

REPORT OF THE 26TH ARIZONA INDIAN TOWN HALL

*"Preserving Arizona's Tribal Cultural Resources,
Sites and Languages"*

*June 5-7, 2006
Scottsdale, AZ*

Hosted by
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26th Arizona Indian Town Hall Report

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INTRODUCTION

The Arizona Commission of Indian Affairs is proud to offer the Final Report of the 26th Annual Arizona Indian Town Hall (AITH). This report reflects the hard work of over 130 participants from federal, state, local and tribal governments, as well as community members from across Arizona.

The concept of the Arizona Indian Town Hall (AITH) can be traced back to traditional native cultures. For centuries, many Indian nations and tribes settled issues by discussion among their villages, clans, and elders until consensus was reached. Harmony and consensus were valued, and leaders in many tribes ruled by the consent of the people. Leaders were held accountable to the people and could not make decisions without first discussing the matter with their tribal citizens; the will of the people was paramount.

The timeless tradition of discussion and consensus-building is the foundation upon which the AITH builds. Today, the AITH borrows many of the methods of the Arizona Town Hall for its structure and process, such as group panel discussions and a plenary session, where all participants work to develop a final report of recommendations.

The AITH Report is designed to be a "snapshot" of participants' perceptions and understanding of the issue or issues under discussion, and to provide recommendations for policy changes to resolve concerns raised during the discussions. The AITH Report should also serve as a "report card" to government officials in developing policies to ensure that both tribal and non-tribal governments learn about these programs and providing training to develop and implement these programs in their own communities.

With that in mind, this year's AITH, *Preserving Arizona's Tribal Cultural Resources, Sites and Languages* proved to be yet again a very timely and topic for discussion. Over the past few years, several different tribes have struggled to protect cultural resources and sacred sites throughout Arizona. Most recently the Hopi, Navajo and other tribes have joined together to prevent the use of reclaimed water on the San Francisco Peaks, which they believe to be sacred. The San Carlos Apache Tribe has also struggled with local, national and international agencies and organizations to prevent the desecration of Mt. Graham, a mountain held sacred to the Apaches, in southern Arizona. In addition, many tribes are struggling with how to best preserve their native languages, thus ensuring that their cultural heritage remains for future generations.

Due to these pressing issues and with an eye toward the future, the Commission of Indian Affairs felt the time was right to bring these important topics to the Indian Town Hall in the hopes that participants would engage in meaningful discussion that would result in not only strengthening the relationships between federal and state governments and tribes, but to hopefully build a better understanding through education and communication of the importance of our culture and history.

The following is the final report of their two and half days of discussion.

Panel Discussion 1
Preserving Arizona's Native Languages

Question 1: Why is it important to preserve native languages?

Participants feel strongly that preserving native languages are vital to preserving tribal cultures. They feel that native languages are the core of "who we are"; the anchor of our cultures. Language also strengthens commitment to the land and sacred water resources and enables the transmittal of culture between generations. Language is the core of our beings, the center of our cultures, say participants. Participants stress that it is especially vital for children to learn their language; "Creator knows us by our language," said one participant.

Participants feel that for some the boarding school culture has contributed to the loss of native languages. There is an entire generation that has grown up not speaking their native language because of a lack of hope and an environment of fear created in the boarding schools to speak their native language. This also contributed to the failure to transmit languages between generations. Participants feel that historically, the boarding school culture contributes to a lack of fluency among youth. Some non-Indian public school officials are resisting working with tribes because they do not understand how tribes work, how languages work to preserve culture, or even how many tribes there are in Arizona. Participants also note that intermarriage, where one parent does not speak the tribal language, contributes to language loss. Participants also feel that passive speakers, who are having trouble becoming fluent, are being discouraged from learning more because they do not have an environment conducive to practicing. Many participants noted that some fluent speakers frequently ridicule members attempting to become fluent, which deters passive speakers from making the attempt, although some participants note that they are encouraged to practice.

Some participants also felt that some religions and church doctrines discouraged the speaking of their Native American language and practicing their culture, because historically they felt it was the "work of the devil". It was further felt by some that the pervasive media influence on youth has also contributed to the loss of fluency.

Question 2: What are the challenges to keeping tribal languages alive? How does Prop. 203, the 2000 voter proposition that mandates that English be the only language used in Arizona public schools, affect tribal language instruction in public schools? Can the Native American Languages Act, a federal statute be better utilized to ensure that Arizona public schools teach native languages in districts with substantial numbers of tribal students?

Participants feel that Prop. 203¹ denies the creation of the whole person by denying children another chance to learn their language. They feel that is an example of not recognizing Native people, and is another attempt at forced assimilation. Prop. 203 was not supposed to affect tribal members on the reservation, say participants. However, Prop. 203 has actually stopped language classes in reservation public schools. Participants encourage Native American school boards to research cases of other school districts, such as Roosevelt School District, which have successfully circumvented the requirements of Prop 203 through appeals to the U.S. Department of Justice. Participants therefore recommend that the state clarify Prop. 203 as it relates to native language instruction in public schools. It is also recommended that tribal communities and parents put pressure on schools to ensure that children learn their languages.

Finally, participants note that Native American Language Act² (NALA) grants come with oversight requirements that do not recognize the reality of language instruction. However participants agree that NALA should be used as a tool to counter the Prop. 203 "English-only" instructional requirements.

Question 3: What strategies can be employed to ensure language transmittal to future generations? (Discuss tribal language programs, community programs such as the Yuman Language Summit, and other grass-roots efforts; master apprentice language study programs; and other language programs.)

Participants recognize that tribal governments play a significant role in developing effective language preservation programs on their own and in partnership with schools. Tribally supported language programs are not subject to the same federal and state requirements to which schools are subject. This is clearly an advantage of using tribally supported language programs, and participants indicated that tribes should utilize this whenever possible. Also, participants encourage tribes to share effective language preservation practices and programs with one another.

One strategy that was suggested was to interest tribal members, particularly young people, in participating in tribal ceremonies where they will hear their language spoken. Another

¹ Proposition 203 was passed by Arizona voters in 2000. The proposition states "all children in Arizona public schools shall be taught English as rapidly and efficiently as possible." Implementation of Prop. 203 began during the 2001-2002 school year and quickly was embroiled in controversy due to the ambiguous language used in the proposition.

² Native American Language Act (P.L. 101-477) was passed in 1990 to recognize the language rights of Native Americans, Alaska Natives and Native Hawaiians. It offers no new programs or appropriations for language preservation but encourages government efforts to support and preserve Native languages while placing no restrictions on Native languages in any public proceeding. [Later amendments also provided for competitive grants for language preservation.]

strategy that was brought up was to develop immersion classes³, camps, elder-youth pairings, and integrate traditional stories into school curriculum to teach native languages. Other participants suggested using tribal history as a means to teach the native language. Participants also discussed the availability of utilizing technology, such as media productions to teach native languages.

Some participants noted that it's not just words that describe a connection, rather an interaction between one another. For example, the description of "A feather, flowing in the wind" in the English language does not capture the emotional or spiritual nuances, and the interpersonal relationships still need to play a significant role. Participants strongly noted that tribes take the lead in conducting business in their language whenever possible, to provide a good example for youth. Participants also stressed that language instruction begins at home, and realize that any structured program will require funding. Participants also stressed the need to be tolerant of language learners, and to encourage them rather than ridicule them as they are learning.

Question 4: What role does the state play in assisting tribes in language preservation? The state currently requires all instructional personnel to be certified as teachers, which requires formal university training. However, many native language instructors do not have this certification, nor would it be practicable for them to make the effort, since many of them do not have the educational background to succeed in college. However, there is a need for native language instruction in schools. How can the state and tribes develop a protocol and/or change the law/regulation to enable these valuable instructors to teach language in schools?

Participants feel that the state should provide funding for language programs. The example noted was New Mexico's language revitalization grant program. Participants further recommend that the state adopt a system similar to New Mexico's, in which tribal language instructors are granted certification through a state-tribe MOU. The MOU requires that the state grant this certification based on standards enacted by the tribe. In any case, participants stress that tribal language instructors should not be subject to the requirement for a higher college degree to teach language and cultural knowledge, and that the state and tribes work together to develop certification based on tribal standards.

Panel Discussion II

Protecting Native Ceremonial, Burial and Sacred Sites

Question 1: Why is it important for tribes to protect their ceremonial, burial and sacred sites from desecration and theft?

Participants note that it is vital to protect ceremonial, burial and sacred sites from desecration because it creates an imbalance in tribal cultures; these sites are central to a tribe's cultural life, and to damage these sites creates a disharmony, and can even cause injury to people or to the earth. Participants also note that protection of these sites is an extension of human

³ The State of Hawaii has adopted Hawaiian as one of its official languages in Article XV of its constitution, and the state education department offers Hawaiian immersion classes. (<http://www.hawaii.gov/lrb/con/conart15.html>) This is the only state to adopt an indigenous language as an official language.

rights; they consider it disrespectful and note that tribes continue to conduct ceremonies at these sites.

Question 2: What Federal and/or tribal laws are currently in place to address site protection? (discuss the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA) etc.) How well are they enforced, and what strategies could be employed to make the current laws more effective in preventing and/or mitigating site damage? How could these laws be strengthened? How can tribes work with other governments and private firms, such as telecommunications firms, in ensuring that sites are protected during construction projects? What about archaeological assessments? Arizona Revised Statutes 41-841 prohibits excavation of historic or prehistoric ruin, burial ground, archaeological or vertebrate paleontological site, or site including fossilized footprints, inscriptions made by human agency or any other archaeological, paleontological or historical feature, except under certain conditions. Is this statute working to adequately protect sites? What about private lands? Should the State enact legislation to better protect native sites on private land? Why or why not? How can government agencies better educate themselves to be sensitive to tribal cultural concerns when encountering cultural sites?

Laws currently in place include Native American Graves Protection and Repatriation Act (NAGPRA), National Historic Preservation Act (NHPA), Archeological Resources Protection Act (ARPA), National Environmental Policy Act (NEPA) and Executive Order 13007, and numerous tribal ordinances regarding the protection of culturally significant sites. Participants noted that the current laws lack "teeth" in enforcement and are costly to prosecute. Participants also note that jurisdictional disputes and other issues often arise during attempts to enforce existing laws. Participants recommend that the investigator position of ARPA violations be reinstated along[er] with additional support personnel in a timely manner. They also suggested that tribes maintain an inventory of all their sites and positively identify their locations in order to determine if Federal, State or Tribal law governs jurisdiction.

Tribes should facilitate consultation with state and federal agencies regarding sites that might be significant within a proposed project. Participants recommend that tribes also conduct an environmental assessment of cultural sites and use other laws, such as the Clean Water Act and the Environmental Policy Act to enhance their site protection strategy. Participants further recommend that tribes should exercise caution in working with any outside groups; however, participants also indicated that tribes should utilize other federal programs such as the National Register of Historic Places, which can be a tool in site protection and insuring consideration of these sites in state or federal projects. They caution that this strategy may not be effective for sites that have already been compromised. However, sacred sites such as San Francisco Peaks or Mt. Graham can be further protected by all tribes, land managers, and legislators collaborating in nominating such sites to the National Register of Historic Places. Participants stress that tribes will see improved results if they work with one another.

Tribes are encouraged to take protective measures and share responsibility for their spiritual sovereignty by passing tribal laws, resolutions or ordinances determining their traditional beliefs, practices and spiritual rights to the San Francisco Peaks. These measures should be adopted and written in their own language, as well as in English.

Participants also recommend that tribes should demand a person-to-person consultation prior to any construction projects requested by entities on or near Indian country. They also recommend that tribes insist on having tribal cultural preservation officers or other such personnel present during archaeological assessments. Other recommendations include the development of a statewide protocol for training anybody who might come in contact with a culturally significant site. They also recommend that tribes take the lead in educating all entities involved in construction and infrastructure projects. Tribes should also educate themselves on the laws, policies and procedures involved before becoming involved with consultation efforts. Participants recommend that full Historic Preservation Fund allocations be made to tribal Historic Preservation Offices. Participants also stress that this is the key to successful collaboration during construction projects.

Participants note that the current state laws “regarding human remains (ARS 41-841 and ARS 41-865) only come into play if skeletal remains are found on state and private land. Therefore, they do not feel that the current law is adequate to protect sites. Participants recommend that fines and other enforcement be increased to deter unscrupulous conduct of developers. They also recommend taking those fines and developing a mechanism to return them to the tribe. Participants also indicated that Arizona should consider enacting legislation similar to California’s SB 18⁴, which requires tribal consultation while considering any construction projects. Another strategy recommended is to encourage private landowners to preserve archeological and sacred sites on their land as a NAGRPA site. Participants note that Pima County, which includes the city of Tucson has involved their tribes in a comprehensive plan process to identify and preserve and monitor significant cultural sites. This springs from Pima County’s comprehensive plan that incorporates long-term planning, open space requirements and other strategies. They feel that this model could be incorporated throughout the state.

They also recommend that the current Arizona law be amended to include a proposal made by Hopi to expand the protection of private lands. They also recommend that culturally significant sites be preserved by the use of open space laws. Participants say that 41-841’s language lists historic and prehistoric sites, and that the concept of “preponderance of evidence” be used to prove that a contemporary tribe is either the cultural owner or the descendent of an older tribe and should therefore be considered the cultural owner in regards to site protection. Participants also recommend that tribes help educate government agencies in cultural sensitivity and that legislation be enacted to require state agencies to develop and enact tribal consultation policies; participants note that there is a current executive directive in place requiring certain

⁴ SB 18 (2004) requires cities and counties to contact, and consult with, California Native American tribes prior to amending or adopting a general plan or specific plan, or designating land as open space.

agencies to develop these policies. Tribes should engage in the development and continuing review of these policies.

Question 3: How well does the Arizona State Parks’ Site Steward Program work to ensure protection of sensitive tribal sites? Could tribes make better use of the site stewards, and if so, how could this be brought about?

Participants agree that the Arizona State Parks Site Steward program⁵ is not adequately known or understood by tribes. Participants who are familiar with the program agree that the Site Stewards do a good job in monitoring sites. However, participants also feel that Site Stewards, who are volunteers, are not always adequately familiar with or educated on culturally significant sites. Participants recommend that site stewards, the law enforcement personnel who respond to Site Steward reports, and other related personnel receive additional education on tribal sites in general and contemporary sites in particular. Participants recommend that tribes use this model to implement similar monitoring programs on tribal lands. They also recommend that the Site Steward program conduct more outreach and information on their programs to tribes and that full-time staff be increased. Participants also suggest that other agencies enact policies similar to the Site Steward program.

Question 4: In 2005, Arizona Attorney General Terry Goddard brought suit against a private developer for ruining tribal sites, devastating a herd of endangered big horn sheep and blading thousands of acres of desert lands, causing extreme damage to the environment. Could tribes make use of civil suits against offenders of existing laws, and if so, would partnering with the AG’s office be a good strategy to employ? Why or why not? How could tribal, state and/or local governments work to return a sacred site to the tribe? (Discuss Mt. Graham, the San Francisco Peaks and other areas). What would the procedure be in such a case? How could tribes raise awareness of the spiritual significance attached to certain sites without revealing sensitive information? What would it take for Tribes to establish or re-establish an area they consider to be a sacred site? (Mt. Graham, San Francisco Peaks, etc.).

Participants are divided over whether a partnership with the Arizona Attorney General’s (AG) office to jointly engage in a civil suit against people or firms who wantonly destroy culturally significant sites is advisable. Participants note that they should take the cost vs. benefit into consideration if considering a suit on their own behalf. Participants also note that the AG’s suit against the person who devastated the big horn sheep herd should be examined as a model to teach tribes the jurisdictional, legal and environmental issues involved, to prevent such cases arising again. Participants asked if any information is being collected on civil suits on behalf of tribes, and if so, they recommend that an organization be established to work solely on these issues.

Some participants recommend that the best way for a tribe to reclaim a federal or state site is to purchase the land it sits on. In the case of the San Francisco Peaks, participants note that the land has multiple usage policies, which spotlight the issues of monetary gains to leaseholders

⁵ For more information on the Arizona State Parks Site Steward program please visit: <http://www.pr.state.az.us/partnerships/shpo/sitestew.html>

vs. the spiritual interests of the tribes. Participants also note that a public law exists that governs the protocols involved in returning surplus lands to tribes. Participants further recommend that spiritual practitioners and/or elders help provide outreach, and also establish a database of specialists to serve as resources. They also recommend that information regarding culturally utilized sites be reviewed by elders or other spiritual practitioners before being released to the public.

Participants say that the reestablishment of a sacred site is offensive to them. They stress that it is not necessary to reestablish an area, because it has always retained its significance. Participants note that oral tradition does not seem to carry the same weight as written information, and because of that, participants note that it is very difficult, if not impossible to establish its significance. Participants recommend that the tribes establish a protocol and that the state develop mechanisms to recognize them. There is already a federal process in place.

Panel Discussion 3 *Repatriation of Native Artifacts and Burials*

Question 1: How well does the Native American Graves and Repatriation Act (NAGPRA) work in ensuring that tribes have the opportunity to reclaim artifacts and human burials that were stolen or otherwise misappropriated? Should the State enact a similar law? Why or why not?

Participants say that NAGPRA is not working as well as it could, because of the difficulty of proving ownership of an item or items. However, other participants felt that NAGPRA does work; however, some tribes do not have the proper ceremonies in place to reclaim the artifacts for re-introduction into the ceremonial cycle or the proper protocols for re-burial. The process can be lengthy and expensive. Private museums are not governed by NAGPRA. They agree that NAGPRA works best when all parties collaborate.

They also recommended that institutions and/or government agencies update their cultural artifact inventory. They also recommend that tribes be engaged in the legislative process, to influence the formation of laws or regulations.

Participants noted that NAGPRA does not govern any private or state lands, nor does existing state law (ARS 41-865) have adequate enforcement provisions. Participants recommend that existing state law be amended to 1) more closely reflect language in NAGPRA; and 2) strengthen enforcement provisions. Participants also feel that NAGPRA does not deal well with intangible entities such as cultural sites, and that the law should be amended to address those intangibles. They further recommend that state law be developed to include private ownership and private museum collections. On the other hand, other participants note that academic and ethnographic research is the key to any actions in regards to private collections, in order to conserve resources.

Question 2: Tribes are dealing with repatriated objects and/or human remains that are laced with arsenic and other potentially deadly chemicals. Some tribes use these items again in their ceremonies. What is the effect on these toxins on individuals who use these items? Some tribes re-bury the items into soil that may become contaminated with these poisons. Are these poisons affecting our water or plant resources? If so, how can this issue be addressed? (Discuss the research conducted by the Hopi cultural Preservation Office).

Participants understand there are health concerns related to contaminated repatriated items and that more research is needed to determine their effects. Participants recommend that entities providing a repatriated object provide documentation on any contaminants to tribes. Some participants note their personal experiences with encountering artifacts resulted in their becoming contaminated.

Some participants are concerned with possible effects of contaminated artifacts that are stored in homes. They also recommend that tribal members be educated in the health effects of handling contaminated artifacts. Participants recommend that tribes be proactive in learning what contaminants may be on repatriated items. They also recommend that these items be respected, and that only certain persons are qualified to examine them. Finally, a recommendation was made that the Arizona State Museum conduct training in safe handling of objects and those institutions modify their policies and procedures in regards to dealing with tribes in repatriation issues.

Question 3: How well are tribes prepared to deal with repatriated objects and/or remains? Discuss tribal cultural resource departments/programs, committees and the like. How can tribes with well developed programs assist those that are still developing their programs? How well does tribal leadership communicate with their cultural resource departments, elder councils, etc., help tribal leaders form their messages on cultural preservation for use in dealing with federal, state or local governments?

Participants acknowledge that some tribes are more prepared than others to deal with repatriated items. They recommend that tribes create a training program to address repatriation issues. Tribes should formulate policies to interact with medicine men and women, elders and other cultural practitioners in dealing with repatriated objects. They also recommend that tribal members educate their councils in repatriation issues.

Question 4: How could tribes work with the state, universities, or private entities to help develop or enhance their programs? (e.g. the University of Arizona holds the annual American Indian Language Development Institute, and Phoenix Indian Center has Navajo language lessons.)

Participants recommend that the three State Universities in Arizona implement an apprenticeship program in partnership with tribes to support tribal cultural programs and projects. The students would preferably come from tribes. Participants also recommend that tribes continue to strengthen communications for partnership development with universities and include community colleges in the process.

Participants recommend that tribes work together to more effectively deal with private entities on cultural issues. Some strategies could include issuing resolutions supporting businesses that enact and implement policies recognizing and respecting tribal cultural values, and implementing policies that will take advantage of the growing influence of tribes' water rights in sparking positive changes on the part of private developers.

CONCLUSION

As time goes by it becomes extraordinarily important for tribes to protect their cultural resources both on and off their reservations. Sacred sites, culturally significant areas and even native languages are a connection to a past that transcends generations, and is perhaps a link to the beginning of time. Each time a site is desecrated or an Indian child does not learn her language, it is not just a travesty but the loss of history. Ultimately it is the responsibility of tribes and Indian families to ensure that their sites are protected and that cultural teachings and languages are passed down from generation to generation. However local, state and federal governments also have a responsibility to enforce existing laws that protect culturally significant and sacred sites. Communication and education between tribes and non-Indian government agencies and the public at large is paramount and should continue to be strengthened whenever possible.

The 26th Arizona Indian Town Hall highlighted some of these issues that tribal people face when trying to protect their cultural resources. By utilizing the recommendations in this report, stakeholders have a powerful tool that should ultimately help to preserve and protect our cultural heritage and history.

Appendix

These materials were prepared for informational purposes by a law student who is not a licensed attorney. Please consult a licensed attorney before taking action on matters described in this material.

The Native American Graves and Repatriation Act (NAGPRA)

NAGPRA⁶ was passed in 1991 in response to the growing concern for the protection of graves and funerary objects and for the repatriation thereof, and is to date the most significant federal statute affecting the cultural resources of Native Americans. NAGPRA is human rights legislation.⁷ Senator Daniel Inouye summarized the reason for this legislation best when he stated “[w]hen human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are laying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.”⁸

There are two different aspects to NAGPRA. First, the Act required all federal agencies and museums, at the time the Act was passed that had “possession or control” of Native American human remains and cultural and religious objects to do an inventory of those objects and “to the extent possible based on information possessed by such entities, to identify the geographical or cultural affiliation of such items.”⁹ Second, this Act works to “halt the removal of sacred objects and objects of cultural patrimony both on and off tribal lands.”¹⁰

NAGPRA involves federal agencies, museums (including state and local governments and education institutions), Indian tribes, lineal descendants, and Native Hawaiian Organizations.¹¹ The federal agencies and museums are to return “human remains and associated funerary objects upon the request of a lineal descendent, Indian tribe, or Native Hawaiian organization...”¹² “Associated funerary objects,” are items found by the body and items made specifically for the funeral.¹³ The statute also provides for items that are “unassociated funerary objects,” “sacred objects” and “cultural patrimony.”¹⁴ “Sacred objects” are items that are “specific ceremonial objects” needed by “traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”¹⁵ The key words here are “present day adherents” “for use in currently practiced traditions and for those that need the items to renew a tradition.”¹⁶ “Cultural patrimony” is defined as those items “which shall mean an object having ongoing historical, traditional, or

⁶ 25 U.S.C. § 3001-3013 (2000)

⁷ Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 59 (1992).

⁸ *Id.*

⁹ Marilyn Phelan, *A synopsis of the Laws Protecting Our Cultural Heritage*, 28 New Eng. L. Rev. 63, 89 (1993).

¹⁰ Katosha Belvin Nakai, Book Note, *When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?*, 35 Ariz. St. L.J. 1283, 1312 (2003).

¹¹ Trope & Echo-Hawk, *supra* at 61.

¹² *Id.*

¹³ 25 U.S.C. § 3001(3)(A).

¹⁴ *Id.* at § 3001(3).

¹⁵ *Id.* at § 3001(3)(C).

¹⁶ Trope & Echo-Hawk, *supra* at 65.

cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American."¹⁷

NAGPRA only pertains to items discovered on tribal and federal land.¹⁸ If discovered on tribal land then the tribe controls all "cultural items" disposition.¹⁹ If discovered on federal land then the "tribe . . . with closest affiliation to the item has ownership or control."²⁰ However, if an item is discovered on tribal land, but the cultural affiliation is not determinable, then "the tribe that has obtained the judgment has the right of ownership and control over the items, unless another can show a stronger cultural relationship."²¹

Persons wishing to intentionally excavate are required to obtain a permit pursuant to the Archaeological Resources Protection Act.²² Furthermore, if there is an intention to excavate on tribal lands, then the tribe must be given notice of these intentions and provide its consent.²³ If the excavation is to take place on federal land, there still needs to be notice and consultation with the "appropriate tribe."²⁴ However, when there is an inadvertent discovery, such as at a construction site, the discoverer must cease activity and notify the responsible federal agency, then the agency notifies the appropriate tribe, or the discoverer must notify the tribe when it is on tribal land—the tribe is then given 30 days to respond.²⁵ NAGPRA also protects cultural items and human remains against trafficking, for sale or profit, that have been illegally obtained.²⁶

In conclusion, the most empowering aspect of NAGPRA is its capacity to correspond to and work with Indian tribes on culturally important issues such as protecting burial sites and cultural items. These items, and Native American culture, demand dignity and respect.

The Archaeological Resources Protection Act (ARPA)

ARPA²⁷ amends and expands the Antiquities Act of 1906 (protects historical sites and monuments in the United States).²⁸ The purpose of ARPA is to "secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data . . ."²⁹ This Act prohibits "...the sale, purchase, transport, exchange, or receipt of any archaeological resources removed without permission . . ."³⁰

ARPA is more specific than the Antiquities Act in that it provides for the preservation of "archaeological resources"—"any material remains of past human life or activities that are of

¹⁷ 25 U.S.C. § 3001(3)(D).

¹⁸ *Id.* at § 3002.

¹⁹ Trope & Echo-Hawk, *supra* at 71.

²⁰ *Id.*

²¹ *Id.* at 71-72.

²² Trope & Echo-Hawk, *supra* at 72.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Trope & Echo-Hawk, *supra* at 73.

²⁷ 16 U.S.C. § 470aa-470mm

²⁸ Phelan, *supra* at 66, 75.

²⁹ 16 U.S.C. § 470aa(b).

³⁰ *Id.*

archaeological interest and which are at least 100 years of age."³¹ The items that are included in this statute are "...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."³²

As with NAGPRA, this Act calls for the consent of the Indian tribe pursuant to the tribe's own "terms and conditions."³³ Also, when obtaining a permit with the possibility of "harm to or destruction of sites having religious or cultural importance", there must be notice given to the Indian tribe before the permit is issued.³⁴ However, ARPA lacks the inclusion of religious objects of *recent* origin.³⁵

The National Historic Preservation Act (NHPA) and The National Environmental Policy Act (NEPA)

NHPA³⁶ was passed when it came to Congress's attention that many of this Nation's important historical sites were vanishing.³⁷ "The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."³⁸ This Act broadened the National Register of Historic Places to include the protection of more "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."³⁹ This act does not particularly pertain to those sites located on private lands because private property owners do not have to consent to this Act's provisions.⁴⁰

NEPA⁴¹ added "...the requirement that environmental and cultural values be considered along with economic and technological values when proposed federal projects are assessed."⁴² "NEPA provides environmental protection not only against pollution but also from other threats that could negatively impact environmental quality and cultural denigrations."⁴³ These two Acts may help protect some aspects of Native American culture; however, the two previous Acts pertain more directly with cultural preservation.

Arizona Repatriation Legislation

Arizona has two significant statutes on the issue of repatriation. Before these statutes were passed in 1990, "registered and marked" graves were always protected under the current

³¹ Phelan, *supra* at 75, quoting *Id.* at 470bb(1).

³² *Id.* at § 470bb(1).

³³ *Id.* at § 470cc(g)(2).

³⁴ *Id.* at § 470cc(c).

³⁵ Phelan, *supra* at 88.

³⁶ 16 U.S.C. § 470

³⁷ Nakai, Book Note, *supra* at 1303.

³⁸ Pamela D'Innocenzo, Comments, "Not In My Backyard!" *Protecting Archaeological Sites On Private Lands*, 21 Am. In. L. Rev. 131, 135 (1997).

³⁹ *Id.* at 136.

⁴⁰ *Id.*

⁴¹ 42 U.S.C. § 4331

⁴² Phelan, *supra* at 73.

⁴³ Nakai, Book Note, *supra* at 1303.

law at the time; however, "such protection did not extend to most older Indian burial sites on private property."⁴⁴ Furthermore, this only extended to "marked" graves, not unmarked graves.⁴⁵

A.R.S. § 41-844 was passed in 1990 and expanded Arizona's current repatriation legislation. This statute states that when "any archaeological, paleontological or historical site or object that is discovered" while a person is "in charge of any survey, excavation, construction or other like activity on any lands owned or controlled by the state" the discovery must be promptly reported to the Arizona state museum director.⁴⁶ There is a duty for the discoverer to maintain the preservation of the site.⁴⁷

In many ways, this statute operates similar to that of NAGPRA, for example, if the items discovered are "human remains, funerary objects, sacred ceremonial objects or objects of national or tribal patrimony," then the Arizona state museum director must give notice to five entities.⁴⁸ First to the person with "direct kinship to the human remains," second, to those groups who may have a "cultural or religious affinity" to the remains, third, the "curatorial staff" at the state museum, fourth, to members of the faculty that may have a "significant scholarly interest" in the items, and finally, to the state historic preservation officer.⁴⁹ Furthermore, if the items were found on tribal land that are or were occupied by a tribe, then notice must given to that tribe as well.⁵⁰

Like NAGPRA, Arizona's repatriation legislation encourages cooperation with tribes. Once a discovery is made, the director has six months to assemble a meeting of all those notified.⁵¹ Here the director is to "encourage agreement among all participants regarding the most appropriate disposition and treatment of the materials."⁵² However, if there is no agreement as to the disposition of the remains at the end of the six months, then "the human remains or funerary objects shall be disposed and treated in accordance with the wishes of the nearest relative with a direct kinship relationship, or with the wishes of the governing body of the group with cultural or religious affinity to the remains or objects if no relative exists."⁵³ Disposition of "sacred ceremonial objects" or "objects of national or tribal patrimony" will be disposed of by those with the closest "cultural or religious affinity" to the items.⁵⁴ When the items are American Indian remains, then the statute calls for the "cooperation of the Indian tribe located nearest to the place where the remains were discovered."⁵⁵ Also, with American Indian items that are "sacred ceremonial objects" or "objects of national or tribal patrimony," then there has to be a consultation with the "appropriate" tribe.⁵⁶ Furthermore, this statute only covers human remains that are at least 50 years of age and older.⁵⁷

⁴⁴ Paul Bender, *1990 Arizona Repatriation Legislation*, 24 *Ariz. St. L.J.* 391, 394 (1992).

⁴⁵ *Id.*

⁴⁶ A.R.S. § 41-844(A).

⁴⁷ Catherine Bergin Yalung & Laurel I. Wala, Book Note, *Statutory Survey: A Survey of State Repatriation and Burial Protection Statutes*, 24 *Ariz. St. L.J.* 419, 420 (1992).

⁴⁸ A.R.S. § 41-844(B).

⁴⁹ *Id.* at §§ 41-844(B)(1)-(5).

⁵⁰ *Id.* at § 41-844(D).

⁵¹ *Id.* at § 41-844 (E).

⁵² *Id.*

⁵³ *Id.* at § 41-844(F).

⁵⁴ *Id.*

⁵⁵ *Id.* at § 41-844(G).

⁵⁶ *Id.*

⁵⁷ *Id.* at § 41-844 (M)(4).

The second Arizona statute pertains to the historic preservation of human remains or funerary objects.⁵⁸ This statute provides for the non-disturbance of human remains or funerary objects without permission of the Arizona state museum director⁵⁹ that are not on lands owned by the state (private).⁶⁰ Furthermore, the director must have notification, and must give permission for further disturbance, if there was an unintentional disturbance of "human remains or funerary objects" on such lands.⁶¹ When there are Native American "human remains or funerary objects" discovered, then the "statute grants the governing body of the descendant tribe the authority to determine the most appropriate treatment or disposition of the remains or objects."⁶² Taking these statutes together, Arizona has diligently worked to protect the cultural resources of Native Americans within its borders.

Executive Order 13007

Executive Order No. 13007:
Indian Sacred Sites

May 24, 1996

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

- i. "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;
- ii. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and
- iii. "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately

⁵⁸ A.R.S. § 41-865.

⁵⁹ Yalung & Wala, Book Note, *supra* at 421

⁶⁰ A.R.S. § 41-865 (A).

⁶¹ A.R.S. § 41-865(B).

⁶² Yalung & Wala, Book Note, *supra* at 421.

authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Section 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things,
i. any changes necessary to accommodate access to and ceremonial use of Indian sacred sites;
ii. any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and
iii. procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Section 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedures Act (5 U.S.C.551[13]).

Section 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.

William J. Clinton

The White House
May 24, 1996

The Arizona Commission of Indian Affairs would like to thank the following individuals for their dedication, hard work and expertise in making the 26th Arizona Indian Town Hall a success!

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