CHAPTER 2

PROTECTION AND REPATRIATION OF INDIGENOUS CULTURAL HERITAGE IN THE UNITED STATES

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In the United States, federal and state statutes largely define the legal regime for protection and repatriation of indigenous heritage. This study summarizes the legislation, with a focus on the Native American Graves Protection and Repatriation Act (1990; NAGPRA), its regulations, and interpretations of it. NAGPRA’s gradual maturation as a human rights instrument may not always be apparent from discourse about the indigenous heritage in the United States. It will be seen, however, that NAGPRA has worn well, having become effective and well accepted over time. Provisions in NAGPRA for review of issues related to it and for avoiding and resolving disputes are particularly noteworthy. These provisions have given rise to ongoing processes of consultation, significant interpretations of the law, and refinements in it. The minutes of the NAGPRA review committee’s meetings, in particular, disclose the law’s efficacy. Still, NAGPRA has its problems. After a review of the general legal regime for protecting the indigenous heritage in the United States, a concluding section of this study will identify strengths and weaknesses of NAGPRA that have become apparent in its first decade and a half.

A. THE STATUTORY FRAMEWORK

1. Federal Laws

The Antiquities Act\(^2\) (1906) provides a permit system for examination of ruins, excavation of archaeological sites, and gathering of artifacts on federally owned or controlled lands. Further, this legislation made it a crime to “appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity,” found on federally owned or controlled lands.

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lands, without a permit from the federal government. Penalties for violations of the law are minor, however.\footnote{3 See United States v. Diaz, 499 F.2d 113 (9th Cir. 1974) (where the Ninth Circuit Court of Appeals, whose jurisdiction encompasses a major part of the indigenous cultural heritage, largely eviscerated the penal provisions of the Act. As a matter of due process, the court declared unconstitutional the vague definitions of the terms “ruin,” “monument,” and “object of antiquity.”); \textit{but see} United States v. Smyer, 596 F.2d 939 (10th Cir. 1979) (declaring that the act is not unconstitutionally vague and uncertain, and upholding penalties for wrongful appropriation of ancient objects which, unlike the objects at issue in \textit{Diaz}, were ancient). Despite the \textit{Diaz} decision, the 1906 act continues to have profound effects in protecting cultural heritage. For example, the act authorizes the president, without legislative enactment, to establish national monuments in order to preserve “objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States.” Under this authority, for example, Theodore Roosevelt established the Grand Canyon National Monument in 1908, Franklin D. Roosevelt designated the Jackson Hole National Monument in 1913, Jimmy Carter added 15 more national monuments in Alaska in 1978, and, in 1996, Bill Clinton created the Grand Staircase-Escalante National Monument, which is the largest outside Alaska.}{3}

The National Historic Preservation Act\footnote{4 16 U.S.C. §§ 470–470w-6 (2000).} (1966; NHPA) is rooted in scattered, often site-specific legislation originating in the 19th century. It requires federal agencies to manage heritage resources under their control and establishes a National Register of historically significant buildings, sites, and areas, providing special tax benefits, such as income tax credits, deductions, and accelerated depreciation of designated property. The NHPA also creates special historic easements, provides for transferability rights, and authorizes federal matching grants to the states to support local survey and preservation efforts. All federally directed, funded, or licensed projects—public or private—must be evaluated to determine a project’s impact on archaeologically significant resources and take account of non-binding comments by an Advisory Council on Historic Preservation. Amendments in 1980 and 1992 require substantial participation of Native Americans in policymaking and decisionmaking under the NHPA.\footnote{5}

The Archaeological Resources Protection Act\footnote{6 16 U.S.C. §§ 470aa-470mm (2000).} (1979; ARPA) refines and largely supersedes the Antiquities Act. It reasserts federal control over archaeological resources on federal lands, requiring a permit for any excavation, removal, or alteration of such resources. ARPA also provides stiff penalties for persons who knowingly excavate, sell, purchase, transport, exchange, receive, or remove those resources without a federal permit. The term “archaeological resources” is defined to include “any material remains of past human life or activities which are of archaeological interest” and are at least 100 years old. To summarize, ARPA has helped guide an ongoing successful effort by federal agencies to protect Native American sites on public land.\footnote{7 See Marcia Yablon, \textit{Property Rights and Secret Sites: Federal Regulatory Responses to American Indian Claims on Public Land}, 113 Yale L.J. 1623 (2004).}