provided that they are more than 100 years old. If they are excavated on federal lands, they are considered "federal property" of historic and scientific interest to the public at large. Only if they are excavated on tribal lands are such remains and objects considered the property of the tribe.

There are many problems with ARPA, and it can be fairly said that the statute epitomizes the essential differences in values and beliefs about the past between Native Americans and Euroamericans. ARPA allows desecration of ancestral and sacred sites, although it requires a permit to undertake such desecration. ARPA considers research on Indian remains to be "in the public interest." ARPA treats human remains and funerary objects as "property" and directs that ultimate management and control of the excavated objects reside with the landowner—whether federal or tribal. Thus, to the extent that tribes have control over the excavation and disposition of such objects, it is because they are property owners and not because they have a recognized legal interest in their ancestors' remains.

Although ARPA pays lip-service to Native American interests by specifying certain notification and consultation requirements whenever excavation of a site could result in harm to or destruction of a religious or cultural site, the statute does not give a tribe the right to veto excavation on public lands. And the responsibility to mitigate damage is merely an option, not a requirement, for the federal land manager. Moreover, although the excavated remains ultimately may have to be repatriated under NAGPRA, the remains and objects can be legally excavated and studied prior to such repatriation.

Thus, ARPA's only value may lie in deterrence of illegal excavation of archaeological sites and illegal trafficking in the excavated objects. Through enforcement of ARPA's criminal and civil provisions, some site desecration may be stopped. However, ARPA does not disallow *all* site desecration. And the fact that the statute legalizes excavation, which many native peoples regard as site desecration, is testament to the fact that old attitudes still remain: Indian bodies and sacred objects are not treated the same as non-Indian bodies and "church property."

The Antiquities Act and ARPA are weighted heavily toward the interests of archaeologists in obtaining knowledge about the past. The permit requirements of the statutes ensure that only "qualified" people will excavate, but the statutes definitely support excavation and scientific study as a "public benefit."

Native American Graves Protection and Repatriation Act of 1990

Unlike ARPA or the Antiquities Act, NAGPRA is primarily "human rights legislation" designed to remedy the inequality in treatment between Caucasian remains and Native American remains: a history of inequality that, as Senator Daniel Inouye pointed out, carries the message of racism—that "Indians are culturally and physically different from and inferior to non-Indians" (136 Cong. Rec. S17174–75 [daily ed. Oct. 26, 1990]). NAGPRA thus governs the treatment of Indian remains, funerary objects, sacred objects, and objects of cultural patrimony by imposing certain requirements when such objects are excavated, and by specifying when objects that are in museum or agency collections must be repatriated to descendant tribes and individuals (25 U.S.C. §§ 3001–3013).

NAGPRA has been heavily criticized by some archaeologists who fear that the statute will impair their ability to research past cultures, and who assert that repatriation of remains and objects to contemporary Indians is unjustified because the connections between ancient and modern Indian cultures are too tenuous (e.g., Meighan 1993). Grossman, for example, asserts that NAGPRA is merely a response to the pressures of militant Indian groups that share the "same political orientation and multiculturalist agenda" as other ethnic rights advocates (Grossman 1993:9). Grossman claims that science has become a tool of ideology and that statutes such as NAGPRA prevent the exploration of "objective knowledge," which, she asserts "should be treasured for its own sake . . . and should be made available to all" (Grossman 1993:12).

Grossman's comments marginalize native perspectives on repatriation as being merely a politicized movement to gain "ethnic rights." This designation denies legitimacy to Native American values and interests. In accordance with recent attacks on notions of "group rights" (e.g., Graff 1994), native interests are considered "preferences," attempts to assert "victim" status to gain *special* rights.[6] In fact, NAGPRA *is* built around the notion of separate tribal governmental status and the federal government's unique trust relationship with the tribes (25 U.S.C. § 3010). Thus, NAGPRA requires that requests for repatriation come from the tribal community and makes the interpretation of ownership and alienability dependent upon tribal concepts of property (Strickland and Supernaw 1993).

Importantly, however, the native interests in gaining repatriation of ancestral remains and objects recognized by NAGPRA are largely an effort to obtain the *same* rights that Euroamericans have always had to *their* past, which is largely consecrated in Christian, marked cemeteries along with the bones of their ancestors. In this way, NAGPRA seeks to recognize indigenous human rights, which are inherent rights of all peoples that command international support and recognition. As Edward Halealoha Ayau comments: "NAGPRA recognizes the cultural right of

living . . . Native Americans to speak on behalf of their ancestors and to determine proper treatment of ancestral remains. Such recognition is a basic human right, the exercise of which is a long standing attribute of native sovereignty and self-determination" (Ayau 1992:216).

In fact, some Indian people would assert that NAGPRA does not go far enough in acknowledging indigenous human rights. For example, NAGPRA applies only to excavations on federal or tribal lands and to repatriation of objects in federal or federally funded institutions. This leaves out many excavations undertaken on private lands or state lands (if not federally funded projects); and for the most part, unless the objects were illegally acquired and are commercially traded in interstate commerce, NAGPRA leaves private collections of Native American remains intact. Moreover, NAGPRA authorizes the intentional excavation of human remains, funerary objects, sacred objects, and objects of cultural patrimony if these objects are removed in accordance with all permit requirements (such as those under ARPA), and so long as notification and consultation with the affected Indian tribes occurs prior to excavation.

Thus, although NAGPRA represents an important recognition of indigenous cultural rights, the statute provides only limited protection for Native American interests in preventing desecration of ancestral sites. The objects may ultimately be repatriated to the tribe under NAGPRA, but they may still be unearthed and the subject of scientific testing before being returned to the tribe. Both activities constitute desecration under the belief systems of many indigenous peoples.[7]

National Historic Preservation Act of 1966

The NHPA serves as the basic charter for America's national historic preservation program (16 U.S.C. §§ 470–470w-6). As early as 1896, the Supreme Court had acknowledged the federal government's authority to designate and preserve "historic sites," finding that this was a "public purpose" within the meaning of the Fifth Amendment takings clause when accomplished by condemnation of private property (*United States v. Gettysburg Electric Railroad Company,* 160 U.S. 668, 681–682 [1896]). The NHPA accomplishes this "public purpose" through several means. First of all, the statute establishes a National Register of Historic Places and dictates the criteria for eligibility. Secondly, the statute mandates a review process (the "Section 106" process) for federal undertakings that might have an effect on any "district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."

Although the NHPA was originally interpreted as being fairly consistent with Euroamerican practices in terms of defining a historic site, the 1992 amendments clarified that "traditional cultural properties" are included. Significantly, Native

American sacred sites may be considered traditional cultural properties, even absent evidence of human occupation, provided that they meet the appropriate criteria (Parker and King 1990). Moreover, the Section 106 process mandates notice and consultation with Native American tribes if a proposed federal undertaking might affect a sacred site or ancestral site that is eligible for listing on the National Register.

As with the other federal statutes, however, the NHPA is only marginally protective of tribal interests that involve sites off the reservation. Under the 1992 amendments, the tribal historic preservation officer has significant authority with respect to tribal lands; however, the tribes' role in the Section 106 process on other lands is much more limited. The NHPA is first and foremost a procedural statute, designed to ensure that there are no inadvertent impacts on historic properties. The statute, however, does not forbid adverse impacts on historic properties when no other measure is deemed adequate. Indeed, "establishing that a property is eligible for inclusion in the National Register does not necessarily mean that the property must be protected from disturbance or damage" (Parker and King 1990:4).

In fact, the very requirement that an ancestral or sacred site be documented as "eligible" for protected status is problematic for Native American people. Rather than being accorded respect as a matter of right, Indian people have to "prove" that their ancestral sites are "worthy" of preservation. Although this requirement is thought to be necessary to differentiate genuine from spurious claims, what counts as adequate proof is determined by the dominant society's legal structure. Native American people must generally enlist the services of professional archaeologists and anthropologists, who are seen as credible by the outside world. This process raises concerns for Native American people, who are often held to norms of secrecy and confidentiality when dealing with sacred information. While NHPA regulations counsel confidentiality, the mere act of revelation to an outsider can constitute a violation of traditional religious and cultural norms. Moreover, all expert testimony is subject to contradictory testimony from opposing experts, and to ultimate adjudication by non-Indian courts.[8]

National Environmental Policy Act of 1969

The National Environmental Policy Act is intended to serve as America's "basic national charter for protection of the environment" (42 U.S.C. §§ 4321–4370d). NEPA requires an analysis of major federal actions that may significantly affect human health and the environment. As the courts have held, this includes not only traditional environmental concerns of air and water quality, but also the "historic, cultural and national aspects of our heritage" (*Havasupai Tribe v. United States,* 752 F. Supp. 1471, 1493 [D. Ariz. 1990]). Thus, NEPA is an umbrella statute that

generally mandates inclusion of environmental impact analyses under other relevant statutes as well, such as the NHPA, ARPA, and arguably, the American Indian Religious Freedom Act (AIRFA), although the courts have been less than charitable in assessing impacts on Native American religious interests under AIRFA.

However, NEPA is also purely a procedural statute, designed to ensure that agencies make informed decisions when engaging in development projects. NEPA does not require any particular substantive result, and, indeed, a project may go forward even if it will have some adverse impact on human health or the environment. Moreover, some courts have held that where Indian tribes fail to make full disclosure of religious interests, including the specific location of sacred sites and a detailed description of practices affected, the statute will not protect these interests (*Havasupai Tribe,* 752 F. Supp. 1498–1500). Even where the tribe does disclose this information, it is subject to analysis and criticism by other "experts," such as anthropologists or archaeologists.

In short, NEPA, like NHPA, provides limited protection for Native American interests. While both statutes require studies to document historic and cultural sites, neither precludes subsequent development that would negatively impact these sites or the living cultures that treasure them. All of these statutes, however, require some kind of relationship between the professionals who document the sites for the government studies and the Native Americans who oppose desecration of the sites. To the extent that the statutes require the disclosure of sensitive information by Native Americans to the professionals, a fiduciary relationship may arise. I leave for others the discussion of what that relationship should look like and the extent to which the professional must honor constraints on the disclosure of information and refrain from using it inappropriately. Like it or not, however, the federal statutes render Native American cultural preservation to some extent dependent on an accurate translation by archaeologists and anthropologists. Because of this, the ethical boundaries of this relationship must be articulated.

Conclusion

Although my discussion has focused on the federal cultural and historic preservation statutes, I should acknowledge that state and tribal statutes also play important roles in detailing applicable values and interests and defining the appropriate role of the archaeologist. While archaeologists continue to assert that scientific goals benefit society as a whole, and yield an understanding of the past that is a common good, these assumptions are clearly challenged by many Native Americans. Native Americans regard their ancestors and their past as belonging to the living descendants of these cultures and believe that they must be honored and respected according to tribal customs and traditions. These customs may specify that knowledge should remain exclusively within the indigenous culture. Thus, for many

Native Americans, knowledge of the past is not a common good; it is a legacy of past generations that must be respected and treated with care by this generation.

Many Native Americans do not distinguish appropriation of their ancestors for commercial gain from appropriation for scientific benefit. A looter of archaeological sites desecrates burial grounds for commercial gain. A scientific excavation of archaeological sites desecrates burial grounds for the sake of gaining knowledge about the past. Indeed, knowledge of the past which becomes the property of the public at large (through, for example, publication in national magazines) encourages the idea that Native American people are historic resources that belong to the American public. In fact, from an indigenous rights perspective, nothing could be more offensive or less grounded in reality.

The federal statutes encourage controlled access to Native American ancestral sites, which can be problematic. Although recent efforts to recognize tribal governments as the primary decision makers for cultural preservation issues on tribal lands are a step in the right direction, an ethic of respect mandates similar control over sites on ancestral lands that have been removed from tribal ownership. The idea that Native American remains and cultural objects can serve some common good must become a relic of a dying colonialism. The future relationship between archaeologists and Native Americans depends on the ability of the archaeologist to understand the cultural values that drive indigenous cultural preservation efforts. NAGPRA is a positive step toward recognition of basic human rights for Native Americans, but there is still significant work to be done. Perhaps no one can really "own" the past, but we need to acknowledge the special responsibilities of those Native American people who are caretakers of an ancestral past that lives on.

I would like to thank Kurt Dongoske, Nina Swidler, and the other organizers of the SAA forum on Native Americans and Archaeology for inviting me to participate. I benefited from their remarks as well as those of the other participants. I would also like to thank Professor Robert N. Clinton (University of Iowa) and Professor Jeffrie G. Murphy (Arizona State University) for their thoughtful comments on earlier versions of this chapter.

NOTES

1. I am indebted to my colleague, Jeffrie Murphy, for calling this quotation to my attention. Hughes's acerbic comment makes an important point: whether the collection of artifacts is called anthropology or plunder can depend on one's position as the researcher or the subject. I would argue that similar problems attach to the designation of "scientific benefit" as it is understood within the discipline of archaeology.

2. An indigenous rights perspective has been taken by a number of Native American rights organizations in relation to protection of indigenous human remains and ancestral sites and was a major impetus for the Native American Graves Protection and Repatriation Act

(Riding-In 1992:25). Professor Riding-In details the history of the reburial movement and efforts of groups such as American Indians Against Desecration, the National Congress of American Indians, the Association of American Indian Affairs, the American Indian Science and Engineering Society, the Native American Rights Fund, and the International Indian Treaty Council. As another scholar notes, the reburial issue has become "a political issue of respect—respect not only for the dead, but also for the Native American people" (Bowman 1989:150).

3. For example, as James Anaya points out, issues of indigenous cultural integrity, encompassing "indigenous peoples' works of art, scientific knowledge, . . . songs, stories, human remains, funerary objects and other such tangible and intangible aspects of indigenous cultural heritage" are the subject of a study sponsored by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities (Anaya 1996:103). The 1993 *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* "identifies widespread historical and continuing practices that have unjustly deprived indigenous peoples of the enjoyment of the tangible and intangible objects that comprise their cultural heritage" (Anaya 1996:103–104).

4. I should note that property has been affirmed as an international human right (Anaya 1996:105), and in that sense, a distinction between "property rights" and "human rights" is nonsensical. However, indigenous property rights have long suffered from a lack of equal recognition according to international law constructs of property, and it is only now, "where modern notions of cultural integrity and self-determination join property precepts," that indigenous rights are beginning to receive equal respect and recognition, at least in theory (Anaya 1996:105).

5. The Ninth Circuit's opinion in *United States v. Diaz,* which held the Antiquities Act to be unconstitutionally vague because it fails to specify the age of the objects to be protected, has cast doubt on the legality of the Act: 449 F.2d 113 (9th Cir. 1974); cf. *United States v. Smyer,* 596 F.2d 939 (10th Cir. 1979) (upholding constitutionality of the act as applied to protection of Mimbres jars that were up to 900 years old). However, the Antiquities Act remains valid as a means to establish historic and scientific sites, and it may be used to gain permission to excavate sites that are less than 100 years old.

6. For example, Graff attacks the notion of "ethnocultural nationalism" as "a metaphor designed to serve ideological or political objectives" (Graff 1994:209–210).

7. It is important to acknowledge that there is no uniform view among Native Americans as to the propriety of scientific testing of ancestral remains. Some Native Americans believe that this is permissible when there is a "specific purpose to the study and a definitive time period for the study" (S. Rep. 101-473, 101st Cong., 2d Sess., Sept. 26, 1990, "Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony," pp. 4–5). Some Native Americans object to museum retention of human remains with only a general intent to research at some future time period, and some Native Americans question the scientific value of unidentified human remains altogether (Bowman 1989). In a 1993 article, for example, Vine Deloria rejected the standard arguments regarding the scientific value of research on Native American remains and said that if this is true, then archaeologists should also be unearthing old non-Indian bodies in towns across

the nation "to uncover information regarding malnutrition, premature deaths, and other human afflictions" (Riding-In 1992:26–27) (citing Vine Deloria, Jr., "A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue," *Native American Rights Fund Legal Review,* Fall 1989, p. 5). Finally, it should be noted that under some tribal religious views, scientific testing of human remains is considered inappropriate behavior (Marsh 1992:92).

8. A recent case illustrates the potential problems for Indian tribes seeking to protect sacred ancestral sites under the NHPA. In *Pueblo of Sandia v. United States,* the Pueblo of Sandia and various environmental groups brought an action against the United States and a National Forest Service supervisor, alleging that the Forest Service failed to comply with the National Historic Preservation Act in its evaluation of Las Huertas Canyon in the Cibola National Forest. The Forest Service had concluded that the canyon did not constitute a traditional cultural property and it promulgated a new management strategy for the area. The Forest Service relied on a report by one expert, although there were conflicting opinions by experts testifying on behalf of the Pueblo that indicated that the canyon was a traditional cultural property. The District Court upheld the conclusion of the Forest Service, although it was later overruled by the Tenth Circuit, which held that the Forest Service's efforts "were neither reasonable nor in good faith." See *Pueblo of Sandia v. United States,* 50 F.3d 856 (10th Cir. 1995). On remand, the experts will most likely develop their reports and a final determination will be made as to the legal status of Las Huertas Canyon.