INDIAN REMAINS, HUMAN RIGHTS: RECONSIDERING ENTITLEMENT UNDER THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

by Angela R. Riley*

I. INTRODUCTION

> Tribal representatives described a gruesome scene where pieces of caskets, the outlines of additional graves, and parts of human burials were exposed and lying on the surface of the drawdown zone.[1]

When the federal government undertook to build Fort Randall Dam in 1949, it was known that the Indian cemetery downstream would become the site of Lake Francis Case. According to the government's relocation plan, the bodies in the cemetery would be exhumed and reburied in a new location. But, decades later, as the U.S. Army Corps of Engineers (the Corps) raised and lowered the lake's water levels, the remains of dead Indians began to emerge in the tide. By the time the Yankton Sioux Tribe was notified, caskets, bones, pots, and burial shrouds had floated to the surface of Lake Francis Case.[2]

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1. *See* South Dakota: Drawdown of Francis Case Reservoir, *at* http://www.achp.gov/casearchive/cases6-00Sd1.html (last visited Nov. 14, 2002).

2. *See infra* Part III.B.4.

Burial practices exist in almost every human society. They embody cultural traditions and spiritual beliefs, linking the living to the dead, and the present to the past. As evidence of their significance, grave preservation laws have been developed in almost every state in the United States. However, most have proven incapable of protecting Indian burial grounds and accommodating the unique mortuary practices and distinct historical context of American Indians.[3]

In order to remedy this social injustice, Congress enacted the Native American Graves Protection and Repatriation Act (NAGPRA, or the Act) in 1990.[4] Intended to protect Indian cultural property, NAGPRA established guidelines for repatriation, criminalized trafficking of Indian cultural property, and set forth consultation procedures to govern future excavations of Indian human remains and funerary objects. Since its enactment, however, NAGPRA has been applied almost exclusively in the context of repatriation. In contrast, significantly less attention has been devoted to NAGPRA's provisions designed to prevent future excavations of Indian burial grounds.[5] The few published judicial opinions that do address this aspect of NAGPRA, however, demonstrate that, while NAGPRA undoubtedly marked a major victory for indigenous peoples in regards to repatriation, traditional property models continue to thwart the human rights objectives that NAGPRA was enacted to preserve.

This article posits that human rights and property rights are inextricably linked. The ability to hold property and wield power is essential to the exercise of other basic human rights.[6] Thus, the

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3. This Article uses the terms "Indian" and "American Indian" interchangeably to refer to the indigenous peoples of the United States.

4. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2000).

5. *See* Hartman Lomawaima, *NAGPRA at 10: Examining a Decade of the Native American Graves Protection and Repatriation Act*, *in* Implementing the Native American Graves Protection and Repatriation Act 1, 2 (Roxana Adams ed., 2001) ("The legislation seems to have less to do with graves protection, though that's in its title, than it does with repatriation. Graves protection is something that has been on the minds of Native people for a very long time. I would like to see that emphasized as equally as repatriation.").

6. Leslie Kurshan, *Rethinking Property Rights As Human Rights: Acquiring Equal Property Rights For Women Using International Human Rights Treaties*, 8 Am. U. J. Gender Soc. Pol'y & L. 353, 357 (2000); *see* Yoram Barzel,

recognition of property rights is critical, as it allows groups to function as "economic actors" in society.[7] Because classical property models operate to deprive indigenous peoples of the right to control their own property—tangible and intangible—they are often powerless to exercise their human rights. This article contends that the human rights goals of NAGPRA will only be realized through a fundamental shift in thinking from an individual rights-oriented property model to one capable of accommodating both the rights and responsibilities inherent in property ownership.[8]

Part II briefly sets forth the history and goals of NAGPRA, providing a background to the Act and detailing the human rights initiatives at its core. Part II also discusses the significance of cultural property to indigenous communities and its role in the cultural survival of indigenous groups. Part III describes NAGPRA's excavation provisions and explains the process through which either lineal descendents or culturally affiliated Indian tribes are to proceed under the Act to achieve, first, a right of consultation, and, second, an opportunity to take possession of the subject human remains and/or funerary objects. Part III further demonstrates how the interpretation and application of NAGPRA by the courts—operating pursuant to limited conceptions of traditional property models—has resulted in the deprivation of indigenous peoples' property rights and human rights. Part IV explores the role of international human rights instruments and norms in securing the rights of indigenous peoples, and focuses, specifically, on the groundbreaking case of *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua* (*Awas Tingni*) decided by the Inter-American Court on Human Rights.[9] Part IV uses *Awas Tingni* as an example of the

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Economic Analysis of Property Rights 4 n.3 (James E. Alt & Douglass C. North eds., 2d ed. 1997) ("The distinction sometimes made between property rights and human rights is spurious. Human rights are simply part of a person's property rights.").

7. Kurshan, *supra* note 6, at 357.

8. *See* Deborah L. Nichols et al., *Ancestral Sites, Shrines, and Graves; Native American Perspectives on the Ethics of Collecting Cultural Properties, in* The Ethics of Collecting Cultural Property 27, 37 (Phyllis Mauch Messenger ed., 1989) ("But most important is the need for a change in attitudes. Archaeologists and museums have a special responsibility to broaden public awareness and knowledge of Native Americans, which includes a responsibility to respect Native American values.").

9. The Mayagna (Sumo) Indigenous Community of Awas Tingni v.

increasingly prevalent shift in international law towards more fluid conceptions of property and ownership that are better suited to ensure the continued survival of indigenous peoples. Finally, Part V suggests new property models capable of accommodating individual property rights in the classical sense, while making room for the protection of indigenous peoples' human rights. Part V discusses the possible consequences of new property models as applied to the NAGPRA cases discussed herein, as well as their effect on other struggles of indigenous peoples in Western legal systems. This article concludes that it is necessary to move beyond the classical property model—one which considers the rights but not the obligations of individual property owners—to new models of property capable of reconceptualizing ownership and entitlement for the protection of indigenous peoples' human rights and continued existence.

II. NAGPRA: ITS HISTORY AND AIMS

The history of the deplorable treatment of Indian remains and cultural property in the United States is a sad and sickening tale.[10] Some of the earliest writings by colonists reveal European fascination with Native American remains and funerary objects. An early example is recorded in the journal of a Mayflower Pilgrim who wrote about uncovering an Indian grave: "We brought sundry of the prettiest things away with us, and covered the corpse up again."[11] To accommodate this morbid curiosity with Indian dead during the early periods of forced assimilation and extermination, museums were created to serve as repositories for Indian artifacts, thus contributing to the fetishism of Indians by Europeans and capturing colonists' love

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Nicaragua, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc.

10. Because the history of the treatment of Indian graves in America is well documented and easily accessible, I will not recount it here in detail. For a more thorough account of this history, see, for example, Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, *in* Repatriation Reader: Who Owns American Indian Remains? 123, 126 (Devon A. Mihesuah ed., 2000). *See also* Mary Lynn Murphy, *Assessing NAGPRA: An Analysis of Its Success from a Historical Perspective*, 25 Seton Hall Legis. J. 499, 502 (2001) (discussing colonial views of Indians as inferior, and the disregard of Indian religion, culture, and property norms during the development of America's legal system).

11. Mourt's Relation: A Journal of the Pilgrims at Plymouth 28 (Dwight B. Heath ed., 1963).

affair with the romantic West.[12] With Western expansion, Indians were viewed as a vanishing people, and Indian "trinkets" and bodies were coveted out of blatant curiosity.[13] In congressional debates over NAGPRA, Congress found that during much of the history of the United States digging and removing the contents of Native American graves for reasons of profit or curiosity had been common practice.[14]

The mistreatment of Indian dead extended beyond individual curiosity, becoming formal federal policy in 1868, when the Surgeon General ordered all U.S. Army field officers to send Indian skulls and other body parts to the Army Medical Museum for studies comparing the sizes of Indian and White crania.[15] Pursuant to this order, the heads of thousands of Indians, many of whom died during infamous massacres by the federal government, were cut off their bodies and sent to museums for display or study.[16] Then, in 1906 Congress passed the Antiquities Act, intended to protect "archaeological resources" located on federal lands.[17] The Antiquities Act, however, considered Indian remains on federal lands "archeological resources," thus converting them into federal property and allowing them to be kept and displayed in public museums.[18] These and other federal policies led to the mass excavation of Indian bodies and the looting of Indian graves. By 1986, the Smithsonian Institution alone held the remains of over 18,000 American Indians in its collections.[19]

The unlawful excavation of Indian bodies and the looting of graves was, in part, a result of racism, with a belief in Indians' racial inferiority certainly contributing to the epidemic.[20] But perhaps even

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12. *See* Murphy, *supra* note 10, at 500–01.

13. *Id.*

14. Trope & Echo-Hawk, *supra* note 10, at 126.

15. *Id.*

16. *Id.* ("Government headhunters decapitated Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arapaho victims of Colorado's Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum.").

17. Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–433 (2000)).

18. Trope & Echo-Hawk, *supra* note 10, at 127.

19. *Id.* at 136.

20. *See, e.g.*, Robert E. Bieder, A Brief Historical Survey of the Expropriation of American Indians (1990) (recounting the goal of Dr. Samuel

more invidious was the complete devaluation of indigenous perspectives and cultures in American jurisprudence that set the stage for mass theft of Indian cultural property. Eurocentric property conceptions, which contemplated property rights as individual rights, regarded ownership as an individual safeguarding his or her own goods.[21] As such, the vast majority of White graves were marked and walled off from society, whereas Native peoples maintained traditional practices of storing items in open areas or caves. The Eurocentric point of view thus diminished Indian burial traditions and did not respect unique Native mortuary practices, such as scaffold, canoe, or tree burials.[22] Nor did it protect unmarked graves, treating them as abandoned, even though many of the graves were left behind by tribes that were forcibly removed from their ancestral homelands by the government.[23] Native burial practices, which were so unlike European burials, deterred government officials from prosecuting cases of theft of Native cultural property, since such property was kept in the open and was free for the taking by whomever "discovered" it.[24] As such, the private property values of Western law contributed not only to the displacement of Indian peoples but also to the "abandonment" by Indians of their own burial grounds.[25] It was not until the 1980s that state burial laws were extended to protect unmarked graves or those outside of specifically designated cemeteries.[26]

Morton, a physical anthropologist, who sought to prove that the American Indian was a racially inferior "savage" doomed to extinction).

21. Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 Ariz. St. L.J. 363, 365 (1999).

22. Trope & Echo-Hawk, *supra* note 10, at 130.

23. *Id.*

24. Hutt & McKeown, *supra* note 21, at 369.

25. *See* Murphy, *supra* note 10, at 506–07.

26. Current cases nevertheless indicate that many jurists still do not understand the differences between Western and Indian property values. *See, e.g.*, Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001). In *Castro Romero v. Becken*, the Fifth Circuit rejected the claim of the lineal descendant of the Lipan Apache Chief dealing with the protection of cemeteries, holding that Castro's allegation that "the oral history of the Lipan Apache establishes the Universal City land as a burial ground is not sufficient to convert the land into a 'cemetery' for purposes of the statute" because the plaintiff had not alleged that the land "was publicly dedicated as a cemetery, that the land was enclosed for use as a cemetery, or that the land even if once used for burial purposes has not been abandoned." *Id.* at 355.

In response to the mistreatment of Indian dead and the continued devaluation of Indian cultural property, NAGPRA was finally enacted in 1990.[27] Perhaps most significantly, the passage of NAGPRA symbolized the tacit recognition that cultural property rights have been obstructed by the disparity between Eurocentric views of personal private property, which dominate American jurisprudence, and the less formalized system of property rights seen in Native communities.[28] In this regard, NAGPRA is significant as it stands as one of the first American statutes which incorporates indigenous peoples' perspectives and confirms the belief that indigenous peoples' right to control the fate and integrity of their cultural property is a valuable tool of self-determination and a necessary component of cultural survival.[29]

Similarly, international legal doctrines contemplate and recognize the right to maintain group culture and identity and place particular emphasis on the rights of indigenous peoples.[30] As such,

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27. 25 U.S.C. §§ 3001–3013 (2000).

28. Sherry Hutt, *Native American Cultural Property*, 34 Ariz. Att'y 18, 20 (1998).

29. *See, e.g.*, Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 Ind. J. Global Legal Stud. 59, 87 (1998). Rosemary J. Coombe notes that:

> [I]f human rights were to be "recognized as truly interdependent and individual, then [intellectual property rights] would also have to be compatible with the rights enshrined in the International Covenant on Civil and Political Rights. Civil and political rights may, in many circumstances, come into conflict with the exercise of [intellectual property rights].

Id.

30. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 27, S. Exec. Doc. E, 95-2, at 31 (1978), 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (affirming the right of persons belonging to minorities to enjoy their own culture in community with the other members of their group); *id.* art. 1 (defining indigenous groups as "peoples" within the meaning of Article 1, which holds that "all people have the right to self determination"). The right to self-determination through cultural integrity for groups is also a generally accepted principal of customary international law. *See* S. James Anaya, *Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests*, 7 Buff. Envtl. L.J. 1, 9 (2000).

these doctrines capture and acknowledge the importance of group cultural property in giving meaning to human existence.[31] Cultural property situates indigenous peoples in time, linking them to their place of origin. For a tribe, controlling collective cultural property, particularly that which is sacred and intended solely for use and practice within the group, is a crucial element of self-determination. As with other forms of collective ownership seen in indigenous communities, objects of cultural property derive their status from community use and recognition rather than individual ownership.[32] Legal enforcement of group ownership of cultural property supports self-determination principles by placing the destiny of tribal cultural property into the hands of indigenous peoples, affirming their ability to determine themselves as a people through their culture. When a group has exclusive authority to prescribe the employment of its most valuable creations, the entire community benefits.[33] As Sarah Harding argues, "[c]ultural property takes on a life and meaning of its own; it acquires something like a soul and it is this soul, not a specific human end, which shapes our relationship with cultural property."[34]

Because recognition of indigenous peoples' property rights—to a traditional land base, preservation of the environment, and communal intangible knowledge—is essential for cultural survival, battles are now waged on every front to ensure the continued existence of indigenous peoples worldwide.[35] Conflicts over land have long been a hallmark of Indian-White relations in this country, and Indians' struggle to maintain or recover a traditional land base or right of occupation seems never-ending.[36] Similarly, because of the

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31. Hutt, *supra* note 28, at 19.

32. Susan Scafidi, *Intellectual Property and Cultural Projects*, 81 B.U. L. Rev. 793, 811 (2001).

33. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 Cardozo Arts & Ent. L.J. 175 (2000).

34. Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 Ind. L.J. 723, 760 (1997).

35. *See, e.g.*, Anaya, *supra* note 30, at 8 (discussing indigenous peoples' property interest in land as also linked to their cultural integrity, "insofar as these cultures are connected with land tenure"); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 Ind. L. Rev. 1291, 1306 (2001) (arguing that to "[n]ative peoples, land is vital to political ideology . . . self-sufficiency, and also to cultural identity").

36. *See, e.g.*, United States v. Dann, 470 U.S. 39 (1985) (discussing the

unique cultural relationship of indigenous peoples to the land, many scholars now claim indigenous peoples possess a human right to preservation of the environment.[37] For indigenous groups whose existence depends on and is identified through their relationship to the land and nature, it is impossible to differentiate between environmental injustice and human rights abuses.[38]

In addition, arguments are being made, both domestically and internationally, for the recognition of group rights to intellectual property in indigenous communities as a mechanism to "allocate rights over knowledge."[39] Recognizing some form of intellectual property rights for indigenous peoples "could be a valuable tool for

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viability of a claim of tribal title by Shoshones, where compensation for the land had been paid into a trust for, but not yet disbursed to, a Shoshone tribe); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (holding that the 1877 act that relinquished the Sioux Nation's rights to the Black Hills amounted to a taking of tribal land for which just compensation was required); The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), ¶ 4, *available at* http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc (ordering Nicaragua to recognize and protect tribal lands).

37. *See, e.g.*, Anaya, *supra* note 30, at 3 (commenting that related to the discourse that joins human rights and environmentalism is a discourse "that focuses directly on the human rights of indigenous peoples. This discourse views indigenous groups and their cultures as valuable, and it constructs a series of rights and entitlements that are deemed to pertain to these communities and their members on the basis of broadly applicable human rights standards.").

38. *See* Arctic Refuge: A Circle of Testimony 5 (Hank Lentfer and Carolyn Servid eds., 2001) (quoting Sarah James, member of the Gwich'in Nation, discussing her opposition to plans to drill for oil in the Arctic National Wildlife Reserve: "But our fight is not just for the caribou . . . . [O]ur fight is a human rights struggle—a struggle for our rights to be Gwich'in, to be who we are, a part of this land."); Sevine Ercmann, *Linking Human Rights*, 7 Buff. Envtl. L.J. 15, 17 (2000).

39. David R. Downes, *How Intellectual Property Could Be A Tool to Protect Traditional Knowledge*, 25 Colum. J. Envtl. L. 253, 256 (2000); *see* Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 St. Thomas L. Rev. 275, 284 (2001) ("Intellectual property rights are not merely technical matters. They increasingly involve crucial questions not only of economic interest, competitiveness, and market power, but also of environmental sustainability, human development, ethics and international human rights."); James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 Stan. L. & Pol'y Rev. 255, 260–63 (2001) (asserting the need for "new legal approaches to intellectual property that would protect intangible Native American cultural property").

communities to use to control their traditional knowledge and to gain a greater share of the benefits."[40] In this respect, intellectual property rights are significant insofar as the protection of traditional knowledge is integral to cultural heritage and ensures "the right to maintain and take part in cultural life."[41]

But no cultural practice is more fundamental to group identity and survival than treatment of the dead. Burial practices are, in almost all cultures, indicative of religious beliefs, value for human life, reverence for the land, and relationships with nature.[42] This is particularly true for indigenous peoples, who are forever linked to their dead, as they define themselves through their history and place as connected to ancestors, the environment, and the earth.[43] For indigenous peoples, "[h]uman remains generally hold great religious significance, both for present day descendants and for the spiritual well-being of deceased ancestors."[44] For example, many

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40. Downes, *supra* note 39, at 256. David R. Downes states that:

> An international human rights perspective on the protection of indigenous knowledge through [intellectual property rights] would presuppose that State governments not only have obligations to indigenous peoples subject to their own jurisdictions, but also that these obligations involve respect for and protection of the indigenous knowledge of indigenous peoples . . . globally.

Id. See also Coombe, *supra* note 29, at 90; Riley, *supra* note 33, at 215 (noting that the "communal approach to entitlements in cultural property will not only preserve group property generally, but it will secure the work in the cultural context from which it arose, ensuring that the creation endures through time to be enjoyed by individuals whose identity is inextricably bound to the cultural work").

41. Downes, *supra* note 39, at 255.

42. *See, e.g.*, Trope & Echo-Hawk, *supra* note 10, at 124 (arguing that "respect for the dead is a mark of humanity and is as old as religion itself").

43. When Geronimo, the famous Apache leader and warrior was held prisoner at Fort Sill, he was approached by a school teacher to give his life story and he began by recounting the Apache tribal creation story. Robert J. Conley, The Witch of Goingsnake and Other Stories, at xii (1988).

44. Dean B. Suagee, *Tribal Voices In Historical Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 Vt. L. Rev. 145, 203 (1996); *see* Harding, *supra* note 34, at 765 ("[G]rant[ing] Native Americans the same legal rights as other Americans have concerning their ancestral remains is pivotal to cultural integrity and pride and thus the preservation of

Indian people are buried with pottery or other goods because it is believed they will need these items in the afterlife. As Tessie Naranjo, a Santa Clara Pueblo tribal member, stated:

> Traditional Native Americans see an essential relationship between humans and the objects they create. A pot is not just a pot. In our community, the pots we create are seen as vital, breathing entities that must be respected as all other living beings. Respect of all life elements—rocks, trees, clay—is necessary because we understand our inseparable relationship with every part of our world.[45]

A tribe may pursue repatriation of a pot or beaded belt buried with the dead not because of the tribe's appreciation for its physical dimensions per se, but for what it symbolizes metaphysically. While indigenous peoples revere land and earth and all that it embodies, human remains are valued not only because they represent physical property that belongs to the tribe but because human remains connect living Indians to their past and to their future.

For Indian peoples, burial ceremonies and burial sites are sacred. Although the philosophical and religious ideas of Native peoples are diverse, the vast majority of Indians hold one core belief: that the dead remain connected to the living and to the physical remains they left behind.[46] For example, when the Tennessee Valley Authority threatened to flood the Little Tennessee Valley in the late 1970s, Eastern Cherokees mounted fierce resistance to the project based on the threat that it posed to their cultural heritage and religious beliefs.[47] The Cherokees believed that the knowledge of the deceased was placed in the ground with them at the time of burial.[48] Exhumation of an Indian grave would destroy the knowledge and beliefs of the deceased and everything they have taught, including, in

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cultural identity, regardless of particular Native American beliefs about the spiritual afterlife of their ancestors.").

45. Tessie Naranjo, *Thoughts On Two World Views*, *in* Implementing the Native American Graves Protection and Repatriation Act 22 (Roxana Adams ed., 2001).

46. *See* Trope & Echo-Hawk, *supra* note 10, at 151.

47. *See* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1160 (6th Cir. 1980).

48. Sequoyah, 620 F.2d at 1162, *cited in* Laurie Anne Whitt et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 Okla. City U. L. Rev. 701, 701–02 (2001).

the case of the Eastern Cherokee, their spiritual leader's knowledge of medicine.[49] Thus, for many Indians, the looting of a grave goes beyond legal transgression and is treated as "an act of desecration that violates deeply held religious beliefs that are essential to the spiritual well-being of Native Americans."[50]

NAGPRA's role in the preservation of cultural property, and thus, cultural survival, has designated it, first and foremost, a human rights law.[51] A triumph for Indian peoples, NAGPRA represents the culmination of "decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired religious and cultural property."[52] As such, NAGPRA is "one of the most significant pieces of human rights legislation since the Bill of Rights."[53] NAGPRA is recognized as having created the opportunity to allay the breach between living and dead by restoring bones and possessions to the earth from which they were torn in the name of science, profit, or idle curiosity.[54]

NAGPRA has undoubtedly produced major successes in the repatriation context. According to C. Timothy McKeown, NAGPRA Program Leader for the National Park Service Archeological Assistance Program, by 1998 over 1000 NAGPRA summaries were received from federal agencies and institutions receiving federal funding. Approximately 700 of these institutions had completed inventories, some 400 of which included human remains. It is estimated that up to 200,000 individual remains will eventually be accounted for through the NAGPRA process.[55]

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49. *Id.*

50. Nichols et al., *supra* note 8, at 37.

51. *See, e.g.*, Trope & Echo-Hawk, *supra* note 10, at 123 ("On November 23, 1990, President Bush signed into law important human rights legislation.").

52. *Id.*

53. David Hurst Thomas, Skull Wars: Kennewick Man, Archaeology, and the Battle For Native American Identity 214 (2000).

54. John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 U. Mo. Kan. City L. Rev. 1, 46 (2001).

55. Nichols et al., *supra* note 8, at 256.

However, NAGPRA's role in preventing future excavations of human remains and/or funerary objects remains uncertain.[56] In practice, when courts apply NAGPRA in the excavation context, they consistently do so within the traditional paradigm of Anglo-American law. This approach fails to consider indigenous perspectives, resulting in the diminishment of indigenous peoples' human rights and the rejection of non-Western, community-based property conceptions. As a result, NAGPRA's human rights objectives remain unsatisfied, and the cultural survival of indigenous peoples is threatened.

III. RAISING THE DEAD

A. NAGPRA's Excavation Procedures

NAGPRA establishes three mechanisms to ensure the protection of Indian cultural property.[57] First, it creates procedures through which culturally affiliated Indian tribes can recover human remains and funerary objects from federally funded museums.[58] Secondly, NAGPRA criminalizes the trafficking of Indian human

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56. *See, infra* Part III.B; Thomas, *supra* note 53, at 214. David Hurst Thomas quotes the late Northern Cheyenne Elder William Tallbull:

> How would you feel if your grandmother's grave were opened and the contents were shipped back east to be boxed and warehoused with 31,000 others and itinerant pothunters were allowed to ransack her house in search of 'artifacts' with the blessing of the U.S. government? It is sick behavior. It is un-Christian. It is [now] punishable by law.

Id. Brian Patterson writes:

> In many ways, [NAGPRA] is a wonderful law because it has helped many Indian nations protect their sacred sites and restore the artifacts of their heritage. However, this law worries me because of what it says about our society. I have three children, and I do not have to tell them that it is wrong to go into a cemetery and dig people up. They know it is wrong. No one would consider building a parking garage on top of Arlington National Cemetery. Congress does not have to pass a law saying that would be wrong. Everybody knows it is wrong.

Brian Patterson, *Preserving the Oneida Nation Culture*, 13 St. Thomas L. Rev. 121, 123 (2000).

57. 25 U.S.C. §§ 3000–3013 (2000).

58. *Id.* § 3005.

remains and cultural items.[59] Finally, it sets forth notification and consultation procedures for intentional or inadvertent excavation of Native American human remains and cultural objects on tribal and federal lands.[60] It is this final portion of the Act that is the subject of this article.

NAGPRA creates mandatory excavation procedures that govern ownership and control of cultural items discovered in the future on tribal or federal lands. The procedures vary, depending on whether the artifacts are to be intentionally excavated or have been inadvertently discovered.[61] Because NAGPRA applies only on tribal and federal lands, it functions solely within these geographical limitations. Under the Act, "tribal lands" are defined as: "(A) all lands within the exterior boundaries of any Indian Reservation; (B) all dependent Indian communities; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3."[62] Allotted Indian trust lands outside reservation boundaries do not fit the statutory definition of "tribal lands" unless they also are within a dependent Indian community.[63] However, because such lands are held in trust by the United States and are subject to federal control, they are treated as "federal lands" for purposes of NAGPRA.[64]

The statute defines "federal lands" as "any land other than tribal lands which are *controlled or owned* by the United States."[65] The implementing regulations state, further, that "United States'

59. *Id.* § 3007.

60. *Id.* § 3011.

61. *Id.* § 3002.

62. *Id.* § 3001(15).

63. This limited definition raises problems not addressed by this Article, but that are a major subject of concern for Native Alaskans in light of the Supreme Court's decision in *State of Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), wherein the Court found that Congress intended the Alaska Native Claims Settlement Act to divest Alaskan Native tribes of their jurisdiction over remaining territories, determining that the land was not "Indian Country." This makes application of NAGPRA's excavation procedures in the State of Alaska, insofar as applied to "tribal lands," highly uncertain. For a thorough discussion of the Court's decision, see Kristen A. Carpenter, *Interpreting Indian Country In* State of Alaska v. Native Village of Venetie, 35 Tulsa L.J. 73 (1999).

64. *See* 25 U.S.C. § 3001(15) (2000); 43 C.F.R. § 10.2(f)(1) (2002); Suagee, *supra* note 44, at 205.

65. 25 U.S.C. § 3001 (2000) (emphasis added).

'control,' as used in this definition, refers to those lands *not owned by the United States* but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person."[66] Additionally, with respect to the amount of federal "control" necessary to bring lands within the purview of NAGPRA, the Department of the Interior has taken the following position: "Such determinations must necessarily be made on a case-by-case basis. Generally, however, a federal agency will only have sufficient legal interest to 'control' lands it does not own when it has some other form of property interest in the land such as a lease or an easement."[67]

Future excavations of cultural items only fall within the purview of NAGPRA if they are embedded in either tribal or federal lands. Accordingly, lands owned by individual states, municipal governments, corporations, or other private owners do not fall within the NAGPRA rubric. Though the Southwestern United States contains Indian reservations that are expansive in size, most reservations in the United States are small, and are surrounded by non-Indian towns, farms, and commercial forests. Additionally, many tribes in the U.S. were forcibly removed from their ancestral homelands—and, thus, ancestral burial grounds—by the government, leaving many Indian graves on land that was intentionally opened up for White settlement.[68] Discoveries on these lands are outside of NAGPRA's protections as well.[69]

1. Intentional Excavation

In the case of a planned, intentional excavation on tribal lands, NAGPRA requires both notification and consent of the appropriate Indian tribe prior to excavation.[70] If the intentional

66. 43 C.F.R. § 10.2(f) (2002) (emphasis added).

67. *Id.*; *see* Suagee, *supra* note 44, at 205.

68. Trope & Echo-Hawk, *supra* note 10, at 130.

69. *See* Russell L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 St. Thomas L. Rev. 127, 140 (2000). Indian burial grounds continue to be discovered on state and municipally owned lands. *See, e.g.*, Don Behm, *Bridge Foes Cite Indian Remains*, JSOnline, Apr. 8, 2002, *at* http://www.jsonline.com/news/OzWash/apr02/33691.asp (noting that a plan to widen a state-owned road met opposition due to the discovery of Indian human remains).

70. 25 U.S.C. § 3002(c)(2) (2000).

excavation is set to take place on federal lands, NAGPRA calls for prior consultation with the appropriate Indian tribe, but consent is not required.[71] Procedures regarding consultation with Indian tribes are set forth in detail in the Act's implementing regulations.[72] Responsibility for compliance with consultation procedures on federal lands lies with the appropriate land managing agency.[73] The federal agency in charge of administering the excavation must also complete a written plan of action with the appropriate tribe regarding the disposition of the remains. Once the agency has complied with the consultation procedures, the process of allowing the tribe to exhume human remains and cultural items from the site begins.[74]

Intentional excavations of cultural items are also subject to the permit requirements of the Archeological Resources Protection Act of 1979 (ARPA).[75] ARPA provides, in pertinent part:

> If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the federal land manager, before issuing such permit the federal land manager shall notify any Indian tribe which may consider the site as having religious cultural importance.[76]

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71. *Id.* § 3002(c)(2), (c)(4).

72. 43 C.F.R. §§ 10.3(b), 10.5 (2002).

73. Charles Carroll, *Administering Federal Laws and Regulations Relating to Native Americans: Practical Processes and Paradoxes*, *in* Implementing the Native American Graves Protection and Repatriation Act 34 (Roxana Adams ed., 2001).

74. The implementation of the Native American Graves Protection and Repatriation Act (NAGPRA, or, the Act) to the excavation context has not always been smooth. The consultation and notification procedures have, at times, proven confusing to both tribes and the federal government. *See, e.g.*, Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047, 1058 (D.S.D. 2000) (holding that, where there was a conflict within the statute, the Act's provisions protecting Native American cultural items take precedence over its provisions requiring consultation with Indian tribes).

75. 16 U.S.C. § 470aa–mm (2000); 25 U.S.C. § 3002(c)(1) (2000); *see also* Trope & Echo-Hawk, *supra* note 10, at 126.

76. 16 U.S.C. § 470cc(c) (2000); *see* Carroll, *supra* note 73 (discussing five federal laws that prompt consultations between federal agencies and Indian tribes, including: the National Environmental Policy Act of 1969; the National Historic Preservation Act of 1966; the American Indian Religious Freedom Act of 1978; Archeological Resources Protection Act of 1979; and the Native American Graves Protection and Repatriation Act of 1990).

A permit may be issued pursuant to ARPA upon a showing that the applicant is qualified, the resources will remain the property of the United States and be preserved in an appropriate institution (this provision has been modified by NAGPRA), the activity is undertaken to further archaeological knowledge, and the activity is consistent with the applicable land management plan.[77]

2. Inadvertent Discovery

In cases where cultural items or remains have been inadvertently discovered as part of another activity, such as construction, mining, logging, or agriculture, the person who has discovered the items must temporarily cease activity and notify the responsible federal agency (in the case of federal land) or the appropriate tribe (in the case of tribal land).[78] If notice is provided to the federal agency, that agency, in turn, has the responsibility to promptly notify the appropriate tribe.[79] The purpose of this provision is to "provide a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony."[80]

In cases of inadvertent discovery, the tribe is afforded thirty days to make a determination as to the appropriate disposition of the human remains and objects.[81] Activity may resume thirty days after the secretary for the appropriate federal department or the Indian tribe certifies that notice has been received, provided that resumption of the activity does not require excavation or removal of human remains or cultural items.[82] If human remains or cultural items must be excavated or removed, then the permit procedures for intentional excavations apply.[83]

77. 16 U.S.C. § 470cc(b) (2000).

78. 25 U.S.C. § 3002(d) (2000).

79. *Id.*

80. S. Rep. No. 101-473, at 10 (1990).

81. 25 U.S.C. § 3002(d) (2000).

82. *Id.*

83. *Id.* § 3002(d)(1).

While NAGPRA indisputably affords tribes greater rights in the preservation of Indian remains and funerary objects than has ever existed under American law, vast portions of land in the United States contain Indian remains and/or cultural items, but are not covered by the Act.[84] When discoveries are made on such lands, tribes have no right to notification or consultation under NAGPRA.[85] This gap in the Act is exacerbated by the limitations imposed by courts applying NAGPRA within the unyielding parameters of the classical property model. The following cases, which address future excavations of Indian remains and/or cultural items pursuant to NAGPRA, further illustrate this point.

B. Excavation Cases

1. *Castro Romero v. Becken*[86]

In 2000, Daniel Castro Romero, Jr. (Castro), General Council Chairman of the Lipan Apache Band of Texas, lineal descendent of the great Lipan Apache Chief, Cuelgas de Castro, sued the City of Universal City (the City) over the construction of a golf course on the ancient burial grounds of the Lipan Apache.[87]

Through gifts from private landowners, the City acquired enough land to build an eighteen-hole golf course.[88] The U.S. Army

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84. At the time of this Article, there were thirteen published cases addressing NAGPRA claims, of which at least three, or twenty-three percent, addressed the issue of "federal control" under NAGPRA, but declined to apply the Act. *See infra* Part III.B.

85. Although some other federal statutes provide for consultation with tribes in some similar circumstances, they are also inapplicable on state or privately owned lands. *See, e.g.*, National Historic Preservation Act, 16 U.S.C. § 470 (2000) (requiring consultation with tribes as well as local governments and the public in assessing adverse effects of federal undertakings upon historic properties); National Environmental Policy Act, 42 U.S.C. § 4321 (2000) (requiring the federal agency to consider whether a proposal to conduct some action on federal lands or with federal funds will have a significant effect upon the environment).

86. Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001).

87. The court of appeals indicated in dicta that Castro did not have standing to bring the NAGPRA claim because "the Lipan Apache Band of Texas is not a federally-recognized tribe." *Id.* at 354. However, the court did not base its decision to dismiss Castro's claims on this ground. *Id.* at 354–55.

88. *Id.* at 352.

Corps of Engineers surveyed the proposed site, as required by the Clean Water Act. In the course of the survey, human remains were found in one section of the site thought to be a prehistoric campsite.[89]

Shortly after the discovery of the remains, Castro sent a letter to the U.S. Army Corps of Engineers, demanding the return of the remains to the Lipan Apache Band of Texas, Inc. for reburial.[90] Castro received a written response from the Texas Historical Commission, informing him that the Corps agreed with its decision to turn the remains over to the City for reburial. Castro then filed suit, alleging violations of various state burial laws and federal statutes, including NAGPRA. The district court dismissed his case for failure to state a claim. Castro appealed.[91]

As to Castro's NAGPRA claim, the Court of Appeals for the Fifth Circuit acknowledged NAGPRA's broad enforcement procedures, stating that the Act "grants the district courts 'the authority to use such orders as may be necessary to enforce the provisions of the Act.'"[92] The court determined, however, that "[b]y its plain terms, the reach of the NAGPRA is limited to 'federal or tribal lands.'"[93] Thus, the court held that, "the district court correctly held that Castro's claims suffer from a fundamental flaw—that the human remains were found on municipal rather than federal or tribal land."[94] Specifically, the court asserted that, even though the U.S. Army Corps of Engineers, a federal agency, held a supervisory role with regards to construction of the golf course, this did not convert the property into "federal land" within the meaning of the statute.[95]

Accordingly, the court upheld the district court's dismissal of Castro's complaint, and the remains of the Lipan Apache were turned over to the City for reburial in a state cemetery.[96]

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89. *Id.*

90. *Id.* at 352–53.

91. *Id.* at 353.

92. *Id.* at 354 (citing 25 U.S.C. § 3013 (1994)).

93. *Id.* (citing 25 U.S.C. § 3002(a) (1994)).

94. *Id.*

95. *Id.*

96. *Id.* at 355.

2. *Abenaki Nation of Mississquoi v. Hughes*[97]

The Village of Swanton, Vermont (the Village) has operated a hydroelectric facility since 1928. In 1979, a proposal was created to upgrade the facility. In order to proceed with the project, the Village was required to apply for a license from the Federal Energy Regulatory Commission pursuant to the Federal Power Act.[98] It also needed to procure a permit from the U.S. Army Corps of Engineers for the discharge of dredged material into the Mississquoi River.[99] In 1992, after various phases of the project were considered and approved, the Corps issued a conditional authorization for the proposed project.[100]

Immediately after the Corps issued its authorization, the Abenaki Nation sought to enjoin defendants from all actions associated with the Corps's authorization for the Village to raise the spillway elevation of the hydroelectric facility. The tribe sued under a variety of statutes, including NAGPRA.[101] The tribe contended that the Corps's plan violated NAGPRA by leaving the fate of unearthed Indian remains and artifacts in the hands of the Corps, the State, and the Village.[102]

In assessing the Abenaki Nation's claims, the court noted that the Tribe's proposed construction of "federal control" would include the regulatory powers of the Corps, as well as its involvement in devising and supervising the construction plan.[103] Although the

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97. Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992).

98. *Id.* at 237.

99. *Id.*

100. *Id.* at 239.

101. This court also questioned the standing of the Abenaki Nation because it "is not an 'Indian tribe' recognized by the Secretary of the Interior," but determined that it did "fall within the class protected by NAGPRA." *Id.* at 251. This case was decided prior to the promulgation of final rules implementing NAGPRA. In the preamble to the final rules, the Department of the Interior has taken the position that the term "Indian tribe" includes only federally recognized tribes, but that recognition may be through a federal agency other than the Bureau of Indian Affairs. 43 C.F.R. § 10.4 (2002).

102. *Abenaki Nation*, 805 F. Supp. at 251; *see* William A. Haviland & Marjory W. Power, The Original Vermonters: Native Inhabitants, Past and Present 264 (2d ed. 1994).

103. *Abenaki Nation*, 805 F. Supp. at 251–52.

court conceded that the possibility of unearthing cultural or funerary items at the site was "extremely high," it ruled against the Tribe on its NAGPRA claim.[104] In so doing, the court held that, because the project was intended to take place on state-owned land,

> [s]uch a broad reading [of "under federal control"] is not consistent with the statute, which exhibits no intent to apply the Act to situations where federal involvement is limited as it is here to the issuance of a permit. To adopt such a broad reading of the Act would invoke its provisions whenever the government issued permits or provided federal funding pursuant to statutory obligations.[105]

Thus, in the State of Vermont, which has no reservations and where the amount of federally owned land is quite small, the court declined to apply NAGPRA, depriving the Abenakis of any legal avenue to seek recovery of the remains.[106]

3. *Western Mohegan Tribe and Nation of New York v. New York*[107]

In 1986, the State of New York decided to turn Schodack Island, a series of connected peninsulas located on the eastern shore of the Hudson River, into a state park for recreational activities. From 1986 to 1989, the New York State Office of Parks, Recreation and Historic Preservation (OPRHP), the state agency with jurisdiction over the island, developed a master plan for the park that balanced recreational needs with concerns for environmental and cultural resources. The project was not active from 1989 to 1996, at which point the State renewed its interest in the park.[108] In 1999, OPRHP began construction of a bridge and a roadway for public access to the Park.

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104. *Id.* at 252.

105. *Id.*

106. Nichols et al., *supra* note 8, at 34.

107. 100 F. Supp. 2d 122 (N.D.N.Y. 2000), *rev'd in part by* W. Mohegan Tribe & Nation of N.Y. v. New York, 246 F.3d 230 (2d Cir. 2001). The appeals court did not reach the issue of NAGPRA's applicability, as the Tribe had abandoned its NAGPRA claim on appeal. 246 F.3d at 232 n.1.

108. 100 F. Supp. 2d at 124.

In 2000, the Western Mohegan Tribe and Nation commenced a lawsuit against various defendants, including the State of New York, contending that Schodack Island held religious and cultural significance to the Tribe and that it should not be converted into a park. In particular, the Tribe objected because of its belief that one area of the island, south of the planned park site, was the location of a former Mahican village.[109] The Tribe alleged various claims, including violations of NAGPRA, and sought both to enjoin construction of the bridge connecting the mainland to the island and to order the OPRHP to conduct a new archeological survey.[110]

In assessing the Tribe's NAGPRA claim, the district court reiterated NAGPRA's geographical limitations, concluding, "the Island does not fall within the scope of NAGPRA's jurisdiction since it is neither federal nor tribal land within the statute's meaning."[111] The court did acknowledge the possibility of a broader construction of the Act, noting that, "[f]ederal lands are defined in relevant part as 'land other than tribal lands which are controlled or owned by the United States.'"[112] Though the court recognized that "the Corps did issue a permit to Defendants to permit construction," it nevertheless found that the "permit does not transform the Island into federal property or place it under the United States' 'control.'" In conclusion, the court held that "[p]laintiffs' broad reading of the statute is inconsistent with NAGPRA's plain meaning and its legislative history where the language 'federal lands' denotes a level of dominion commonly associated with ownership, not funding pursuant to statutory obligations or regulatory permits."[113] Accordingly, the court denied the Tribe's claim.[114]

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109. The Tribe's status as a non-federally recognized Indian tribe played some role in the Court's reasoning. *Id.* at 128.

110. *Id.* at 125.

111. *Id.*

112. *Id.* (citing 25 U.S.C. § 3001(5) (2000)).

113. *Id.* at 125–26. The court denied the Tribe's claim under the National Historic Preservation Act on similar grounds, holding that the issuance of a permit by the Corps "is insufficient to transform the Park into a federal project." *Id.* at 127.

114. The court also found that there had been no discovery of human remains or funerary objects at that time, so the NAGPRA claim, even if it were to apply, was premature. *Id.* at 126.

4. *Yankton Sioux*:[115] Measured Success

Since the enactment of NAGPRA over twelve years ago, only one published decision applying the Act to the future excavation of Indian remains and/or funerary objects has resulted in success for the tribe bringing suit.[116] But, as this case illustrates, even when a tribe is afforded all possible relief under the Act, NAGPRA's human rights aims remain unsatisfied.

Marked graves in the cemetery of White Swan Church date back as far as 1869. But the oral history of the Yankton Sioux describes the land near the church, including but not limited to the demarked cemetery, as being used as a burial ground for tribal members at least since the late 1800s.[117] Some tribal members claim that the Tribe's oral tradition traces Sioux burials around the Church's landscape to prehistoric times.[118]

Though aware of the existence of the Indian cemetery, the United States filed a petition in 1949 to begin construction of Fort Randall Dam and Lake Francis Case on the site of the cemetery of White Swan Church. As part of the condemnation proceedings, the bodies were to be removed and reburied by the Corps pursuant to a Relocation Plan. However, the Corps failed to effect the removal and reburial of all the bodies in the cemetery.[119] In 1966, after Fort Randall Dam created the lake, a Corps memorandum indicated that a deer hunter reported that graves containing bones had been uncovered at the cemetery and the alternate flooding and drying of the cemetery site had made the outline of the graves easily discernable. As a result, thirty to forty of the graves had been unearthed, and bones were scattered on the ground around them.

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115. Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047 (D.S.D. 2000).

116. At the time this Article was published, the Yankton Sioux had initiated a separate lawsuit to enjoin construction activities that it contended violated NAGPRA. Though the case has not been fully resolved, the District Court granted a preliminary injunction in favor of the Tribe based on its NAGPRA claim. *See* Yankton Sioux Tribe v. United States Army Corps of Eng'rs, 194 F. Supp. 2d 977, 986 (D.S.D. 2002).

117. *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1048–49.

118. *Id.* at 1049.

119. *Id.*

The Corps removed the bones and reburied them in a new cemetery, but the partially revealed remaining bodies were not removed.[120]

Again in October of 1990, a Corps park ranger investigated the site based on reports from local fishermen that they had observed bones and casket parts along the shoreline. The ranger confirmed the fishermen's report, but the remains were merely covered with white fabric and were not removed. In December 1991, Corps personnel again visited the cemetery where they verified burials that had been missed by the contractor responsible for removal. Some new bones had been exposed since the investigation in 1990. The Yankton Sioux Tribe was apparently notified regarding the remains at that time but no action was taken.[121]

In 1999, another Corps park ranger observed remains and notified the Tribe. Shortly thereafter, the Tribal Council of the Yankton Sioux voted to file suit to stop the excavation of the bodies. Relying on NAGPRA, the Tribe sought time to remove the remains in accordance with its own traditions and customs. Further, the Tribe requested an injunction to prevent the Corps from raising the water level until the Tribe had enough time to complete religious ceremonies, consult with anthropologists, and determine the appropriate method for disposing of the remains. The Corps opposed all of the Tribe's requests for relief.[122]

The district court first considered whether the Corps had appropriately consulted with the Yankton Sioux regarding the intentional discovery and subsequently planned excavation of human remains on federal lands. Although tribal consent was not required for excavation, the Corps had a duty under NAGPRA to: (1) certify receipt of notification of the discovery; (2) take immediate steps, if necessary, to further protect the cultural items, including, as appropriate, stabilization or covering; (3) notify Indian tribes that might be entitled to ownership or control of the items under the Act; (4) initiate consultation with the appropriate tribe(s) regarding the inadvertent discovery; (5) follow the required procedures for excavation which includes refraining from raising and lowering the water levels of the lake over the cemetery for at least thirty days

120. *Id.* at 1050–51.

121. *Id.*

122. *Id.* at 1051–53.

from the date of certification; and (6) ensure that proper disposition of the cultural items was carried out.[123]

The court found the Corps had fulfilled its duties in every respect. Although the Corps did not supply the Tribe with written notice of the discovery, the court nevertheless found that the Tribe had not been prejudiced and refused to grant additional time to protect and collect the remains. The court also determined that the thirty day cessation of activity dates from the time of certification of the discovery of the remains, not thirty days from the time the Tribe actually received notice. Accordingly, the tribe was afforded less time than the thirty days allotted by NAGPRA to devise a plan for disposition of the remains.[124] Because of the difficulty in exhuming some of the bodies, due to frozen ground and uncertain water levels, at the time the court's opinion was published, the Tribe and the government were participating in ongoing negotiations regarding removal of the remains.[125]

C. Analyzing the Excavation Cases

In the first three cases discussed—*Castro Romero v. Becken*, *Abenaki Nation of Mississquoi v. Hughes*, and *Western Mohegan Tribe of New York v. New York*—the tribes were not even consulted regarding the fate of the embedded human remains. As a result, in *Castro Romero*, the Lipan Apache remains and funerary items exhumed during the building of a golf course were turned over to the City for reburial in a state cemetery.[126] And in *Abenaki Nation*,

123. *Id.* at 1055.

124. *Id.* at 1057–58.

125. Kay Humphrey, *Efforts To Preserve Exposed Burial Sites Fuel Court Action*, Indian Country Today, Nov. 1, 2000, at 1. Following the court's decision, the U.S. Army Corps of Engineers (the Corps) filed a motion to dismiss the Tribe's claims for lack of subject matter jurisdiction or for summary judgment. The Corps argued that all of the relief available under NAGPRA had been granted to the Tribe because NAGPRA does not give the court the authority to address long-term protection of remains that may be exposed in the future. In its March 2002 opinion, the court denied the Corps's motions, holding that the Tribe had standing to pursue its claims under NAGPRA because there existed a "live case and controversy" in this action. The court held, further, that the Corps had not clearly satisfied its duty to protect the remains upon the lapse of the thirty day cessation of activity period. Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 194 F. Supp. 2d 977, 985–86 (D.S.D. 2002).

126. Castro Romero v. Becken, 256 F.3d 349, 353 (5th Cir. 2001).

although the court admitted the likelihood of uncovering remains was "extremely high," the Tribe was not allowed to participate in decisions concerning their disposition. Instead, any remains, if found, would become property of the State of Vermont, with their fate completely out of the Tribe's hands.[127]

From one standpoint, the respective courts applied NAGPRA correctly in each case. After all, NAGPRA applies only to excavations on federal and tribal lands, and the courts found that there was insufficient federal control to bring the lands within the purview of the Act. Thus, the state and municipal governments were free to dispose of the remains according to their own devices, and without consideration for the tribes' wishes. In light of current American legal principles, the results in these cases do not represent a departure from well-settled legal doctrine.

On the other hand, in each case, the courts had the opportunity to make choices as to the application of NAGPRA and the disposition of the remains, but opted, instead, to construe the Act as narrowly as possible, affording the tribes the least possible protection available under NAGPRA. Curiously, each court examined the tribes' claims without regard for the historical context in which the violations arose. Federal Indian law is informed by and, in fact, can only be understood in the context of the turbulent relationship between Indian tribes and the U.S. government. This relationship is defined by a history of oppression, genocide, and reparations. This historical link has given rise to the judicially-constructed trust responsibility owed by the federal government to Indian nations, which has defined Indian-government relations for the past 200 years.[128] The trust doctrine, in essence, creates a fiduciary duty owed by the government to Indian tribes.[129]

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127. Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992).

128. The concept of a federal trust responsibility to Indians evolved judicially. It first appeared in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). For a complete history of the trust doctrine, see, for example, Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471.

129. *See* United States v. Mitchell, 445 U.S. 535 (1980) (applying the trust doctrine to question of the government's liability for its management of Indian natural resources); Seminole Nation v. United States, 316 U.S. 286 (1942) (invoking the trust doctrine in a case involving the application of fiduciary principles to the government in the administration of Indian affairs); Menominee

The *Abenaki Nation* court was the only one to even mention the trust doctrine, and, from the opinion, it would appear that its inclusion was almost inadvertent. In a brief footnote, the court summarily dismissed the Tribe's trust cause of action, holding that the Abenaki Nation's "violation of fiduciary duty claim is extremely nebulous and rehashes arguments that have been previously addressed."[130] The court did so without undertaking even a cursory examination of the historical relationship between the federal government and Indian tribes or of previous applications of the trust doctrine. Nor did the court even contemplate the possibility that the trust doctrine would necessarily be implicated where a federal agency was responsible for facilitating, supervising, and authorizing the project that resulted in the excavation of Indian human remains.

Also conspicuously absent from the three opinions is any discussion of the Indian canons of statutory construction. An extension of the trust doctrine, the Indian canons of construction require that enactments pertaining to Indian affairs are to be liberally construed for the benefit of Indian peoples and tribes.[131] Pursuant to this doctrine, ambiguous terms in federal laws are construed in favor of Indians, which results in broader statutory construction.[132] Construing NAGPRA consistent with the Indian canons has the potential to accommodate many claims by tribes to human remains.[133] Not surprisingly, however, none of the three

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Tribe v. United States, 101 Ct. Cl. 22 (1944) (applying the trust doctrine to the manner in which the United States has managed Indian property).

130. *Abenaki Nation*, 805 F. Supp. at 252 n.26.

131. Trope & Echo-Hawk, *supra* note 10, at 140.

132. The primary canons of construction in Indian law were first developed in cases involving treaties. For a recent application, see *Menominee Tribe v. United States*, 391 U.S. 404 (1968), which held that a 1954 statute terminating the federal trust relationship with the Menominee Tribe did not nullify the treaty rights of tribal members to hunt and fish on the reservation free from state regulation.

133. Because of unequal bargaining power between Indian nations and the federal government, canons of construction have evolved which favor the Indian tribes and by which treaties must be interpreted. The three canons by which all treaties are interpreted are (1) ambiguous expressions must be resolved in favor of the Indian parties concerned; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of Indians. *See, e.g.*, Carpenter, *supra* note 63; Larry Echo-Hawk & Tessa Meyer Santiago, *Idaho Indian Treaty Rights: Historical Roots and Modern Applications*, Advocate (Idaho State Bar), Oct. 2001, at 15.

courts construing NAGPRA and interpreting the phrase "under federal control" even mentioned the Indian canons. In fact, when considering the Act in light of its implementing regulations, the courts found no ambiguity existed at all, and quickly dismissed the tribes' NAGPRA claims.[134]

Even without reference to the trust doctrine or application of the Indian canons, however, due to the unique ownership status of the lands at issue, as well as the role of the federal government in approving the respective projects, each court could have found the lands to be "under federal control."[135] In fact, determining that the lands met this definition would not have been inconsistent with the statute's implementing regulations defining "control" as "lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person." Nor would such a finding constitute a major departure from the U.S. Department of the Interior's standard for application. Although the Department of the Interior's definition focuses on lands in which the federal government either possesses title or holds a monetary stake, the Department of the Interior nevertheless made clear that each decision regarding "federal control" is to be made on a "case-by-case basis."[136] But, instead of taking a broader view of ownership, each court confined itself to the strictest construction of the Act, as is so

134. A resurgence of judicial activism has brought the viability of the Indian canons into question. In fact, recent Supreme Court decisions indicate that the country's highest court may have abandoned the Indian canons altogether. *See* Chickasaw Nation v. United States, 534 U.S. 84 (2001). As esteemed Indian law scholar David Getches argues, in the past the Supreme Court "regularly employed canons of construction to give the benefit of doubt to Indians, and it deferred to the political branches whenever congressional policy was not clear. Now, these legal traditions are being almost totally disregarded." David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 268 (2001).

135. To the extent this Article raises issues that implicate the Fifth Amendment's Takings Clause, those arguments are not fully considered here. However, a recent Supreme Court opinion on the subject indicates that application of NAGPRA, even on private land, likely would not violate the Takings Clause. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948 (2002).

136. *See* Suagee, *supra* note 44, at 205 (citing Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62,134-01, 62,139 (Dec. 4, 1995)).

aptly captured in the court's opinion in *Mohegan Tribe*, where the court held that "'federal lands' denotes a level of dominion commonly associated with ownership, not funding pursuant to statutory obligations or regulatory permits."[137]

While NAGPRA's shortcomings are evident in the first three cases, *Yankton Sioux Tribe v. United States Army Corps of Engineers* raises other concerns. After all, insofar as *Yankton Sioux* was a case about NAGPRA, it represents a victory for the Tribe. Full execution and utilization of the Act's enforcement mechanisms allowed the Tribe all possible relief at the district court level. The Yankton Sioux received notification of the discovery as well as an opportunity to remove the remains of their ancestors who had floated to the water's surface during the government's flooding of Lake Francis Case. They were allowed to rebury their dead with dignity pursuant to their own religious ceremonies and traditions and accompanied by essential funerary objects.[138] Yet, from a human rights perspective, even the victory in *Yankton Sioux* rings hollow.

If *Yankton Sioux* is understood as the watermark for all possible relief allowed under NAGPRA, the question persists: why are courts, when given an opportunity to protect human rights, so reluctant to apply NAGPRA to future excavations? If nothing else, *Yankton Sioux* proves that, even where a tribe is granted relief under the Act, the most significant obstacle a project will face is a thirty day cessation of activity for tribes and federal agencies to devise a plan for recovery of remains. In light of the fact that the projects at issue in both *Abenaki Nation* and *Mohegan Tribe* had been pending for over ten years, the imposition of a thirty day wait appears negligible. And NAGPRA imposes no consent requirement, even in cases involving federal lands. Thus, while the burden on the land owners would have been minimal, the relief for the Tribe, even though clearly less than ideal, would have been significant.

Yet courts consistently reason around NAGPRA's application in the excavation context, despite the overwhelmingly negative

137. W. Mohegan Tribe & Nation of N.Y. v. New York, 100 F. Supp. 2d 122, 125 (N.D.N.Y. 2000). The court denied the Tribe's claim under the National Historic Preservation Act on similar grounds, holding that the issuance of a permit by the Corps "is insufficient to transform the Park into a federal project." *Id.* at 127.

138. *But see* Humphrey, *supra* note 125 (discussing the U.S. Army Corps of Engineers's efforts to avoid its responsibilities pursuant to NAGPRA).

cultural consequences for the tribes. It seems that when Indian cultural survival or political sovereignty is at issue, courts neglect to recount the many instances in American law that reflect the willingness of our judicial system to restructure and overhaul traditional property regimes to avoid undesirable social consequences.[139] For example, when Americans finally rejected racial segregation as a form of social life, Congress enacted public accommodations statutes that limited property owners' power to exclude.[140] Similarly, efforts to bar unreasonable restraints on alienation of property resulted in the emergence of common law property doctrines, such as the rule against perpetuities.[141] And zoning laws demonstrate that, in some situations, the full enjoyment of property rights is only possible by agreeing to certain property limitations.[142]

Property regimes, like all other social spheres of life, are regulated and defined in accordance with society's values.[143] The courts' treatment of NAGPRA in these cases reflects the elevated status of individual property rights that exists in the classical property model. The courts parsed out entitlements and granted to the individual property owners possession of, and title to, all embedded property.[144] But, as these cases demonstrate, particularly when the property rights and human rights of indigenous communities are at stake, entitlement cannot and should not always be defined by reference to ownership alone.[145]

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139. *See* Jane B. Baron, Review Essay, *The Expressive Transparency of Property*, 102 Colum. L. Rev. 208 (2002).

140. *Id.* at 209.

141. *Id.* at 208–09, 215–16.

142. *See* Tsosie, *supra* note 35, at 1301.

143. *See* Joseph William Singer, The Edges of the Field: Lessons on the Obligations of Ownership 10 (Beacon Press, 2000) (2000) [hereinafter Singer, Edges of the Field]; Joseph William Singer, *Property and Social Relations*, *in* Property and Values: Alternatives to Public and Private Ownership 20 (Charles Geisler & Gail Daneker eds., 2000) [hereinafter Singer, *Property and Social Relations*].

144. Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 Conn. J. Int'l L. 197, 229 (2001).

145. *See* Baron, *supra* note 139, at 217.

IV. HUMAN RIGHTS AND PROPERTY RIGHTS: LEARNING FROM *AWAS TINGNI*

While often perceived as too remote or inaccessible to protect tribes' interests in cultural survival effectively, international law, in fact, provides a workable framework for the protection of indigenous peoples' rights.[146] For example, under most major international instruments that address human rights, property ownership is often identified as a basic human right.[147] Article 21 of the American Convention on Human Rights guarantees the right to use and enjoy one's property free from deprivation of property without compensation, and the Universal Declaration on Human Rights enumerates rights to property ownership. Other international human rights documents are in accord.[148]

Property rights are intimately tied to human rights. Thus, the deprivation of property rights has come to be seen, in itself, as a serious human rights abuse.[149] The ability to hold property and wield power is essential to the exercise of other basic human rights.[150] Property rights empower groups to function as "economic actors," which is essential to self-determination and sovereignty.[151] This

146. Rebecca Tsosie, Preserving Tribal Cultural Heritage Through Cultural Property Laws 239 (2002) (draft conference paper presented at the Federal Bar Conference on Indian Law, on file with author).

147. American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, art. 21, O.A.S.T.S. No. 36, at 7, 1144 U.N.T.S. 143, 150 (entered into force July 18, 1978); *Universal Declaration on Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 2, U.N. Doc. A/810 (1948).

148. *See e.g.*, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int'l Conference of American States, art. 23, O.A.S. Official Record, OEA/Ser.L/V./II.23, doc.21 rev.6 (1948), *reprinted in* Basic Documents on Human Rights 488, 492 (Ian Brownlie ed., 3d ed. 1992) (asserting the right of every person "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home"); Lara L. Manzione, *Human Rights in the Kingdom of Nepal: Do They Only Exist On Paper?*, 27 Brook. J. Int'l L. 193, 196 (2001).

149. Kurshan, *supra* note 6, at 355; *see* Jay M. Vogelson, *Women's Human Rights*, 30 Int'l Law. 209, 210 (1996) ("Generally, the right of an individual to own some property and not be deprived of it arbitrarily is recognized as a human right.").

150. Kurshan, *supra* note 6, at 357; *see* Barzel, *supra* note 6, at 4 ("The distinction sometimes made between property rights and human rights is spurious. Human rights are simply part of a person's property rights.").

151. Kurshan, *supra* note 6, at 357.

phenomenon operates even more significantly with regards to indigenous peoples, whose culture, religion, and political autonomy are particularly linked to the preservation of communal property and a traditional tribal land base. International instruments, too, reflect the unique status of indigenous peoples in relation to the land. The International Labor Organization's Convention on Indigenous and Tribal Peoples of 1989, for example, affirms the specific right of ownership and possession of indigenous peoples to the lands they have traditionally occupied.[152] In this regard, the contemporary international human rights movement has recognized indigenous peoples as special subjects of concern.[153]

Although the battle to maintain a traditional land base differs in some respects from efforts to preserve cultural property, in both cases indigenous peoples have struggled with Western legal systems, which devalue, if not completely ignore, communal ownership. Both areas of collective tribal ownership serve as a source of Indian cultural integrity, self-determination, and sovereignty. But indigenous peoples have had difficulty with communal property claims because Western law often fails to acknowledge the common ownership of property.[154] Additionally, communal ownership and collective tribal power have long been viewed as a threat to mainstream society.[155] In fact, many of the destructive assimilationist policies imposed on Indians in the United States were the result of the government's desire to destroy collective Indian ownership and group identity.[156]

Rights to cultural property and a traditional land base are similar in another important respect as well. In regards to indigenous peoples, property rights are often sought—such as in the NAGPRA excavation cases—in circumstances in which indigenous peoples do not hold title to the property they seek to obtain. Because ownership in Western law is virtually always determined according

152. *See* Anaya, *supra* note 30, at 7.

153. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Land and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Hum. Rts. J. 33 (2001).

154. Hutt, *supra* note 28, at 39.

155. *See* Anaya & Williams, *supra* note 153, at 44 ("[T]raditional [indigenous] land tenure generally is understood as establishing the collective property of the indigenous community and derivative rights among community members.").

156. *See* Tsosie, *supra* note 35, at 1294–96.

to title, this has been a great source of mass divestiture of property from Indian peoples since the point of European contact.[157]

Accordingly, indigenous peoples' efforts to protect their traditional lands provide a constructive and informative paradigm in the struggle to preserve cultural property. Despite facing great challenges in this regard under American law, a communal right to indigenous peoples' traditional lands is now finding recognition in international law. In the Fall of 2001, the Inter-American Court on Human Rights decided the groundbreaking *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. The case revolved around efforts by the Awas Tingni and other indigenous communities of Nicaragua's Atlantic Coast to demarcate their traditional lands and to prevent logging in their territories by a Korean company under a government-granted concession.[158] The Awas Tingni filed a petition with the Inter-American Commission on Human Rights (Commission), charging Nicaragua with failure to take steps necessary to secure the land rights of the Mayagna (Sumo) indigenous community of Awas Tingni and of other Mayagna and Miskito indigenous communities in Nicaragua's Atlantic Coast region.[159]

Evidence presented before the court included the oral testimony of members of the Awas Tingni community. Jaime Castillo Felipe, member of the Mayagna ethnic group, and lifetime resident of Awas Tingni, testified regarding the Tribe's ownership of the disputed territories. In explaining why he believed that the Tribe owned the land, he stated that they "have lived in the territory for over 300 years and this can be proven because they have historical places and because their work takes place in that territory."[160] Felipe explained that the community, as with most traditional indigenous societies, held land and resources in common and are occupied and utilized by the entire community.[161] Other tribal members testified similarly regarding the significance of the land to the religion and

157. *See id.*

158. Anaya & Williams, *supra* note 153, at 37–38.

159. *Id.*

160. The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), ¶ 83(a), *available at* http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc.

161. *Id.* ("Nobody owns the land individually; the land's resources are collective.").

cultural survival of the Awas Tingni people and their conceptions of collective ownership of the land and all the resources it encompasses:

> The territory of the Mayagna is vital for their cultural, religious, and family development, and for their very subsistence, as they carry out hunting activities (they hunt wild boar) and they fish (moving along the Wawa River), and they also cultivate the land. It is a right of all members of the Community to farm the land, hunt, fish, and gather medicinal plants; however, sale and privatization of those resources is forbidden.[162]

Despite the Tribe's intimate relationship with the land—which evidence demonstrated is sacred and beautifully symbiotic—it was up to the court to determine who owned the lands on which the Tribe resided. The Awas Tingni claimed they had occupied and, thus, quasi-owned the lands for hundreds of years, but could only present oral history as evidence of their presence on those lands prior to 1990.[163] In its factual findings, the Inter-American Commission had determined that the community had "no formal title nor any other instrument recognizing its right " to the lands it claimed.[164]

Nevertheless, in an unprecedented decision, the court ruled that the State violated, among others, the right to property as contained in Article 21 of the American Convention on Human Rights to the detriment of the members of the Mayagna (Sumo) community of Awas Tingni, and required the State to adopt measures to create an effective mechanism for official recognition, demarcation and titling of the indigenous community's properties.[165] In particular, the Court acknowledged the Awas Tingni's communal form of property in the land and recognized the importance of the protection of this right to ensure the Community's cultural survival:

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.

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162. *See, e.g.*, Starr v. Starr, 1999 WL 1610554 (Scot. O.H. Apr. 8, 1998).

163. The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), ¶ 83(c), *available at* http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc.

164. *Id.* ¶ 104(*l*).

165. *Id.* ¶ 153.

> For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[166]

Virtually every aspect of *Awas Tingni* is remarkable. While it may be dismissed as an aberration insofar as it deviated from Western property ideals in granting the community the right to their continued existence on their traditional lands as tribal peoples, it serves as a model of possibilities. Drawing from oral history and demonstrating a belief in the right of indigenous peoples to exist, *Awas Tingni* proves that well-settled legal principles can give way to indigenous peoples' fight for survival, even when human rights and Western property regimes conflict.

V. ENTITLEMENT, PROPERTY, AND OWNERSHIP

A. Considering New Models

The "traditional" or "classical" model of property upon which Anglo-American property law is based rests on the notion "that property rights identify a private owner who has title to a set of valued resources with a presumption of full power over those resources."[167] The classical view assumes consolidated rights and a single, identifiable owner of those rights who is identifiable by formal title rather than by information relations or moral claims. It also assumes rigid, permanent rights of absolute control conceptualized in terms of boundaries that protect the owner from non-owners by granting the owner the absolute power to exclude non-owners, and the full power to transfer those rights completely or partially on such terms as the owner may choose.[168] As such, the current property system is designed only to protect those with property, not those without it.[169]

Judicial application of the classical model of property is responsible for a myriad of legal decisions that either devalue or

166. *Id.* ¶ 104(n).

167. Singer, *Property and Social Relations*, *supra* note 143, at 4.

168. *Id.* at 5.

169. *Id.*

altogether disregard the rights of indigenous peoples.[170] In this respect, many judicial opinions concerning Indians that have diminished tribal rights, particularly in regards to Indian efforts to prevent the destruction of sacred sites or thwart intrusive land development, might be explained as the application of the historically austere Anglo-American right of private property, which includes a belief in the owner's right to control property uses as the owner wishes.[171] Courts adhering strictly to this model grant legal preference to private property owners above all other interests, often equating "title" with "entitlement." This has been the case even when the federal government holds title, and ostensibly, has a greater obligation to consider the interests of society's members.[172]

The application of a traditional property model by courts is illustrated by NAGPRA. For example, the Department of the Interior's definition of "federal control," as it is applied in the context of NAGPRA, operates within a very narrow framework, one obviously rooted in the Anglo-American system. Under the guidelines promulgated by the Department of the Interior, "control" is equated with title, ownership, or evidence of some other form of pecuniary stake.[173]

The classical property model is not without criticism. Contemporary scholarship posits that the classical property model is distorted and misleading because it is descriptively inaccurate and normatively flawed.[174] In particular, because state regulation and state recognition actually give rise to property rights, it is wrong, some scholars argue, to envision property and regulation as

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170. *See, e.g.*, Lyng v. N.W. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988) (holding that the Free Exercise Clause did not prohibit the government from certain kinds of land development despite tribal interests); Howard J. Vogel, *The Clash of Stories At Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 Santa Clara L. Rev. 757, 789 (2001) ("*Lyng* is the most recent case in a very old story about the coercive transformation of Native American understandings of land to conform to the Anglo-American understanding of land familiar to students of property law.").

171. *See* Tsosie, *supra* note 35, at 1304–05.

172. *See Lyng*, 485 U.S. at 453 (concluding "[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land"); Vogel, *supra* note 170, at 789.

173. 43 C.F.R. § 10.12 (2002); *see* Suagee, *supra* note 44, at 205.

174. Singer, *Property and Social Relations*, *supra* note 143, at 5.

opposites, rather than interrelated components of society's recognition of ownership.[175] In practice, an owner's use of property is limited (or should be) when such use may adversely affect others or society at large.[176] Property has always been, then, not "a domain of freedom into which regulation intrudes. Rather, property is constituted by and suffused with regulation."[177]

In response to perceived social injustice fueled by the classical model of property, modern scholars and critics of the classical system have devised new theories of property and entitlement, which exemplify a renewed interest in the obligations of owners.[178] From this perspective, "[e]ach stick in the bundle of rights that describes property ownership is defined, directly or indirectly, in terms of the relationship between the owner and others."[179] Because only the recognition of property rights by society gives property meaning and definition, this scholarship seeks to reconceptualize property as a system of social relations.[180]

Although variations on this property model are evidenced throughout modern legal scholarship, property rights theorist Joseph Singer first articulated and advocated for the social relations theory of property. Singer's theory asserts that property is not merely an individual right, but is, in fact, "an intensely social institution."[181] As such, under the social relations model, strict individualism is tempered by significant communal responsibility.[182] The model requires balance between the rights and obligations of property owners. According to Singer, property rights must not be viewed alone in a vacuum, but must achieve a delicate balance: "On one side are claims of property; on the other side are claims of humanity. On

175. Baron, *supra* note 139, at 217–18.

176. *See* Scafidi, *supra* note 32.

177. Baron, *supra* note 139, at 211.

178. *See, e.g.*, Tsosie, *supra* note 35, at 1308–09 (arguing for the application of an "intercultural understanding of property" which would accommodate indigenous worldviews and values).

179. Scafidi, *supra* note 32, at 797.

180. *See* Tsosie, *supra* note 35, at 1301.

181. *See* Singer, Edges of the Field, *supra* note 143, at 20.

182. *Id.* at 3.

one side are claims to rights; on the other side are acknowledgments of responsibilities."[183]

It is through the imposition of obligations, Singer argues, that balance is created in the social system. If property systems grant ownership rights to individuals but do not impose corresponding obligations and limitations, relationships among rights holders are skewed and unbalanced. Because the exercise of rights by one affects others, Singer's theory maintains that legal rights:

> must be shaped to create an environment that will allow individuals both to obtain access to property and to enjoy their legal rights without unreasonable interference by others. This means that the rights of each must be curtailed to ensure an environment that allows all others to exercise their rights fully. Rights must be limited to protect rights.[184]

Singer contends that property is necessary to exercise liberty and freedom. Thus, property systems should be designed to protect both those who have property and those who do not.[185]

Rather than envisioning the imposition of obligations on property owners as inhibiting freedom, Singer's model functions on the premise that greater restrictions and limitations on property owners actually promote liberty. Singer posits that possession of property is essential for individuals and groups to become economic actors and fully participate in society because the recognition of property, even if through regulation, promotes liberty and equality for all peoples.[186]

Thus, Singer concludes, the "paradox" of property is the tenuous relationship between ownership and obligation. As people living together in communities, the fate of every person is tied to the fate of others.[187] It is this relationship among people within the

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183. *Id.* at 10.

184. Singer, *Property and Social Relations*, *supra* note 143, at 20.

185. Singer, Edges of the Field, *supra* note 143, at 27 (quoting Jeremy Waldron as stating that "[p]eople need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and that is why it is wrong that some individuals should have no private property at all").

186. *Id.* at 17.

187. *Id.* at 20.

context of laws that gives property value.[188] Singer's model "reconceptualizes property as a social system composed of entitlements that shape the contours of social relationships. It involves, not relations between people and things, but among people."[189]

B. NAGPRA Excavation Redux—Possibilities in Light of New Models

Models that balance property owners' rights with their obligations facilitate a shift towards less rigid property conceptions necessary to protect the human rights of indigenous peoples. If property is, in essence, a social system, then it creates a "web of communal rights and responsibilities."[190] In such a system, title does not always give rise to entitlement.[191] At a minimum, obligations accompany ownership, and responsibilities arise out of the exercise of rights.

Mistakenly, a common response to NAGPRA is the assumption that application of more fluid property conceptions will result in Tribe's having "veto-power" over any project, even those occurring on private land, if Indian remains are discovered. As this paper has demonstrated, particularly in light of the court's holding in *Yankton Sioux*, that is certainly not the case. Construction on the dam and the lake at issue in *Yankton Sioux Tribe v. United States Army Corps of Engineers* began in 1950. In addition to flood control and generation of hydroelectric power, the project provides navigation support and irrigation, while subsidizing the municipal water supply.[192] Moreover, the Indian cemetery had been under water for over forty years by the time the Tribe filed the lawsuit. Thus, abandoning the project would be illogical, if not impossible. Nor is that result mandated by application of the social relations theory of property. On the contrary, Singer's theory is meant only to encourage a reconsideration of entitlement when allocating the rights and

188. *Id.* at 82.

189. Singer, *Property and Social Relations*, supra note 143, at 8.

190. Scafidi, *supra* note 32, at 797.

191. Baron, *supra* note 139, at 217.

192. *See* U.S. Army Corps of Engineers, Fort Randall Dam/Lake Francis Case, *at* http://www.nwo.usace.army.mil/html/Lake_Proj/fortrandall/welcome.html (last visited Oct. 10, 2002).

responsibilities of ownership. Thus, in *Yankton Sioux*, application of Singer's theory would merely have required a contemplation of the rights and responsibilities of the real property holders vis-à-vis the Tribe's claim to the human remains and other embedded property. One possible result, then, would have been the creation of an excavation plan that allowed the Yankton Sioux sufficient time to exhume the bodies and funerary objects in a manner consistent with their own customs and tribal beliefs.[193]

Accordingly, the social relations theory of property, which is meant only to provide an alternative framework through which rights, ownership, and entitlements are viewed, is not intended to redistribute property or trample on the rights of title holders. To the contrary, as Singer explains: "This model suggests that property which is used in a way that affects the interests of non-owners or the community at large can be regulated in a way that responds to public policy concerns without impinging illegitimately on the owner's property rights."[194]

In this regard, even if courts were to contemplate the social relations theory when considering NAGPRA's applicability, it would be possible to do so while preserving the title holder's property rights. After all, in the excavation context, NAGPRA, at best, allows for notification, consultation, and the right of Tribes to remove their ancestors properly and prepare them for reburial. It does not serve as a trump card for tribes to exercise control over lands to which they do not possess title.

Even with these limitations in mind, however, because the social relations theory of property envisions property rights beyond those which are dictated by a strict adherence to legal title analysis, its contemplation by the courts in deciding the excavation cases would have allowed them greater latitude to apply NAGPRA. Undoubtedly, had the courts contemplated non-traditional models of property, they would have had greater flexibility in considering factors other than legal title in allocating rights to the embedded human remains and funerary objects. As this Article has demonstrated, a finding that the land was, in fact, "under federal control" was plausible in each case. But the courts' failure to consider

193. Sadly, even though NAGPRA was applied, that result was not reached. *See* Humphrey, *supra* note 125, at 1.

194. Singer, *Property and Social Relations*, *supra* note 143, at 7.

the responsibilities—rather than merely the rights—of the property owners facilitated a finding that NAGPRA did not apply.

Of the excavation cases, *Castro Romero v. Becken* demonstrates the most extreme departure from the social relations theory of property. There, the court looked only at the rights of the title holders, and a finding that the land was "municipal rather than federal or tribal" allowed the court to ignore the responsibilities that necessarily followed from the real property owner's rights. Had the court viewed the plaintiff's claims through the lens of the social relations model, perhaps it would have more thoughtfully contemplated the title holder's responsibility to the Lipan Apache as a people, the living descendants of those who had died, and the rights of the deceased themselves.[195] Ironically, the court allowed the City—based solely on its title to the land—to exhume the bodies and rebury the remains in its own cemetery. In so doing, the court confirmed the City's rights, but not responsibilities, to the human remains.

Awas Tingni is instructive here as well. Although the court did not expressly apply the social relations theory, it rejected a strictly title-based analysis in determining the respective rights of the *Awas Tingni* Community vis-à-vis the State. The Court expressly held that the Community's own conceptions of ownership must be taken into account in determining whether a violation of the right to property existed, and, in so doing, concluded that the Community's lack of real title to the property did not preclude the Community's continued right of occupancy.[196] The Court's willingness to look beyond the issue of title and consider other factors—such as the ambiguous ownership status of the lands occupied by but not "owned" in the traditional sense by the Awas Tingni Community—allowed it the flexibility to accommodate the property rights and human rights of the Community. Had the Court taken the same strict title-based approach as the courts in the excavation cases, it likely would have found no ambiguity existed at all, and the Awas Tingni's lack of proof of ownership over their ancestral lands would have precluded the

195. Although the Fifth Circuit's opinion does not fully discuss the issue, it is clear that the federal district court denied Castro Romero's attempt to bring this suit on behalf of the Lipan Apache people. Accordingly, this suit was brought by Castro individually. Castro Romero v. Becken, 256 F.3d 349, 354 (5th Cir. 2001).

196. The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), ¶ 151, *available at* http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc.

Tribe's claims to the land and their continued existence.

Likewise, the courts in the excavation cases could have taken the Department of the Interior's mandate that each situation be treated on a case-by-case basis and recognized the ambiguous ownership status of the lands and property at issue. Instead, the courts failed to thoughtfully question the level of control exerted by the federal government, and U.S. Army Corps of Engineers in particular, over the projects. In so doing, they failed to undertake the more thorough and, indeed, more complicated analysis that would have been required to conclude that NAGPRA was applicable.

I do not mean to suggest, however, that consideration of new property models will ensure NAGPRA's applicability in every circumstance. To the contrary, the U.S. Army Corps of Engineers had various levels of participation in the three projects at issue in the excavation cases and unique facts existed as to each of the tribes' claims. While the facts of each case likely could have supported a finding that the lands were "under federal control" and, therefore, subject to NAGPRA, that analysis is one that must be undertaken by the trial court. Nevertheless, the courts' decisions indicate an unwillingness to view the claims of the tribes, and the status of the lands at issue, beyond the confines of the classical property model. Consideration of new models, then, while not guaranteeing different outcomes, would have at least opened up new possibilities for creating a greater balance between the obligations of property owners and the rights of indigenous peoples.

C. Broader Applications: Beyond the Excavation Cases

Disputes over property between non-Indians and Indians rage on in the modern United States. Indigenous property claims—often based on conceptions of communal ownership, preexisting occupation, or political sovereignty—are foreign to non-Whites, and, thus, are often diminished or disregarded when contested by individual owners. Conflicts arise almost daily as indigenous peoples attempt to reclaim ancestral homelands or preserve sacred sites. These struggles are particularly compelling in a time in which Americans are increasingly driven to acquire more and greater material goods, an ethos signified by popular culture's quasi-deification of individual property rights.

For example, Congress recently enacted the Sand Creek Massacre National Historical Site Establishment Act of 2000, which

will establish a permanent memorial at the site of the 1864 massacre of the Cheyenne and Arapaho Indians near Eads, Colorado, by members of the local government's militia. The legislation contemplates the demarcation of an area of approximately 12,480 acres along Sand Creek in Kiowa County, Colorado, to serve as the boundary of the historic site. As part of the Sand Creek Massacre National Historical Site Establishment Act, the National Park Service is authorized to negotiate with "willing settlers" for property within the boundary.[197]

Completion of the memorial requires acquisition of 1400 acres containing numerous cultural and historic sites that are currently held by a private land owner. The owner, although claiming he would like to see the land be used for the memorial, has placed his land up for public sale because he was not able to strike a deal with the National Park Service, which offered $332,000 for the property. The rancher has requested $1.5 million for the property, five times the offered price and more than five times the average per-acre land value in Kiowa County.[198] Thus, completion of the memorial was stymied as the tribes and the National Park Service negotiated for acquisition of the sacred lands.[199]

In another land dispute, the Eight Northern Pueblo Council (the Council) is fighting to block expansion of a new, unplanned road that was built along the boundaries of the Petroglyph National Monument, a site considered sacred to dozens of tribes in the Southwest.[200] The 3000-year-old petroglyphs are the work of the Anasazi people, ancestors of the nineteen Indian Pueblos in New Mexico, and represent visions and messages to the spirit world left by indigenous ancestors. The area has long been used for prayers, offerings, and gathering medicinal plants. The road, which is being funded by a private land developer, was built without the knowledge

197. Bryan Stockes, *Sand Creek Historic Landmark a Reality*, Indian Country Today, Nov. 8, 2000, at 1.

198. David Melmer, *Owner Stalls Sand Creek Historic Site*, Indian Country Today, Mar. 19, 2002, at B1.

199. Before publication of this Article, a private donor bought the land needed for completion of the Sand Creek Massacre Memorial and turned it over to the Tribe. David Melmer, *Sand Creek Returned to Rightful Owners*, Indian Country Today, May 6, 2002, at B1.

200. Valerie Taliman, *Mayor "Sneaks" In Petroglyph Road*, Indian Country Today, Sept. 16, 2002, at 1.

or input of local tribes and a variety of other interested groups, including the National Park Service, which manages the site. The road was quietly authorized by the Mayor of Albuquerque, New Mexico and was, literally, built overnight. Though initially claiming the road was to be used temporarily to ease traffic delays, the Mayor now concedes the current plan is to expand the road to a full artery with bike lanes that will run right near the sacred site. Many fear additional traffic will lead to further defacement and desecration of the ancient petroglyphs.

The Council is considering legal action to protect the area. The private development company that owns the land has no legal duty to protect or preserve the adjacent sacred site. As a result, those opposing further development will likely find no relief in the courts.

The battle for completion of the Sand Creek Massacre Memorial and the struggle to protect the sacred petroglyphs of the Anasazi signify the types of contemporary property conflicts that persist between Indians and non-Indians. The disputes are complicated, and satisfactory resolutions are not easily achieved. It is clear, however, that Indians must attempt to build public awareness of the "profound historical meanings, and wider cultural and artistic significance of Native American cultural landscapes."[201] Several Indian scholars have suggested that storytelling may be the best way to convey basic Indian values and help close the gap between Anglo-American law and the Indian worldview.[202] However that goal is reached, it is clear that indigenous peoples' perspectives regarding conceptions of entitlement, property, and ownership must be addressed if there are to be any remedies daring enough to encompass the complex history and claims of indigenous peoples.

VI. CONCLUSION

> All the laws and armies in the world cannot protect the earth as fully as the joy people take in discovering and honoring what is sacred. All of the laws and armies in the

201. Suagee, *supra* note 44, at 224 ("There is a resonance in our stories that I believe will come back to us in a good way. Our stories may be some of the best means we have to animate federal agency land management decisionmaking processes so that federal decisions reflect some of our values.").

202. Barsh, *supra* note 69, at 153–54.

> world cannot protect the earth fully if humans are empty and believe that nothing is sacred.[203]

The human rights of indigenous peoples will never be fully recognized or restored as long as individual property rights are exalted and analyzed in a vacuum where they exist only as "entitlements," without the imposition of duties in the social system. As this article demonstrates, without incorporation of indigenous perspectives in the construction of property paradigms, non-traditional property conceptions will never inform the legal regimes responsible for recognition and protection of the property rights of Indian peoples.

It may be impossible for indigenous peoples to ever fully convey to non-Indians the historical power and cultural meaning inherent in Indian cultural property. Communal, land-based peoples conceive of and interpret ownership in ways that are foreign to, and diminished by, Anglo-American property regimes. Nevertheless, NAGPRA provides a framework for a dialogue between Indians and non-Indians in the protection of cultural property.[204] Although limitations on NAGPRA, both in its construction and application, are readily apparent, NAGPRA has at least begun to address complex issues of self-determination and the survival of political sovereignty through the preservation of cultural identity. In many ways, NAGPRA marks the inception of a genuine, ongoing dialogue between Indian tribes and governmental entities.[205]

Moreover, NAGPRA has served as an invaluable tool in educating non-Indians in the brutal history of Indian peoples, the significance of cultural property to Indian cultural survival, and the importance of reconsidering entitlement as it relates to indigenous peoples' continued existence. As Elizabeth Tatar, Vice President of the Bishop Museum in Honolulu, Hawaii, explained regarding the enactment of NAGPRA:

> We were fearful of Native Hawaiians and Native Americans, and of spirituality. We did not truly understand that the human remains and objects in our collections were living to those that claimed them and that Native

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203. Erica-Irene A. Daes, *The Indispensable Function of the Sacred*, 13 St. Thomas L. Rev. 29, 31 (2000).

204. Hutt & McKeown, *supra* note 21, at 379.

205. Nichols et al., *supra* note 8, at 257.

> Hawaiians and Native Americans know how to take care of these remains and objects better than we could. Above all it was difficult for us to let go. We saw the loss of knowledge and history, but not the loss of spiritual balance and wellbeing Hawaiians saw. . . . We are indeed ready to face the present head-on by acknowledging the past in order to clear the way for a bright, productive future.[206]

NAGPRA has laid the groundwork for recognition of, respect for, and preservation of indigenous peoples' cultural property and their continued existence. But law, like people, must be open to new possibilities and innovative thinking to ensure the human rights and cultural survival of all of society's groups.

206. Elizabeth Tatar, *Introduction* to Implementing the Native American Graves Protection and Repatriation Act, at ix, ix (Roxanna Adams ed., 2001).