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## Indian Burial Sites Unearthed: The Misapplication of the Native American Graves Protection and Repatriation Act

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# Articles

## Indian Burial Sites Unearthed: The Misapplication of the Native American Graves Protection and Repatriation Act

Lucus Ritchie<sup>1a</sup>

*Congress passed the Native American Graves Protection and Repatriation Act (“NAGPRA”) in part to shield Indian burial sites from desecration caused by federal actions. To date, however, many agencies charged with managing federal lands have refused to comply with the legislation’s tribal consultation requirements prior to authorizing activity that may disturb tribes’ ancestral gravesites. Moreover, courts have failed to hold agencies accountable for this noncompliance, resulting in severe consequences for tribes in regions with numerous burial grounds and prolific agency activity such as the Missouri River Basin. This article analyzes agency application and court interpretation of NAGPRA in “notice situations”—situations where an agency has knowledge that its actions are likely to disturb Indian human remains—and presents a variety of reasons why current court decisions construe the statute incorrectly. Additionally, it argues that awarding tribes the pre-action consultation that NAGPRA mandates would not only benefit tribal interests but also federal agencies and the general public.*

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## I. INTRODUCTION

The treatment of Indian human remains in the United States is a dark stain on American history. Racist curiosity and profit motive, coupled with federal disregard for differing cultural perspectives, led to mass destruction and looting of Indian burial sites throughout much of our nation's past.<sup>1</sup> In 1990, Congress enacted the Native American Graves Protection and Repatriation Act ("NAGPRA")<sup>2</sup> to protect Indian remains and cultural items from continued desecration.<sup>3</sup> NAGPRA creates procedures for Indian tribes to recover human remains and cultural items from federal agencies and federally funded museums, criminalizes the trafficking of human remains and cultural items, and sets forth requirements to be applied during future excavations and discoveries of human remains and cultural items on federal and tribal lands.<sup>4</sup> These provisions aim to resolve the difficult issues surrounding the disposition of Native American human remains and cultural items.<sup>5</sup> NAGPRA has not, however, provided the intended relief to tribes in future excavation and discovery situations.

NAGPRA sets out two scenarios concerning future excavation and discovery of Indian human remains and cultural items on federal and tribal lands: "intentional excavation" and "inadvertent discovery."<sup>6</sup> To date, in cases dealing with areas known to have burial sites (and in some instances areas where remains had already been found) courts have determined that land managing agencies were subject only to the less stringent inadvertent discovery requirements.<sup>7</sup> These obligations do not require agency consulta-

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1. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 *Ariz. St. L.J.* 35, 38-43 (1992) (documenting the abhorrent history of legal protection of Indian remains in America).

2. 25 U.S.C. §§ 3001-3013 (2000).

3. See H.R. Rpt. 101-877, at 9-20 (Oct. 15, 1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4367-4379 (documenting the intent of NAGPRA's drafters).

4. 25 U.S.C. §§ 3001-3013 (2000). See also 18 U.S.C. § 1170 (2000) (detailing the punishment for violating NAGPRA's criminal provisions); Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10 (2004) (implementing NAGPRA).

5. C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After*, 21 *UCLA J. Envtl. L. & Policy* 153, 212 (2003).

6. 25 U.S.C. §§ 3002(c)-(d) (2000).

7. See, e.g., *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000) [hereinafter *Yankton I*] (determining that Corps' manipulation of reservoir water levels in an area containing Indian burials was subject only to inadvertent discovery requirements);

tion with tribes, whose ancestral remains are being affected by agency or agency-authorized action, until bones are unearthed.<sup>8</sup> In contrast, applying intentional excavation requirements would force federal officials to initiate tribal consultation prior to acting. Additionally, intentional excavation requirements mandate agencies to complete a plan of action subsequent to consultation and to execute the actions called for in the plan, thus providing increased protection for Indian burial sites.<sup>9</sup>

Courts have failed to apply NAGPRA's intended policy and objective for "notice situations"—situations where an agency has knowledge that its actions are likely to disturb Indian human remains or cultural items. NAGPRA's regulations instruct federal land managers to follow intentional excavation requirements any time an activity "may result in the excavation of human remains [or cultural items]."<sup>10</sup> In addition, the legislative goal of NAGPRA was to protect Indian remains and cultural items by providing tribes advance consultation in excavation and discovery situations.<sup>11</sup> Tribe-friendly Executive Orders<sup>12</sup> and fundamental principles of Indian law<sup>13</sup> further support pre-action application of NAGPRA's consultation requirements. In short, intentional excavation requirements that award tribes advance consultation should attach in all "notice situations."

Section II of this article describes past treatment of Indian remains in the United States and generally outlines NAGPRA. Section III summarizes agency obligations in both intentional excavation and inadvertent discovery contexts as implemented by NAGPRA's regulations and highlights how the requirements differ. Section IV analyzes cases that have applied NAGPRA requirements in situations along the Missouri River, an area with numerous Indian gravesites and heavy agency presence. Section V explains why NAGPRA's regulations and legislative intent, as well as fundamental Indian law principles and current federal policy regarding tribal affairs, require agencies to follow the intentional excavation requirements in "notice situations." Section VI presents the benefits of pre-action consultation in ensuring the necessary cultural resource protection for tribes, minimizing

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*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 209 F. Supp. 2d 1008, 1019 (D.S.D. 2002) [hereinafter *Yankton II*] (ruling recreational development on lands known to contain Indian remains subject only to inadvertent discovery obligations).

8. 43 C.F.R. §§ 10.4(b), 10.4(d)(1)(iv) (2004).

9. *Id.* at § 10.3(c)(2).

10. *Id.* at § 10.3(c)(1).

11. *See, e.g.*, H.R. Rpt. 101-877, at 9–20 (Oct. 15, 1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4367–4379 (outlining NAGPRA's aim to foster improved communication between federal agencies and tribes).

12. *See, e.g.*, Exec. Or. 13007, 61 Fed. Reg. 26771 (May 29, 1996) (granting heightened protection to Native American sacred sites); Exec. Or. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (calling for greater consultation and coordination between executive agencies and tribal governments).

13. *See, e.g.*, *Felix S. Cohen's Handbook of Federal Indian Law* 220–28 (Rennard Strickland et al. eds., U. N. M. Press 1982) (explaining the trust doctrine which imposes fiduciary obligations on federal officials dealing with Indian tribes as well as the Indian canon of statutory construction).

agency cost and work delay, and promoting the public interest. In conclusion, Section VII details the findings of this article.

## II. THE HISTORY OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Throughout most of its history, the United States has failed to protect the graves and the dead of Native Americans. While American common law protects the sanctity of the dead by strongly disfavoring disinterment except under the most compelling circumstances,<sup>14</sup> these protections have generally not applied to Indian burial grounds.<sup>15</sup> Racism, curiosity, and desire for profit drove many to acquire, sell, and exhibit Indian remains.<sup>16</sup> National estimates hold that the remains of as many as two million native people have been exhumed without just cause or authorization.<sup>17</sup> Pothunters and looters committed much of this abhorrent desecration on their own accord, but the federal government is also to blame. In 1868, destruction of Indian burial sites became federal policy pursuant to a Surgeon General's Order directing Army personnel to procure Native American remains for the Army Medical Museum.<sup>18</sup> Congress continued this horrific course of action by passing the Antiquities Act of 1906,<sup>19</sup> which allowed thousands of Indian remains to be classified as "archeological resources" and exhumed as federal property.<sup>20</sup> Through much of the twentieth century, it was common for the federal government to treat Native American remains as archeological specimens, property, and exhibits.<sup>21</sup>

Congress enacted NAGPRA in an attempt to resolve the complex issues surrounding protection and custody of Native American human remains and

14. See generally Percival E. Jackson, *The Law of Cadavers and of Burial and Burial Places* 101-122 (2d ed., Prentice-Hall 1950).

15. Trope & Echo-Hawk, *supra* n. 1, at 39. See also H. Marcus Price III, *Disputing the Dead: U.S. Law on Aboriginal Remains and Grave Goods* (U. Mo. Press 1991) (detailing the evolution of state and federal law concerning Indian burial sites).

16. Robert E. Bieder, *A Brief Historical Survey of the Expropriation of American Indian Remains* (Colorado: Native American Rights Fund 1990) [hereinafter *Historical Survey*], reprinted in Senate Select Comm. on Indian Affairs: *Hearings on S. 1021 and S. 1980*, 101st Cong. 278-363 (May 14, 1990).

17. Trope & Echo-Hawk, *supra* n. 1, at 39. See also David J. Harris, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 Wash. U. J. Urb. & Contemp. L. 195 n.3 (1991) (listing various estimates of the number of Indians unlawfully exhumed in American history).

18. *Historical Survey*, *supra* n. 16, at 36-37; Angela Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 Colum. Hum. Rights L. Rev. 49, 53 (2002).

19. Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-433 (2000)).

20. Trope & Echo-Hawk, *supra* n. 1, at 42. By 1986, the Smithsonian Institute alone held the remains of over 18,000 American Indians, as well as countless numbers of funerary objects. Riley, *supra* n. 18, at 53.

21. Trope & Echo-Hawk, *supra* n. 1, at 43. See also Riley, *supra* n. 18, at 53 (detailing use of Indian remains as archeological specimens and exhibits). See generally Robert E. Bieder, *Science Encounters the Indian, 1820-1880: The Early Years of American Ethnology* (U. Okla. Press 1986).

cultural items. Three provisions set up a framework to achieve that goal. The first provision details requirements to be applied in future excavations and discoveries of human remains and cultural items<sup>22</sup> on federal and tribal lands after November 16, 1990.<sup>23</sup> The second provision criminalizes the trafficking of Native American human remains or cultural items under most conditions.<sup>24</sup> The final provision details a mechanism to bring together federal agencies and federally funded museums with lineal descendants, Indian tribes, and Native Hawaiian organizations to ensure the proper disposition or repatriation of Indian remains and cultural items.<sup>25</sup> These components seek to benefit tribes by giving them a much-needed voice in preserving the legacy of their ancestors. In the context of future excavations and discoveries of human remains and cultural items, however, NAGPRA's success has been limited because courts have failed to award tribes the level of pre-action protection that the legislation commands.

### III. FUTURE EXCAVATION AND DISCOVERY: PROCEDURES AND REQUIREMENTS

NAGPRA outlines excavation and discovery procedures for Indian remains and cultural items located on federal and tribal lands.<sup>26</sup> Its regulations chart a process for advance planning when human remains or cultural items

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22. The term "cultural items" describes objects protected under NAGPRA that are not human remains: funerary objects, sacred objects, and objects of cultural patrimony. NAGPRA defines "funerary objects" as "objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later." 25 U.S.C. § 3001(3)(A) (2000). Funerary objects that have been repatriated under NAGPRA include beads, tools, pottery, and weapons of many types. McKeown & Hutt, *supra* n. 5, at 165. "Sacred objects" are "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001(3)(C) (2000). Included among sacred objects that have been repatriated are prayer sticks, pipes, and basketry. McKeown & Hutt, *supra* n. 5, at 165. "Objects of cultural patrimony" are defined as items "having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American." 25 U.S.C. § 3001(3)(D) (2000). Objects of cultural patrimony that have been repatriated to date include medicine bundles, headdresses, and ceremonial masks. McKeown & Hutt, *supra* note 5, at 166.

23. 25 U.S.C. § 3002 (2000).

24. 18 U.S.C. § 1170 (2000).

25. 25 U.S.C. §§ 3003–3008 (2000). While NAGPRA protects the human remains and cultural items of lineal descendants, Indian tribes, and native Hawaiian organizations, this article deletes many references to lineal descendants and native Hawaiian organizations because the cases explored primarily concern Indian tribes.

26. NAGPRA regulations define "federal lands" as "any lands other than tribal lands that are controlled or owned by the United States." 43 C.F.R. § 10.2(f)(1) (2004). "Tribal lands" encompass all lands within the exterior boundaries of an Indian reservation, all dependent Indian communities, and any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act. *Id.* at §§ 10.2(f)(2)(i)–(iii). Allotted Indian trust lands outside reservation boundaries do not fit the statutory definition of tribal lands unless they are also within a dependent Indian community. However, because such lands are held in trust by the United States and are subject to federal control, they are treated as federal lands under NAGPRA. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 Vt. L. Rev. 145, 205 (1996).

may be impacted by development,<sup>27</sup> as well as for those instances when such planning has not occurred and human remains or cultural items are unintentionally discovered.<sup>28</sup> The two situations addressed are “inadvertent discovery” and “intentional excavation.” The procedures agencies must follow differ between the two scenarios.

### A. *Inadvertent Discovery*

Inadvertent discovery refers to the “unanticipated encounter or detection” of Indian human remains or cultural items “found under or on the surface of Federal or tribal lands.”<sup>29</sup> NAGPRA regulations provide that “[a]ny person that knows or has reason to know that he or she has discovered inadvertently human remains [or cultural items] on Federal or Tribal lands . . . must provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal agency official.”<sup>30</sup> For inadvertent discoveries on tribal lands, the responsible Indian tribe official must be immediately notified.<sup>31</sup> If the inadvertent encounter occurred during an on-going activity, the discovering person is required to cease activity proximate to the discovery and make a reasonable effort to protect the remains and items.<sup>32</sup> As soon as possible, but not later than three working days after receipt of the written confirmation of notification, the federal land manager must certify receipt of the notification and take immediate steps, if necessary, to further secure and protect the inadvertently discovered human remains or cultural items.<sup>33</sup> Additionally, the regulations command the land manager to notify by telephone, with written confirmation, the Indian tribes “likely to be culturally affiliated” with the discovered remains and objects, tribes which “aboriginally occupied” the area of discovery, and any other tribe “known to have a cultural relationship” to the remains or cultural items.<sup>34</sup>

NAGPRA regulations additionally require the land manager to “initiate consultation on the inadvertent discovery” with all the tribes he or she notifies.<sup>35</sup> Among other requirements, the consultation must seek to identify tribal religious leaders and result in a written plan of action that the federal agency is required to follow.<sup>36</sup> At minimum, the plan must document the kinds of objects to be considered cultural items, the planned handling,

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27. 43 C.F.R. § 10.3 (2004).

28. *Id.* at § 10.4.

29. *Id.* at § 10.2(g)(4).

30. *Id.* at § 10.4(b).

31. *Id.*

32. *Id.* at § 10.4(c).

33. *Id.* at §§ 10.4(d)(1)(i)–(ii).

34. *Id.* at § 10.4(d)(1)(iii). The notification must include pertinent information regarding the human remains or cultural items encountered, their condition, and the circumstances in which they were discovered. *Id.*

35. *Id.* at § 10.4(d)(1)(iv).

36. *Id.* at §§ 10.5(b)(3), (e).

treatment, and care of all discovered items, and the specific information to be used to determine tribal custody of human remains and cultural items.<sup>37</sup> The activity that resulted in the inadvertent discovery may resume thirty days after the federal land manager certifies receipt of the discovery notification, or at any time that a written, binding agreement which adopts a recovery plan for the excavation of human remains or cultural items is executed between the federal agency and the tribe.<sup>38</sup>

### B. *Intentional Excavation*

NAGPRA regulations define intentional excavation as “the planned archaeological removal of human remains [or cultural items] found under or on the surface of Federal or tribal lands.”<sup>39</sup> The intentional excavation procedures require federal land managers to take “reasonable steps to determine whether a planned activity may result in the excavation of human remains [or cultural items].”<sup>40</sup> Notice must be given to all tribes that are “likely to be culturally affiliated” with human remains or cultural items that may be excavated.<sup>41</sup> Notice is also required to “any present-day Indian tribe which aboriginally occupied the area of the planned activity and any other Indian tribes . . . that the Federal agency official reasonably believes are likely to have a cultural relationship to the human remains [or cultural items] that are expected to be found.”<sup>42</sup> Intentional excavation of human remains or cultural items on federal lands can only occur after consultation with the appropriate Indian tribe or tribes as determined by the federal land manager.<sup>43</sup> On tribal lands, intentional excavation may only go forward with the consent of the appropriate Indian tribe.<sup>44</sup> Proof of the consultation or consent must be shown to the federal agency responsible for permitting the intentional excavation prior to agency action.<sup>45</sup>

Intentional excavations of Indian remains and cultural items are also subject to the permit requirements of the Archeological Resources Protection Act of 1979 (“ARPA”).<sup>46</sup> For the purposes of NAGPRA, the federal land manager may issue a permit under ARPA if: 1) “the applicant is qualified . . . to carry out the permitted activity,” 2) “the activity is undertaken to further archaeological knowledge in the public interest,” and 3) the activity con-

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37. *Id.* at § 10.5(e)(1)–(3).

38. *Id.* at § 10.4(d)(2) (regarding federal lands); *id.* at § 10.4(e)(2) (regarding tribal lands).

39. *Id.* at § 10.2(g)(3).

40. *Id.* at § 10.3(c)(1).

41. *Id.*

42. *Id.*

43. *Id.* at § 10.3(b)(2). The consultation requirements follow those described above in the inadvertent discovery context and mapped out in Sections 10.5(a)–(g).

44. *Id.*

45. *Id.* at § 10.3(b)(4).

46. 16 U.S.C. § 470(aa)-(mm) (2000); 25 U.S.C. § 3002(c)(1) (2000) (making ARPA applicable in the NAGPRA context). Inadvertent discoveries are also subject to ARPA permit requirements if excavation or removal is deemed necessary by the responsible land manager. 43 C.F.R. § 10.4(d)(1)(v) (2004).

ducted pursuant to such permit “is not inconsistent with any management plan applicable to the public lands concerned.”<sup>47</sup>

The striking difference between NAGPRA’s inadvertent discovery and intentional excavation obligations is the point at which tribal consultation rights attach.<sup>48</sup> In intentional excavation scenarios, consultation is required before any planned agency or agency-authorized activity commences.<sup>49</sup> For inadvertent discoveries, tribal consultation rights are not triggered until after human remains or cultural items have been disturbed.<sup>50</sup> NAGPRA’s regulations contemplate application of intentional excavation requirements in any situation where an activity “may result in excavation of human remains [or cultural items].”<sup>51</sup> “Notice situations”—situations where an agency has knowledge that its actions are likely to disturb human remains or cultural items—certainly lie within the scope of that command. Agencies, however, have routinely followed the inadvertent discovery requirements even when tribal oral history, archeological surveys, or past discovery of human remains indicate that their actions may harm cultural resources.<sup>52</sup> More troubling, courts have failed to hold agencies accountable for this noncompliance.<sup>53</sup> As detailed below, nowhere are these failures more evident than in the Missouri River Basin.

#### IV. SITUATIONS IN THE MISSOURI RIVER BASIN

The Missouri River Basin ranks among the areas most affected by the failure of agencies and courts to correctly interpret and apply NAGPRA. The basin contains many of the richest areas of historic properties in the United States.<sup>54</sup> Once home to numerous Indian tribes,<sup>55</sup> the archeology

47. 16 U.S.C. § 470(cc)(b) (2000). ARPA imposes a fourth requirement for permits—that the archeological resource excavated or removed must remain in the control of the United States. *Id.* However, the repatriation provisions of NAGPRA supercede that obligation. Riley, *supra* n. 18, at 65.

48. While consultation conveys no substantive right to tribes, it remains greatly important to Indian peoples in protecting their cultural resources. See Dean B. Suagee, *Historical Storytelling and the Growth of Tribal Historic Preservation Programs*, 17 Nat. Resources & Env. 86, 88 (2002) (stating that consultation gives tribes their sole opportunity to persuade the responsible land manager to act in the interests of Native Americans); *Attakai v. United States*, 746 F. Supp. 1395, 1408 (D. Ariz. 1990) (determining that consultation is the principal means for tribes to protect historical resources).

49. 43 C.F.R. § 10.3(b)(4) (2004).

50. *Id.* at § 10.4(d)(1)(iv).

51. *Id.* at § 10.3(c)(1) (emphasis added).

52. See *infra* nn. 73–114 and accompanying text.

53. *Id.*

54. See generally Donald J. Lehmer, *Introduction to Middle Missouri Archeology* (National Park Service 1971); *Archaeology on the Great Plains* (W. Raymond Wood ed., U. Press of Kan. 1998); Advisory Council on Historic Preservation, *Status Report on the U.S. Army Corps of Engineers Historic Preservation Program for the Missouri River Mainstem System* (2003), <http://www.achp.gov/MORiver-statusreport.pdf> (accessed Feb. 7, 2005) [hereinafter *Status Report*].

55. Tribes that called the Missouri basin home include the Sioux, Blackfeet, Northern Cheyennes, Crow, Mandan, Hidasta, Arikara, Pawnee, Gros Ventre, Oyo, Ponca, and Wichita. Kimbrall M. Banks & J. Signe Snortland, *Dam(n) the Land and Full Speed Ahead: A Case Study of the Missouri River Basin* (forthcoming 2005). Twenty-seven tribes still reside immediately within or near the basin. *Id.* A condensed version of Banks and Snortland’s report is provided by the World Commission on Dams, *Dams*

along the river represents a unique aspect of North American history.<sup>56</sup> Its diverse culturally important properties include, among others: burial grounds, earthlodge village sites, farmsteads, and forts.<sup>57</sup> Besides being unique, historic sites in the basin are prolific. The federal government has recorded more than 5,000 archeological sites on the Missouri, yet the Advisory Council on Historic Preservation estimates the actual number to be much higher.<sup>58</sup>

In addition to containing a wealth of native cultural resources, the Missouri River is the most managed drainage in North America.<sup>59</sup> Pursuant to the Pick-Sloan Plan, part of the Flood Control Act of 1944,<sup>60</sup> the federal government constructed large dams and reservoirs on the upper Missouri River and its tributaries.<sup>61</sup> The U.S. Army Corps of Engineers (“Corps”) now operates seven dams and reservoirs along the river for flood control, hydropower generation, navigation, irrigation, and recreation.<sup>62</sup> Collectively, this controlled section is referred to as the Missouri River Mainstem System.<sup>63</sup> Unfortunately, federal operation and maintenance of Mainstem dams and reservoirs negatively affect the rich cultural history of the Missouri River Basin, leading to tense relations between tribes and managing agencies.<sup>64</sup>

Mainstem operation and maintenance result in damage to Native American burial grounds in multiple ways. Reservoir water releases and corresponding water level fluctuations erode, expose, and cause significant dam-

*and Cultural Heritage Management, Final Report 23–25* (August 2000), <http://www.dams.org/docs/kbase/working/culture.pdf> (accessed Feb. 7, 2005).

56. See Lehmer, *supra* n. 54, at 65–181 (chronicling the unique cultural development in Middle Missouri Indian villages from A.D. 900–1862).

57. Banks & Snortland, *supra* n. 55. See Douglas D. Scott, *Euro-American Archaeology*, in *Archaeology on the Great Plains*, *supra* n. 54, at 481–510 (detailing sites found and examined during the government sponsored Missouri River Basin Surveys of the 1940s and 50s).

58. *Status Report*, *supra* n. 54, at 2–4 (also noting that the lack of surveys results from deficient cultural resource protection funding throughout the Midwest). Todd Kapler, an archeologist and historian from Sioux City, Iowa, contends that there are places along the Missouri in South Dakota where tribes had three or four occupations in one area, one on top of the other, through the centuries. Steve Young, *Black Market Trade in Bones*, *Argus Leader* 1A (Dec. 31, 2000).

59. Banks & Snortland, *supra* n. 55.

60. 58 Stat. 887 (codified as amended in 16 U.S.C. §§ 460d, 825s (2000)); 43 U.S.C. § 490 (2000); and scattered sections of 33 U.S.C. (2000)). See Michael L. Lawson, *Dammed Indians: The Pick-Sloan Plan and the Missouri River Sioux* 9–26 (U. Okla. Press 1982) (recounting the politics behind decisions to dam the upper Missouri).

61. Banks & Snortland, *supra* n. 55.

62. *Id.*; Lawson, *supra* n. 60, at 180. In addition, the Bureau of Reclamation oversees another sixty dams and reservoirs on the upper Missouri’s tributaries. Banks & Snortland, *supra* n. 55.

63. *Status Report*, *supra* n. 54, at 2. At the beginning of the Mainstem System lies Fort Peck Dam and its corresponding reservoir, Lake Peck, in Montana, followed by Garrison Dam (Lake Sakakawea) in North Dakota, and Oahe Dam (Lake Oahe) crossing both North and South Dakota. *Id.* To the south sit Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), and Gavins Point Dam (Lewis and Clark Lake) in South Dakota and Northern Nebraska. *Id.*

64. See Banks & Snortland, *supra* n. 55; *supra* nn. 73–114 and accompanying text (detailing disputes between the Army Corps of Engineers and the Yankton Sioux Tribe).

age to human remains and cultural items.<sup>65</sup> Similarly, increased recreational opportunities in Mainstem reservoirs and adjacent areas negatively impact gravesites.<sup>66</sup> Tribes want to preserve their collective history by protecting burial grounds and other reminders of their past.<sup>67</sup> Conversely, the Corps wants to release water to generate hydropower and allow for increased navigation and various recreational opportunities that fuel the economy.<sup>68</sup> These differing needs have produced conflicting priorities throughout the history of the Pick-Sloan Plan.<sup>69</sup>

Seemingly, NAGPRA and its consultation procedures alleviate some of the tension between the parties by giving tribes the opportunity to participate in the agency decision-making process.<sup>70</sup> To date, however, serious conflict remains. Fueling the fire, the Corps recently acted before engaging in tribal consultation at two Mainstem sites resulting in native grave disturbances and further agency/tribe fragmentation.<sup>71</sup> In each instance, the affected Yankton Sioux Tribe brought suit to compel agency compliance with NAGPRA.<sup>72</sup> The following analysis details the Corps' actions on the Missouri and documents the relief awarded to the tribe by the court.

#### A. White Swan Church Cemetery

White Swan Church Cemetery (White Swan), located near Greenwood, South Dakota, was known to include hundreds of Indian burial sites for hundreds of years.<sup>73</sup> Army Corps documents confirm that Sioux graves at White Swan date back to 1869.<sup>74</sup> Yankton oral history relates that the tribe buried its dead in the area of the church since at least 1838 and possibly since prehistoric times.<sup>75</sup> Though aware of the existence of the Indian ceme-

65. Banks & Snortland, *supra* n. 55. The Advisory Council on Historic Preservation estimates that the average annual erosion at all the Mainstem reservoirs is between one and two square miles, resulting in an estimated loss of 40 to 80 sites per year. *Status Report*, *supra* n. 54, at 3.

66. Banks & Snortland, *supra* n. 55.

67. See *infra* nn. 73–114 and accompanying text (analyzing claims brought by the Yankton Sioux Tribe to protect ancestral burial grounds on the Missouri from damage caused by the Corps).

68. See *Status Report*, *supra* n. 54, at 2. The Mainstem System generated more than \$260 million dollars in direct hydropower revenues in 2002. *Id.* Additionally, the area's significant recreational opportunities contributed more than \$80 million to state and local economies. *Id.*

69. See Lawson, *supra* n. 60, at 68–79 (detailing early disputes between tribes and the Corps regarding dam operation); Banks & Snortland, *supra* n. 55 (discussing more recent agency/tribe conflict).

70. See 43 C.F.R. § 10.3(c)(1) (2004) (requiring agency/tribe consultation prior to agency action that may result in discovery of human remains or cultural items).

71. See *Yankton I*, *supra* n. 7 (documenting the White Swan Church Cemetery ("White Swan") controversy); *Yankton II*, *supra* n. 7 (describing agency action and burial site destruction at North Point Recreation Area ("North Point")).

72. The Corps' activities that disturbed Yankton burial sites at White Swan and North Point not only violated NAGPRA, but also section 106 of the National Historic Preservation Act ("NHPA"). 16 U.S.C. 470–470w-6 (2000). For commentary on the Corps' NHPA noncompliance in the upper Missouri River, see Lucus Ritchie, *The failure of the National Historic Preservation Act in the Missouri River Basin and A Proposed Solution*, 9 Great Plains Nat. Resources J. \_\_ (forthcoming 2005).

73. *Yankton I*, 83 F. Supp. 2d at 1048–49.

74. *Id.* at 1049.

75. *Id.*

tery, the United States filed a petition to condemn the property containing the burial site to construct Fort Randall Dam and Lake Francis Case in 1949.<sup>76</sup> As part of the condemnation proceedings, the government agreed to remove and rebury the bodies of all persons buried on the condemned site.<sup>77</sup> Specifically, the Corps promised to locate burial sites, determine the identity of the persons buried there, and learn of relatives' wishes regarding reburial.<sup>78</sup> The Corps failed to effectively remove and rebury the bodies located at White Swan.<sup>79</sup>

The Corps knew that its actions had the potential to, and in fact did, unearth bones at White Swan. Pursuant to the Corps' Annual Operating Plan for the Missouri River, water levels at Lake Francis Case fluctuate to serve the multiple purposes of the Pick-Sloan Plan including flood control, irrigation, power supply, navigation, and recreation.<sup>80</sup> This water management leaves White Swan under water for a part of each year.<sup>81</sup> Erosion caused by the cyclic flooding and drying of the site has led to repeated bone exposure and looting.<sup>82</sup> A 1966 Corps memorandum indicates that thirty to forty graves were disturbed at White Swan due to fluctuating water levels.<sup>83</sup> In October 1990, the Corps was once more alerted to observations of bones at the White Swan site.<sup>84</sup> On December 10, 1999, the agency observed remains for a third time when a Corps park ranger spotted seven scattered skulls and twenty-five to thirty exposed graves.<sup>85</sup> Relying on NAGPRA, the Yankton filed suit for protection of the remains discovered in late 1999 and an opportunity to rebury them according to their customs.<sup>86</sup> The tribe sought a permanent injunction or alternatively an injunction preventing the Corps from adjusting water levels at Lake Francis Case until the tribe had

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76. *Id.* The condemnation of White Swan was not completed without protest. Faith Spotted Eagle, an enrolled member of the Yankton Sioux and a descendant of the White Swan community, recounted that at the time of the flooding many Yankton elders lamented that burial sites of numerous ancestors would be submerged. Symposium, *Indian Law, Culture, and the Environment: A New Dialogue for a New Century*, 7 Great Plains Nat. Resources J. 44 (2002) (testimony from a speech delivered by Faith Spotted Eagle). And it was not just Yankton living near White Swan that were affected. Corps dams on the Missouri inundated more than 200,000 acres of Indian land forcing approximately 580 families to move from the river's sheltered bottomlands to the open prairie. Lawson, *supra* n. 60, at 29.

77. *Yankton I*, 83 F. Supp. 2d at 1049.

78. *Id.*

79. *Id.*

80. *Id.* at 1050.

81. *Id.* at 1049. The Corps' 2000 Annual Operating Plan called for the reservoir level, pursuant to a projected median runoff, to contrast from a high of 1355 and a low of 1337 feet above sea level. *Id.* at 1050.

82. *Id.* at 1049-50.

83. *Id.* at 1050. In response to the discovery, the Corps contacted the Yankton Tribal Council and decided to remove and rebury the remains immediately. *Id.* at 1050-51. NAGPRA was not then in effect and this conduct was permitted.

84. *Id.* at 1051. This time the Corps did not exhume the remains. Instead, the agency covered the bones with erosion control fabric and notified the Yankton Tribe and the South Dakota State Archeologist. *Id.*

85. *Id.*

86. *Id.* at 1053.

time to complete religious ceremonies, consult with anthropologists, and respectfully remove the human remains from the site.<sup>87</sup>

Judge Piersol, Chief Judge for the United States District Court of South Dakota, presided over the case. The court first considered whether the Corps' actions were subject to inadvertent discovery or intentional excavation requirements.<sup>88</sup> The tribe argued that the Corps' discovery was not inadvertent since it knew that remains were already present at the site and either knew or should have known that wave action was eroding the burial mounds.<sup>89</sup> In just one paragraph, the court analyzed the issue and ruled that the agency's actions were subject only to the lesser inadvertent discovery requirements.<sup>90</sup> The court pointed to a Corps memorandum detailing the 1990 discovery at White Swan and concluded that it did not appear to indicate that the agency anticipated any additional discoveries at the site.<sup>91</sup> It continued that even if the Corps had anticipated some additional exposure of remains, its disruption of the remains through managing water levels was not "*planned archeological removal of human remains [or cultural items]*" and thus did not fit the regulatory definition of "intentional excavation."<sup>92</sup>

After determining that inadvertent discovery requirements attached, the district court considered whether the Corps had satisfied those requirements.<sup>93</sup> As the responsible land manager, 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 human remains and cultural items discovered; 3) notify Indian tribes that might be entitled to control of the items under the Act; 4) initiate consultation with the appropriate tribe(s) concerning the discovery; 5) follow the required procedures for excavation of any discovered remains; and 6) ensure that proper disposition of the cultural items was carried out.<sup>94</sup> The Corps, as discoverer of the remains, also had a duty to refrain from adjusting water levels at the reservoir for a period of thirty days.<sup>95</sup>

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87. *Id.*

88. *Id.* at 1056.

89. *Id.*

90. *Id.* The Corps had argued that not even the inadvertent discovery requirements were triggered because adjusting water levels was not "activity" regulated by NAGPRA. *Id.* The court summarily dismissed this contention. *Id.* The Corps' interpretation of "activity" or any other NAGPRA definition receives no deference because the Corps does not administer NAGPRA. See e.g. *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (determining deference should be accorded to an executive agency's construction of a statute if Congress has entrusted that agency with the duty to implement the statute at issue). The National Parks Service administers NAGPRA as delegated by the Secretary of the Interior. 25 U.S.C. § 3011 (2000).

91. *Yankton I*, 83 F. Supp. 2d at 1056.

92. *Id.* (quoting 43 C.F.R. § 10.2(g)(3)) (emphasis added).

93. *Id.* at 1056-59

94. *Id.* at 1055 (outlining and describing the procedures commanded by 43 C.F.R. § 10.4(d)(1)).

95. *Id.* at 1057; 25 U.S.C § 3002(d)(1) (2000).

The court determined that the Corps had fulfilled its duties in every respect.<sup>96</sup> Although the Corps did not supply the tribe with written notice of the discovery, the court nevertheless held that the tribe had not been prejudiced because it had been sufficiently notified via telephone.<sup>97</sup> Additionally, the court concluded that while NAGPRA regulations generally require that agencies obtain a permit, consult with various Indian tribes, and develop a written plan of action before removing remains or cultural items, those duties were superceded by the Corps' obligation to "make a reasonable effort to protect the items discovered" because of the specific risk of harm to the remains at issue.<sup>98</sup>

The court did grant a preliminary injunction preventing the Corps from raising the reservoir's water level until January 13, 2000.<sup>99</sup> Additionally, the court retained jurisdiction over the controversy by reserving final judgment on the tribe's request for a permanent injunction.<sup>100</sup> It is doubtful, however, that the court expected a second hearing. Judge Piersol commented: "[i]t is hoped that the parties can agree on a culturally sensitive way in which to accomplish this solemn responsibility [of excavating and repatriating the discovered remains]." <sup>101</sup> The anticipated timely resolution did not occur. The White Swan controversy was not resolved until more than four years after the burial site disturbance.<sup>102</sup> Moreover, a second disagreement between the Yankton and the Corps arose shortly after the White Swan decision.

### B. North Point Recreation Area

Planned construction in the Missouri River Basin has also lead to Indian burial site damage. In April 2002, the State of South Dakota began work at North Point Recreation Area (North Point), located only a few miles from

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96. *Yankton I*, 83 F. Supp. 2d at 1057-58.

97. *Id.*

98. *Id.* at 1058-59 (referencing 43 C.F.R. §§ 10.4(d)(1)(ii), (v) and 25 U.S.C. § 3002(d)). The specific risk of harm requiring the precedence of NAGPRA's protection provisions over its consultation and permit obligations was that only three days remained from the opinion date until the end of the 30-day cessation of activity period. The court reasoned that such a short span required swift action to collect the loose remains thus negating an opportunity for permitting or additional tribal consultation. *Id.* at 1060.

99. *Id.* at 1060. In effect, the January 13th date simply upheld the 30-day cessation of activity required by NAGPRA.

100. *Id.*

101. *Id.* at 1059.

102. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, No. 99-4228 (D.S.D. Feb. 26, 2004) (judgment dismissing action). Additionally, a similar drawdown case was brought against the Corps by another South Dakota tribe. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 00-1023 (D.S.D. Nov. 7, 2000) (order granting temporary restraining order in favor of tribe). The Standing Rock charged that the Corps' water manipulation at Lake Oahe, a Missouri Mainstem reservoir, exposed remains and cultural items at nearby Mad Bear Camp. *Id.* In a settlement agreement, the Corps agreed to undertake investigative surveys, stabilize disrupted sites, and regularly monitor Mad Bear Camp for looting and erosion. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 00-1023 (D.S.D. Apr. 17, 2002) (order approving settlement agreement).

the White Swan site, to add approximately 100 camping spots, new roads, and parking areas in anticipation of tourists traveling to the Missouri River Basin to celebrate the bicentennial of Lewis and Clark's westward journey.

<sup>103</sup> On the morning of May 14, 2002, a contractor employed at North Point observed bones in the soil he was moving while operating a front-end loader.<sup>104</sup> The contractor notified the Park Supervisor who in turn notified a Corps archeologist. The archeologist, who knew the Yankton had asserted in the past that ancestral graves were located at North Point, visited the site on May 20, 2002.<sup>105</sup> Determining the discovered remains were human, she collected the loose and scattered bones and placed them in a box. Three days later, she found the additional remains of a young woman and two children as well as pottery shards and beads, in the soil excavated from the North Point site.<sup>106</sup> At this time, the Corps initiated the NAGPRA process.<sup>107</sup>

The Yankton Tribe filed suit shortly thereafter to ensure adequate protection of human remains and cultural items located at North Point that might be culturally affiliated with the tribe. Again Judge Piersol presided and again the first question presented was which requirements attached to the find: inadvertent discovery or intentional excavation.<sup>108</sup> Despite the Corps' knowledge of the tribe's oral history and the abundance of burial sites on the Missouri's banks, the court determined that the agency's actions triggered only the lesser inadvertent requirements with little sophisticated analysis.<sup>109</sup>

As the responsible federal agency, the Corps had many of the same duties it had at White Swan. Here, however, the court determined that the agency did not meet all its obligations under NAGPRA. Specifically, the court found that the archeologist's removal of human remains from the site prior to tribal consultation and ARPA permit authorization was a violation of the NAGPRA.<sup>110</sup> Due to the Corps' failure to comply with NAGPRA, the court issued an injunction against further activity at the site to remain in

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103. *Yankton II*, 209 F. Supp. 2d 1008, 1011 (D.S.D. 2002).

104. *Id.*

105. *Id.* at 1012. Yankton representative Ellsworth Chytka reported that he told Corps representatives several times that the ridges at North Point contained the remains of his ancestors. Lee Williams, *Tribe: Workers Move Bones*, Argus Leader 1B (June 5, 2003).

106. *Yankton II*, 209 F. Supp. 2d at 1012.

107. Although the remains were discovered on state land, the Corps was responsible for administering NAGPRA at the North Point site. *Id.* at 1018. North Point was part of a land parcel transferred by the federal government to South Dakota "for fish and wildlife purposes, or public recreation uses, in perpetuity" via the Water Resources Development Act of 1999 (WRDA), Pub. L. No. 106-53, § 605, 113 Stat. 269 (1999). Pursuant to the WRDA, the Corps and South Dakota agreed that despite the transfer of lands to the state, the Corps retained all its obligations under NAGPRA and various other cultural resource protection statutes. *Id.*

108. *Yankton II*, 209 F. Supp. 2d at 1016-19.

109. *Id.* at 1019.

110. *Id.* at 1019-1020. No emergency situation existed at North Point to supercede the Corps' duty to initiate consultation and obtain an ARPA permit prior to excavating remains and cultural items like it did at White Swan. *Id.*

effect until the earliest of four events: 1) the human remains and cultural items at North Point receive burial according to Yankton customs; 2) the court alters the injunction because the Corps demonstrates that fill placed at certain sites no longer contains cultural items; 3) the parties negotiate an alternative plan; or 4) the court issues a decision on the merits of the Yankton's request for a permanent injunction.<sup>111</sup> The controversy at North Point had yet to be fully resolved by the spring of 2004, more than two years after the initial disturbance.<sup>112</sup>

Undoubtedly, the district court felt it had successfully balanced the equities at White Swan and North Point. The tribe received some protection — Judge Piersol granted injunctions to temporarily stop activity at the disturbed site in both instances<sup>113</sup> — yet Corps' operations on the Missouri were not permanently halted. The tribe's success under NAGPRA thus rings hollow because the Corps was not required to comply with the statute's intentional excavation requirements.<sup>114</sup>

#### V. INTENTIONAL EXCAVATION REQUIREMENTS SHOULD BE FOLLOWED IN "NOTICE SITUATIONS"

NAGPRA calls for pre-action consultation only in the context of intentional excavation.<sup>115</sup> While the statute does not define intentional excavation, NAGPRA's implementing regulations describe "intentional excavation" as "*the planned archeological removal of human remains [or cultural items] found under or on the surface of Federal or tribal lands,*"<sup>116</sup> and "inadvertent discovery" as "*the unanticipated encounter or detection of human remains [or cultural items] on Federal or tribal lands.*"<sup>117</sup> The court's analysis of whether inadvertent discovery or intentional excavation obligations applied at White Swan and North Point focused solely on the regulatory definition of "intentional excavation" and determined that because routine construction activity and water level adjustment were not "planned archeological removal," only the inadvertent discovery requirements attached.<sup>118</sup> This determination relied on an incomplete reading of the NAGPRA regulations.<sup>119</sup> If Judge Piersol had looked at the NAGPRA regulations as a

111. *Id.* at 1025.

112. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, No. 02-4126 (D.S.D. Apr. 15, 2004) (judicial order granting motion to extend time to file response).

113. Piersol's decision regarding White Swan marked the first successful effort to overrule the Corps' plans to release water. Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin*, 6 Great Plains Nat. Resources J. 131, 161 (2002).

114. See Riley, *supra* n. 18, at 71 (arguing that if the White Swan decision exhibits all the possible relief awarded under NAGPRA, the Act's human rights aims remain unsatisfied).

115. 25 U.S.C. § 3002(c)(2) (2000).

116. 43 C.F.R. § 10.2(g)(3) (2004) (emphasis added).

117. *Id.* at § 10.2(g)(4) (emphasis added).

118. *Yankton I*, 83 F. Supp. 2d at 1056; *Yankton II*, 209 F. Supp. 2d at 1019.

119. Other courts have been equally confused by NAGPRA's intricate regulations and interpreted them incorrectly in discovery situations. See *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d

whole, he would have concluded that intentional excavation requirements apply in all “notice situations”—situations where an agency has knowledge that its actions are likely to disturb Indian human remains or cultural items.

The challenged agency actions at White Swan and North Point are not readily described as “planned archeological removals,”<sup>120</sup> as Judge Piersol correctly determined. Neither, however, are the actions properly classified as “unanticipated encounters”<sup>121</sup> due to the Corps’ specific knowledge regarding Indian remains at each site as well as the documented archeological history of the Missouri River Basin.<sup>122</sup> Consequently, NAGPRA and its regulations are ambiguous as to whether inadvertent discovery or intentional excavation requirements apply in “notice situations.”

The Supreme Court has ruled that when interpreting ambiguous statutory or regulatory phrases, a court is “not guided by a single sentence...but look[s] to the provisions of the whole law, and to its object and policy.”<sup>123</sup> Accordingly, NAGPRA regulations implementing the statute’s intentional excavation procedures indicate that pre-action consultation is required in “notice situations.” NAGPRA’s legislative history, as well as fundamental principles of Indian law and current federal policy regarding tribal affairs, further suggest that pre-action consultation must occur when agencies have knowledge that their actions are likely to disturb Indian remains or cultural items. A complete reading of NAGPRA and its regulations, therefore, demonstrates intentional excavation requirements should attach in all “notice situations.”

### A. NAGPRA Regulations

NAGPRA regulations implementing intentional excavation procedures indicate pre-action consultation is required when the land-managing agency believes there is a reasonable possibility that graves will be disturbed by

860, 889 (D. Ariz. 2003) (holding that plaintiff Apache Tribe lacked a cause of action to protect its ancestors’ remains from federally conducted reservoir drawdowns, and stating: “NAGPRA is not prospective, and is triggered only after a person has made an inadvertent discovery.”); *Western Mohegan Tribe & Nation of New York v. New York*, 100 F. Supp. 2d 122, 126 (N.D.N.Y. 2000) (concluding that NAGPRA only applies to remains already discovered or excavated); *Abenaki Nation of Mississiquoi v. Hughes*, 805 F. Supp. 234, 252 (D. Vt. 1992) (determining that while the possibility of human remains and cultural items existing at the site was “extremely high,” plaintiff tribe’s NAGPRA claim was premature because remains or cultural items had yet to be discovered or excavated).

120. 43 C.F.R. § 10.2(g)(3) (2004).

121. *Id.* at § 10.2(g)(4).

122. *See supra* nn. 54–114 and accompanying text (describing the rich archeological history of the Missouri River Basin as well as the Corps’ knowledge of Indian burial sites at White Swan and North Point). “Unanticipated” is defined to mean “unexpected, unforeseen.” *Webster’s New International Dictionary* 2482 (3d ed., Merriam-Webster 1986). The Corps’ knowledge that Indian remains almost certainly existed at White Swan and North Point indicates that the subsequent discovery of such remains was not unanticipated.

123. *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)); *See also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220–221 (1986) (concluding that the meaning of an ambiguous statutory phrase was clarified by the language and purpose of the Act as a whole).

agency action. The regulations do not provide that agencies must consult with tribes before every action to ensure proper burial ground protection; rather, the regulations state a “[f]ederal agency official must take reasonable steps to determine whether a planned activity *may result in the excavation* of human remains [or cultural items].”<sup>124</sup> The regulations further require the agency official to notify and consult with appropriate tribes concerning human remains and cultural items “that *may be excavated*.”<sup>125</sup> Lastly, the intentional excavation regulations give rights to tribes that “become aware of a planned project that *may result in the excavation* of human remains [or cultural items].”<sup>126</sup> In sum, these provisions require the responsible federal land manager to make a good faith determination as to whether a planned activity is likely to result in discovery of human remains or cultural items, and if a reasonable possibility of discovery exists, the land manager must follow the intentional excavation requirements.

The activity of adjusting water levels at Lake Francis Case was planned<sup>127</sup> as was the construction and development at North Point.<sup>128</sup> Moreover, it was reasonable, perhaps even certain, that either activity would result in excavation of human remains or cultural items. At the time of discovery, White Swan Church cemetery had a fifty-year history of human remains being exposed due to water inundation and reduction that the Corps not only knew about, but directly caused.<sup>129</sup> North Point Recreation Area was similarly known to the Corps as a likely home of remains and cultural items.<sup>130</sup> The facts from White Swan and North Point clearly fit within the intentional excavation parameters. Additionally, because of the 30-day cessation of work NAGPRA commands for discovery absent a pre-action agreement,<sup>131</sup> the clear message of the law is for acting parties to consult with affected tribes before beginning a project.<sup>132</sup>

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124. 43 C.F.R. § 10.3(c)(1) (2004) (emphasis added).

125. *Id.* (emphasis added).

126. *Id.* at § 10.3(c)(4) (emphasis added).

127. *Yankton I*, 83 F. Supp. 2d at 1056. The district court determined that Corps regulation of the reservoir's water level, and its effect upon the lakeshore, amounted to “activity” under NAGPRA Section 3002(d). *Id.* at 1056-57. Additionally, the activity was “planned” pursuant to the Corps' Annual Operating Plan for the Fort Randall Dam. *Id.* at 1049-1050.

128. *Yankton II*, 209 F. Supp. 2d at 1011 (referring to North Point as a major construction “activity,” planned in connection with several private contractors).

129. *Yankton I*, 83 F. Supp. 2d at 1050.

130. *Yankton II*, 209 F. Supp. 2d at 1012.

131. 43 C.F.R. §§ 10.4(c), (d)(2) (2004) (implementing the cessation of activity period mandated by 25 U.S.C. § 3002(d)(1)).

132. Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern & Stan N. Harris, *Cultural Property Law: A Practitioner's Guide to the Management, Protection, and Preservation of Heritage Resources* 28-29 (Sec. of Env., Energy, and Resources, ABA 2004).

### B. Legislative Intent

Congress intended for NAGPRA to promote communication between tribes and federal agencies.<sup>133</sup> By not requiring pre-action consultation in situations like White Swan and North Point, courts sidestep the legislative goal of the Act to prospectively protect human remains and cultural items and encourage tribal participation in federal decision-making.

The legislators most involved in passing NAGPRA expressed their intent for the Act to foster greater communication between government agencies and tribes in excavation and discovery situations. For example, the Senate Select Committee on Indian Affairs emphasized the importance of consultation by noting that many of America's culturally insensitive practices such as grave disturbances and looting occurred due to the failure of agencies and federally funded museums to seek the consent of or consult with tribes.<sup>134</sup> It continued that NAGPRA was meant to remedy that problem by establishing "a process which shall provide a framework for discussions between Indian tribes and museums and Federal agencies."<sup>135</sup> Hawaiian Senator and NAGPRA sponsor Daniel Inouye further expounded the importance of consultation by commenting that NAGPRA was designed to foster "a more open and cooperative relationship" among Native Americans, agencies, and federally funded museums, and that the legislation would provide Native Americans "greater ability to negotiate."<sup>136</sup>

Congress unequivocally intended agencies to consult with tribes when agency officials have knowledge that their actions are likely to disturb Indian remains or cultural items. Therefore, advance consultation was legislatively mandated at North Point and White Swan. Because the Corps did not follow intentional excavation procedures, the Yankton needlessly suffered the type of government insensitivity and harm that Congress specifically sought to curtail.

### C. Fundamental Principles of Indian Law

The foundations of federal Indian law require that advance consultation rights attach in "notice situations." NAGPRA must be viewed in light of the trust doctrine, which recognizes a fiduciary duty owed by the government to Indian tribes and peoples<sup>137</sup> and the Indian canon of construction mandating certain laws pertaining to Indian affairs be liberally construed for the

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133. See generally H.R. Rpt. 101-877, at 9-20 (Oct. 15, 1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4367-4379.

134. Sen. Rpt. 473, at 3 (Sept. 26, 1990).

135. *Id.*

136. 136 Cong. Rec. S17, 174-75 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

137. See Felix S. Cohen's *Handbook of Federal Indian Law*, supra n. 13, at 207 (generally explaining the trust doctrine). See also *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (defining the relationship between tribes and the federal government as "a ward to his guardian").

benefit of Indian peoples.<sup>138</sup> Yet in the *Yankton* cases, the court narrowly interpreted NAGPRA's procedural requirements to provide minimal protection to tribes—a result clearly inconsistent with established principles of Indian law.

Federal Indian law is informed by and can only be understood in the context of the historical relationship between Indian tribes and the federal government—a relationship defined by “oppression, genocide, and repatriations.”<sup>139</sup> This past has given rise to a judicially and treaty created trust concept that requires the federal government to act with heightened good faith and fairness in its dealings with Indians.<sup>140</sup> Congress explicitly incorporated this trust responsibility into NAGPRA by exclaiming that the statute “reflects the unique relationship between the Federal Government and Indian tribes . . . and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.”<sup>141</sup> Because the Corps did not engage in advance consultation at North Point or White Swan when they knew their actions might unearth remains, the agency ignored the best interests of its Indian wards, thus violating the trust doctrine.

Failing to require advance consultation is also inconsistent with the canon of construction that federal statutes and agreements with Indian tribes are to be construed liberally in favor of Indian peoples. Supreme Court jurisprudence suggests that ambiguous statutory requirements and directives that affect Native Americans should be given the interpretation that benefits tribes.<sup>142</sup> The district court therefore erred by not interpreting NAGPRA to give pre-action consultation rights to the Yankton.

#### D. Current Federal Policy

Current policy regarding tribal affairs requires executive agencies to afford the utmost attention to consultation and protection of Indian burial

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138. See *Felix S. Cohen's Handbook of Federal Indian Law*, *supra* n. 13, at 224-25 (describing the Indian canon of statutory construction). See also *Antoine v. Washington*, 420 U.S. 194, 200 (1975) (analyzing a statute affecting Indian peoples and stating “[t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [Indian tribes]”) (internal citations omitted).

139. *Riley*, *supra* n. 18, at 74.

140. See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (imposing the fiduciary obligations of private trustees on federal officials dealing with Native Americans); *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935) (determining that federal authority over Indian peoples and land was subject “to limitations inhering such a guardianship”).

141. 25 U.S.C. § 3010 (2000).

142. See *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (facing two constructions of an excise tax to be applied to Indian land sales and upholding the construction more favorable to the tribe); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–413 (1968) (relying on the Indian canon of construction to determine that a statute terminating a federal Indian treaty did not nullify the treaty rights of tribal members to hunt and fish on reservation land free from state regulation); *Winters v. United States*, 207 U.S. 564, 576–77 (1908) (recognizing a rule of interpretation that ambiguities in federal agreements and treaties with Indian tribes are to be resolved in favor of Indian peoples).

sites within the bounds of applicable federal law. President Clinton's 1996 Executive Order 13,007 calls for federal agencies to implement procedures to facilitate consultation with appropriate Indian tribes concerning action on federal lands that may affect the physical integrity of sacred sites.<sup>143</sup> Additionally, the Order commands agencies to give Native Americans access to their traditional sites such as burial grounds and to consider whether certain projects can be located to avoid such sites.<sup>144</sup> Clinton's 2000 Executive Order 13,175 requires federal agencies to uphold the trust doctrine and strive to work with Indian tribes on a government-to-government basis.<sup>145</sup> Specifically, the Order provides that agencies must ensure meaningful and timely input by tribal officials in developing federal policies that have tribal implications.<sup>146</sup>

A Clinton memorandum to the heads of all executive agencies further addressed the need for a government-to-government relationship between tribes and the federal government.<sup>147</sup> In response to this call to work with tribes as sovereigns, the Chief of the Army Corps of Engineers distributed a policy guidance letter to all of his staff.<sup>148</sup> The letter explicitly acknowledged the agency's trust relationship with Indian tribes, affirmed that tribes retain their inherent rights to self-government, and mandated pre-decisional and honest consultation prior to final agency decision-making.<sup>149</sup> The Corps' actions at White Swan and North Point conform neither to the spirit of the guidance letter nor the Executive Orders described above, all of which call for consultation prior to agency action.

NAGPRA's regulations indicate that advance consultation should be provided when agency officials have knowledge that their actions are likely to disturb human remains or cultural items. The statute's legislative history, as well as fundamental principles of Indian law and current federal policy concerning tribes, support this interpretation of the statute. Because pre-action consultation is only required under the intentional excavation procedures,<sup>150</sup> the correct interpretation of NAGPRA is that intentional excava-

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143. Exec. Or. 13007, 61 Fed. Reg. 26771 (May 25, 1996). "Sacred site" refers to "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site." *Id.*

144. *Id.*

145. Exec. Or. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

146. *Id.*

147. *Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22951 (May 4, 1994). Ironically, there is no indication that this presidential policy was developed in consultation with Indian tribes.

148. U.S. Army Corps of Engineers, *Policy Guidance Letter No. 57: Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (Feb. 18, 1998), [http://www.usace.army.mil/inet/functions/cw/cecwp/branches/guidance\\_dev/pgls/pdf/pgl57a.pdf](http://www.usace.army.mil/inet/functions/cw/cecwp/branches/guidance_dev/pgls/pdf/pgl57a.pdf) (accessed Feb. 7, 2005).

149. *Id.*

150. 25 U.S.C. § 3002(c)(2) (2000).

tion requirements are triggered in all “notice situations.” Public policy supports this position. The following section details how early, forthright consultation benefits tribes, agencies, and other involved parties.

## VI. THE BENEFITS OF PRE-ACTION CONSULTATION

The application of intentional excavation requirements in “notice situations” promotes protection of native gravesites, agency efficiency, and the public interest. NAGPRA’s regulations command that following consultation, pre-action plans must be written and executed.<sup>151</sup> These guidance documents make agencies aware of tribal concerns and often address the most sensitive areas of contention.<sup>152</sup> Moreover, the guidance documents make it easier for agencies to both oversee and complete projects by minimizing work stoppages and burdensome procedure. Lastly, pre-action consultation promotes the public interest by better protecting Indian burial grounds and preserving Native American culture for future generations.

### A. Tribal Benefits

Unequivocally, agency or agency-authorized disturbance of ancestral remains and cultural items angers and saddens tribes. This injury to tribal interests can be easily and significantly mitigated through pre-action consultation. To demonstrate the importance of pre-action consultation, the following analysis presents several harms encountered by the Yankton at White Swan and North Point due to the Corps’ non-compliance and reveals how those harms could have been prevented through early consultation.

Pre-action consultation directs the responsible land manager to the tribal member selected by the tribe to be notified when a discovery occurs. The Corps failed to notify the correct NAGPRA tribal representative of the discovery at North Point.<sup>153</sup> Timely notification is essential to ensuring that exposed remains are handled with dignity and respect. At North Point, construction activity reoccurred within 100 feet of the disturbed site prior to the

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151. 43 C.F.R. § 10.3(c)(2) (2004).

152. NAGPRA regulations call for the plan of action to document, at minimum: “(1) The kinds of objects to be considered as cultural items as defined in § 10.2 (b); (2) The specific information used to determine custody pursuant to § 10.6; (3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered; (4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered; (5) The kinds of analysis planned for each kind of object; (6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural patrimony; (7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian organization; (8) The nature of reports to be prepared; and (9) The planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following § 10.6.” *Id.* at § 10.5(e)(1)–(9).

153. *Yankton II*, 209 F. Supp. 2d at 1013.

Yankton even being alerted to the discovery of their ancestors' remains.<sup>154</sup> This additional desecration, which probably could have been mitigated or avoided by earlier tribal presence at the site, clearly supports the need for timely notification and pre-action consultation.

Even more crucial to tribes than notification is the sensitive issue of who collects remains after discovery and how the remains are stored post-collection. NAGPRA does not require the affected tribe be allowed to collect discovered remains or that the agency store the remains in a particular way. The regulations, however, do instruct that the responsible land manager should determine whether the tribal members desire to perform the recovery of discovered remains in a traditional manner.<sup>155</sup> The Corps did not consult the Yankton regarding their burial customs prior to activity commencing at White Swan or North Point.<sup>156</sup> Due to this lack of communication, the Corps removed remains from North Point without an opportunity for tribal traditions to be followed.<sup>157</sup> If the Corps had sought tribal advice on how to treat remains upon a potential discovery, needless harm to the Yankton and their dead could have been averted.

NAGPRA also requires that the responsible land manager, upon notification of discovery, take "reasonable steps" to secure and protect discovered remains and cultural items.<sup>158</sup> The regulations, however, do not specify a time period after which the land manager is relieved of this duty to secure and protect. At White Swan, heated debate between the tribe and Corps concerned how to protect remains that could not be immediately recovered and reburied due to severe weather conditions.<sup>159</sup> The Corps wanted to flood the discovery area to a sufficient depth to avoid erosion caused by wave action and constant freezing and thawing, while tribal experts offered alternative ideas.<sup>160</sup> The parties eventually determined to keep the remains in place and cover them with a protective fabric until a workable plan for disinterment was developed.<sup>161</sup> But a workable solution had yet to be

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154. *Id.* at 1012. Remarkably, the Corps failed to inform contractors involved with the North Point construction about NAGPRA procedures or the possibility that bones might be unearthed at the site despite Yankton oral history of burial mounds in the area. It is not only the tribes that feel frustration at this lack of care but also the contractors. See Lee Williams, *Tribe: Workers Move Bones*, Argus Leader 1B (June 5, 2003) (interviewing two North Point contractors both saddened and appalled at the Corps' failure to inform).

155. 43 C.F.R. § 10.5(e)(7) (2004).

156. *Yankton I*, 83 F. Supp. 2d at 1048-51; *Yankton II*, 209 F. Supp. 2d at 1013.

157. *Yankton II*, 209 F. Supp. 2d at 1012. The Yankton Sioux have many procedures that must be followed for reburial in accordance with tribal traditions, chief among them the ceremonies conducted by the Braveheart Society, a traditional group of tribal women, and rituals conducted by tribal medicine men. *Yankton I*, 83 F. Supp. 2d at 1053.

158. 43 C.F.R. § 10.4(d)(1)(ii) (2004).

159. *Yankton I*, 83 F. Supp. 2d at 1052-53. The parties were specifically worried about the harm that could result from trying to disinter bones from frozen ground. *Id.*

160. *Id.* at 1052-53. The tribe proffered three alternatives to the Corps' proposal all requiring much more intensive archeological fieldwork and forensic study. *Id.*

161. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 194 F. Supp. 2d 977, 981 (D.S.D. 2002).

reached by the fall of 2001, two years after the initial discovery, and the Corps tried to argue that it had discharged its duty to protect the covered bones.<sup>162</sup> The court ruled that the Corps had not clearly fulfilled its obligations under NAGPRA.<sup>163</sup> A permanent solution for protection of graves at White Swan remained a point of legal contention between the agency and the tribe until early 2004.<sup>164</sup>

Advance planning for reasonable care and protection of Indian remains and cultural items are of incalculable value to tribes. Post-discovery consultation is a more emotionally charged process than negotiation prior to agency action, making it a more difficult atmosphere in which to reach a workable plan. Before-the-fact consultation promotes rational and thorough answers to the difficult and sensitive questions of what secure and protect means, giving tribes the protection intended by NAGPRA.

Besides preventing harms encountered by the Yankton, pre-action plans can contain helpful descriptions of procedures to be followed in emergency and dispute contexts. Under NAGPRA, disagreement provisions should include procedures for both agency/tribe and tribe/tribe points of contention. The pre-action plans may also detail specifics for continuing tribal involvement in agency decisions, such as where and when future meetings will take place.

### B. Agency Benefits

Pre-activity consultation and its resulting plan of action not only protect native remains and cultural items, they also aid agency management of federal lands. NAGPRA creates the potential for halting site activity for thirty days if remains or cultural items are discovered in an on-going activity.<sup>165</sup> Such delays can be burdensome and costly but can be avoided if the responsible agency consults with tribes pre-action and develops an appropriate discovery action plan.<sup>166</sup> Early consultation will benefit agencies by ensuring that planned actions on federal lands will go smoothly without work stoppages and unnecessary red tape.

The Transwestern Pipeline Project exhibits the benefits of early, good faith consultation between project proponents, land managers, and affected tribes.<sup>167</sup> The project involved the construction of approximately 300 miles

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162. *Id.*

163. *Id.* at 986.

164. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, No. 99-4228 (D.S.D. Feb. 26, 2004) (judgment dismissing action).

165. 25 U.S.C. § 3002(d)(1) (2000).

166. Dean Suagee argues that pre-action consultation benefits agencies by establishing agreed upon procedures for handling discovery situations without having to stop work each time a discovery occurs. Suagee, *supra* n. 26, at 209. He further contends that such consultation may also benefit tribes by reducing the rate at which discoveries simply go unreported. *Id.*

167. Gary D. Stumpf, *A Federal Land Management Perspective on Repatriation*, 24 *Ariz. St. L.J.* 303, 314-319 (1992).

of thirty-inch pipeline throughout the southwestern United States.<sup>168</sup> Construction took place on private lands and lands managed by the Bureau of Land Management, the United States Forest Service, the Navajo Nation, and the states of Arizona and New Mexico.<sup>169</sup> To avoid work delays, Transwestern Pipeline Company, with assistance from the responsible land managers, developed a pre-construction plan of action for agencies and affected tribes that established the procedures for handling discovered cultural items.<sup>170</sup> Among other specifics, the plan described the methods for excavation in case of discovery, ensuring that remains and other cultural items would be handled in a respectful and dignified manner prior to reburial.<sup>171</sup> The Transwestern plan of action was a great success to both the project proponents and the responsible agencies, accommodating the wishes of Indian tribes with minimal construction delay and expense.<sup>172</sup>

A pre-action plan of action also promotes goodwill between tribes and agencies and helps agencies avoid the protracted litigation faced at White Swan and North Point. Specifically, early consultation and a resulting plan will force agencies to define terms like “reasonable steps to secure and protect” before an activity commences. Planning allows agencies to faithfully discharge their duties under NAGPRA while complying with the federal government’s trust responsibility.

### C. Public Benefits

Exploitation of areas rich in cultural resources often provides economic benefits. For example, operation of the Missouri Mainstem System dams generates affordable hydropower and is an “economic engine” for the Upper Great Plains.<sup>173</sup> Preservation of culturally rich properties, however, is equally important. Protecting sites with religious and cultural significance to Indian tribes propagates indigenous traditions and American history—foundations central to our current identity and future advances.

Pre-action consultation awards tribes the opportunity to develop an arrangement with the responsible federal land manager that respects tribal

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168. *Id.* at 314.

169. *Id.*

170. *Id.* at 316. The Transwestern Pipeline Project commenced shortly after NAGPRA went into effect and before the Act’s regulations had been promulgated. Therefore, the project’s plan of action did not follow the procedures set forth in NAGPRA’s implementing regulations. Rather, the project followed a Memorandum of Understanding (MOU) strikingly similar to the agency action plan later outlined in the regulations. Similarities between the MOU and current regulations can be observed by comparing 43 C.F.R. §§ 10.5(e)(1)–(9) (2004) to the basic provisions of the Transwestern MOU listed at Stumpf, *supra* n. 167, at 317.

171. Stumpf, *supra* n. 167, at 317.

172. Interview with Gary Stumpf, Bureau of Land Management (Jan. 14, 2004). The benefits realized by the responsible land managers in the Transwestern project are similar to the benefits that could have been realized by the Army Corps at North Point if a pre-action plan of action had been developed. Plans of action are of even greater value to agencies in situations like White Swan where the Corps was both the responsible land manager and the acting party.

173. *Status Report*, *supra* n. 54, at 2.

customs regarding disinterment and reburial of their ancestral remains. In turn, this benefits the public by perpetuating knowledge of native traditions and beliefs. Indian culture and customs have shaped all aspects of modern American life from farming and art to military techniques and place names.<sup>174</sup> Each unique tribal culture has its own stories to tell and deserves to be honored, celebrated, and protected.<sup>175</sup> As the preamble to the National Historic Preservation Act of 1966 (NHPA)<sup>176</sup> relates, the historical past of the nation must be preserved as a “living part” of American life “so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”<sup>177</sup> Certainly, native traditions and existing native cultures need to be considered when developing a blueprint for America’s future.

The new buzzword for societal growth is “sustainable development.” And while there is little agreement concerning what that term means, many of its proponents agree that it must include a concept of stewardship—a promise on the part of present generations to preserve natural, cultural, and historic resources so that future generations will be able to use them.<sup>178</sup> Measures designed to protect Indian customs such as pre-action NAGPRA consultation aid this movement. Dean Suagee argues that Indian cultural values exhibit many of the tenets essential to sustainable development, namely, respect for the environment and a local, community-based way of life.<sup>179</sup> For American people, NAGPRA protection is not necessarily about protecting a particular site from damage as a result of development. It is more about retaining native customs and traditions so that generations to come can learn, and potentially benefit, from Indian teachings. The philosophical underpinnings of native traditions regarding environment and community may help us meet the needs of the present without destroying the ability to meet our aspirations of the future.<sup>180</sup>

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174. See Jack Weatherford, *Native Roots: How the Indians Enriched America* (1<sup>st</sup> Ballantine Books 1991) (detailing the vital role Indian civilizations have played in the making of the United States); See also Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 Am. Indian L. Rev. 133 (1993) (explaining the significant part Native Americans have performed in shaping American government).

175. See, e.g., Diane Barthel, *Historic Preservation: Collective Memory and Historical Identity* (Rutgers U. Press 1996) (describing the importance of cultural preservation for future generations).

176. 16 U.S.C. §§ 470–470w-6 (2000).

177. *Id.* at §§ 470(b)(2), (4).

178. Suagee, *supra* n. 26, at 160–61.

179. Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values As A Force for Sustainability*, 3 Widener L. Symp. J. 229, 245 (1998). In their leading work on sustainability, Herman E. Daly and John B. Cobb, Jr. argue environmental protection and local community building are essential components to future world development. See generally Herman E. Daly & John B. Cobb, Jr., *For the Common Good: Redirecting the Economy Toward Community, the Environment, and a Sustainable Future* (Beacon Press 1989).

180. See Miller, *supra* n. 174, at 158–60 (arguing that native traditions and existing native cultures have much to offer policymakers in addressing America’s modern-day issues and problems).

## VII. CONCLUSION

NAGPRA promises protection of Native American burial sites in excavation and discovery situations by ensuring tribal participation in the agency decision-making process. Yet the amount of tribal involvement has not reached the level envisioned by the original legislation. The conflicts between the U.S. Army Corps of Engineers and the Yankton Sioux are representative of future problems that will arise if agencies and courts continue to misinterpret NAGPRA's obligations in "notice situations." Intentional excavation requirements that trigger pre-action consultation must apply when the responsible land manager is "on notice" that Indian remains or cultural items are likely to be disturbed by agency or agency-authorized action. For courts to hold otherwise cuts against NAGPRA's regulations and legislative history, fundamental principles of federal Indian law, and multiple executive decrees that all insist on more meaningful governmental communication and consultation with Native American tribes. But it is not only the law that calls for pre-action consultation when agency officials have knowledge that their actions may unearth remains or cultural items. Heightened resource protection, agency efficiency, and the promotion of national identity and sustainability demand that tribes help guide the decision as well. Thus, NAGPRA commands, and common sense compels, that federal land managers follow intentional excavation requirements in all "notice situations."