

WE COULD TELL YOU, BUT THEN WE'D HAVE TO KILL YOU: HOW INDIGENOUS CULTURAL SECRECY IMPEDES THE PROTECTION OF NATURAL CULTURAL HERITAGE IN THE UNITED STATES

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I. INTRODUCTION

In the past century, Western society has undergone a major shift in regards to its treatment of native peoples and cultures. Unlike our predecessors, who often endeavored to dominate or eradicate indigenous peoples in the Americas and elsewhere around the globe, we now look upon these same native groups with wonder and reverence. This trend has manifested itself in everything from the emergence of New Age medicine to a growing body of national and international law aimed at protecting indigenous groups and cultures. This shift in the political, social, and legal landscapes has served to re-empower many native peoples, but it has not come without a price. For now, the danger facing these groups is not that of imminent demise, but instead the misappropriation, and therefore cheapening, of indigenous cultures. And unfortunately the very laws which we have promulgated for the benefit of native peoples often encourage further misappropriation of native knowledge, for they require that the native groups divulge sensitive cultural information before those laws can be implemented.

This paper examines a very specific example of this legislative Catch-22, which requires that native people choose between either governmental protection or cultural privacy. Namely, a number of U.S. legislative enactments provide Native Americans with legal tools for protecting their sacred sites. However, all such statutory schemes require that the interested tribe provide documentation as to why any given site is sacred before the relevant agency can determine

whether protection is warranted. In other words, the disclosure of sensitive tribal knowledge precedes protection, and protection is not subsequently guaranteed. Ultimately, this paper proposes a framework for addressing this issue. However, before one can comprehend the necessity of such a framework, it is important to understand how this issue has developed. In section II, I briefly explain the international approach to cultural heritage, focusing on the distinctions made between tangible, intangible, and natural cultural heritage in the majority of international conventions on this topic. I then explain the manner in which these distinctions undermine any conventions aimed at protecting cultural heritage. I subsequently explore the various legal regimes in the United States that are aimed at protecting natural cultural heritage, and discuss how these laws are limited in much the same way as their international counterparts. In section III, I discuss three justifications for the guarding of cultural secrecy among indigenous peoples: traditional norms, maintenance of social hierarchies, and the prevention of cultural mutilation. I further discuss the defensibility of each of these concerns. In section IV, I discuss how our view of secrecy in the United States has limited our ability to adequately address the issue of cultural secrecy. Specifically, I address our devotion to governmental transparency in the United States and the legal battles that have ensued when such transparency conflicts with the native tribes' need for cultural secrecy. Finally, in section V, I lay out a framework aimed at addressing the concerns of both indigenous peoples and the American public in general.

II. CULTURAL HERITAGE LAW IN A NUTSHELL

Before delving into any discussion on the merits and means of protecting culture heritage, we must first understand what the term “cultural heritage” encompasses. The task appears daunting at first blush, because it suggests that we must first define “culture” – a term which has

generated an enormous amount of literature but relatively little agreement.¹ Regardless of the confusion surrounding the concept of culture, “cultural heritage” can be explained simply as “anything that is of some cultural importance, whether it be art, literature, music, archaeological sites, sacred artifacts, historical artifacts, natural formations, or ancient remedies.”² This definition is particularly useful to the task at hand, as it recognizes the link between culture and all that it produces, irrespective of where the boundaries of that culture may lie.³ No definition of “culture” is required.

Understandably, protecting cultural heritage is far more difficult than defining it. In the past century, we have created a complex legal framework aimed at protecting cultural heritage, consisting of a web of both national and international laws. The following subsections briefly outline the evolution of this framework both internationally and here in the United States.

A. *Cultural Heritage Realms in International Law*

In the same way that property law is divided into tangible and intangible domains, cultural heritage can likewise be divided between the realms of tangible and intangible.⁴ Tangible cultural heritage, as it suggests, consists of physical goods associated with a culture, such as pottery, artwork or architecture.⁵ In contrast, intangible cultural heritage consists of “traditional knowledge,” which encompasses everything from music to medicinal remedies and

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¹ For an in depth discussion on the problems created by any attempt to define “culture,” see generally Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001) (discussing how any fixing of culture within specific boundaries serves to remove cultural dissent from the picture, thereby inaccurately reflecting true culture); Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007) (noting that culture is not homogeneous and does not necessarily reside in one specific group of people).

² See Sarah K. Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L. J. 291, 297 (1999).

³ *Id.*

⁴ See Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 443-444 (2008) (discussing the evolution of tangible and intangible cultural heritage).

⁵ See Erin K. Slattery, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL-LCA J. ART & ENT. L. & POL’Y 201, 206 (2006).

folklore.⁶ Additionally, unlike traditional property law, cultural heritage also encompasses a third realm: that of natural heritage, which refers to geographical locations with which cultures associate themselves such as the Dead Sea or the Grand Canyon.⁷ Over the years, laws aimed at protecting these various realms have remained significantly segregated. Indeed, legal regimes aimed at protecting tangible and natural cultural heritage predate their intangible counterparts by roughly thirty years.

Protections for tangible and natural cultural heritage were first realized through projects such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, which defined the protected cultural property as:

[M]ovable or immovable property of great importance to the cultural heritage of every people, such as monuments, architecture, art or history, whether religious or secular, archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books . . . as well as scientific collections . . .”⁸

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) originally employed a definition similar to the The Hague’s, recognizing tangible and natural heritage only. For instance, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 defined cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”⁹ The Convention then proceeded to list eleven categories of cultural heritage, including collections of flora and fauna; pictures, paintings and drawings; manuscripts;

⁶ *Id.* at 207.

⁷ *Id.* at 205-6.

⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1(a), May 14, 1954, http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

antiquities; and elements of dismembered historic or archeological sites. Similarly, the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972 defined natural heritage as:

[N]atural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; [and] natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.¹⁰

Notably, neither the Hague nor the UNESCO Conventions made reference to cultural knowledge or traditions. In essence, then, both organizations sought to protect the physical manifestations of and dwelling spaces associated with any given culture while failing to protect the actual cultures that produced those items or inhabited those spaces.

Not until the mid-1980's did the protection of intangible cultural heritage gain international support,¹¹ and not until UNESCO adopted its 1989 Recommendation on the Safeguarding of Traditional Cultural and Folklore did an international body seriously take up this issue.¹² In the 1989 Recommendation, UNESCO defined folklore as:

[T]he totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.¹³

¹⁰ Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 2, Nov. 16, 1972, <http://unesdoc.unesco.org/images/0011/001140/114044e.pdf#page=134>.

¹¹ See Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L. Q. 61, 72 (2000) (discussing the growing trend since the mid-1980s to provide greater international recognition of intangible cultural heritage).

¹² Recommendation on the Safeguarding of Traditional Culture and Folklore, Nov. 15, 1989, http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

¹³ *Id.* at § A.

UNESCO then proceeded to outline a method whereby governments were to identify, preserve, conserve, and protect all those aspects falling within this definition.¹⁴ Just as with the earlier Hague and UNESCO Conventions, the Recommendation limits itself to one piece of the cultural heritage puzzle – the intangible piece. Although numerous other Conventions have been adopted since the 1989 Recommendation, the majority tends to follow the precedent set early on by The Hague and UNESCO in that tangible, intangible and natural heritage are viewed as three distinct entities. And although the popularity of these distinctions may be losing ground on the international level, as demonstrated by the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage,¹⁵ this shift in focus has come slowly and, as demonstrated below, is still all but absent in the United States.

B. The Distinction Legal between Tangible, Intangible, and Natural Cultural Heritage Undermines the Laws Aimed at Protection Cultural Heritage

Although the distinction between natural, tangible and intangible cultural property may initially seem sensible to those of us steeped in Western jurisprudence, in many cases it serves to undermine the legal schemes that embrace such distinctions. The problem is that, in reality, the boundaries of these three types of heritage are not clearly delineated, and thus if we hope to protect tangible/natural object X, we must also protect related intangible aspect Y, and vice versa.¹⁶ Richard Kurin, the Acting Under Secretary for History, Art, and Culture of the Smithsonian Institution, has explained this phenomena as follows:

For many people, separating the tangible and the intangible seems quite artificial and makes little sense. For example, among many local and indigenous communities, particular land, mountains, volcanoes, caves and other tangible

¹⁴ *Id.* at §§ B, C, D, F.

¹⁵ Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2(1), Oct. 17, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>. The Convention defines intangible cultural heritage as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups, and in some cases, individuals recognize as part of their cultural heritage.”

¹⁶ See Slattery, *supra* note 5 at 208.

physical features are endowed with intangible meanings that are thought to be inherently tied to their physicality. Similarly, it is hard to think of the intangible cultural heritage of Muslims on the hajj, Jews praying at the western wall of Jerusalem's temple, or Hindus assembling for the kumbh mela as somehow divorced and from the physical instantiation of spirituality.¹⁷

Many indigenous people have pointed out this shortcoming as well, indicating that, in their view, these three types of cultural heritage are not necessarily distinguishable.¹⁸ Thus, because it is impossible to fully protect any of these types of cultural property without simultaneously protecting the others, and because many native traditions fail to even recognize a distinction between them at all, legal measures that address only one of these cultural aspects are necessarily inadequate and may ultimately prove worthless. In the United States, numerous statutes fall victim to this exact problem, particularly in regards to the protection of natural cultural heritage. The following section provides a brief summary of these laws and highlights the unintentional burden they place on Native Americans.

C. *Cultural Heritage in the United States*

In the United States, a large body of statutory law protects Native Americans' cultures and homes. This body of law includes the American Indian Religious Freedom Act ("AIRFA"),¹⁹ the National Historic Preservation Act ("NHPA"),²⁰ the National Environmental Policy Act ("NEPA")²¹ and the Native American Grave Protection and Repatriation Act

¹⁷ See Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT'L 66, 70 (2004); see also Special Rapporteur on the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Discrimination against Indigenous People: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, para. 26, Comm'n on Hum. Rights, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 28, 1993) (by Erica-Irene Daes) (stating that for "indigenous people, heritage is a bundle of relationships, rather than a bundle of economic rights. The 'object' has no meaning outside of the relationship, whether it is a physical object . . . or an intangible. . .")

¹⁸ See Slattery *supra* note 5 at 455-456 (noting that, for many indigenous peoples, the "unseen is . . . as much a part of reality as that which is seen – the spiritual is as much a part of reality as the material").

¹⁹ 42 U.S.C.A. 1996 (West 2010).

²⁰ 16 U.S.C.A. 470 *et seq.* (West 2010).

²¹ 42 U.S.C.A. 4321 *et seq.* (West 2010).

(“NAGPRA”),²² among others. AIRFA, which was the first of statutory schemes, was designed to combat three major issues facing Native Americans: (1) the inability of many groups to access sacred land, (2) legal restrictions on the use of items integral to religious rites such as peyote and eagle feathers, and (3) interference with sacred ceremonies by an overly enthusiastic public.²³ Although AIRFA ultimately proved to be a toothless statutory scheme,²⁴ it paved the way for later legislation such as NAGPRA.

In contrast to AIRFA, the NHPA has proven to be a very useful tool for indigenous peoples. The NHPA contains specific provisions for the inclusion of important indigenous sites on the National Historic Property Registrar.²⁵ It provides “Indian tribes” with a means for blocking the modification or destruction of those places they hold most sacred, provided that the land in question is owned by the federal government.²⁶

Similarly, NEPA encourages federal agencies to “preserve important . . . cultural and natural aspects of our national heritage.”²⁷ Under NEPA, if a proposed federal action will “significantly affect[] the quality of the human environment,” the responsible agency must draft a detailed environmental impact statement (“EIS”).²⁸ Within this category of “significant effects” are cultural and historical impacts.²⁹ Thus if a federal action will affect culturally and historically relevant sites, including Native American sites, the agency must go through the burden of drafting an EIS.

²² 25 U.S.C.A. 3001 *et seq.* (West 2010).

²³ 42 U.S.C.A. 1996 (West 2010).

²⁴ *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 455-456 (1988) (where the Supreme Court discusses the inadequacies of the AIRFA).

²⁵ *See* 16 U.S.C.A. §470a(a) (West 2010) (discussing the registrar).

²⁶ This is not to say that privately owned land cannot be added to the registrar. However, private owners have the right to object to the inclusion of their property on the federal registrar and thus indigenous groups cannot forcefully apply the provisions of the NHPA. 16 U.S.C.A. § 470(101)(a)(6) (West 2010).

²⁷ 42 U.S.C.A. § 4331(b)(4) (West 2010).

²⁸ 42 U.S.C.A. § 4332(c) (West 2010).

²⁹ 42 U.S.C.A. § 4331(b)(4) (West 2010).

Finally, NAGPRA prohibits the excavation and removal of native remains and related artifacts on federal lands without a permit.³⁰ In granting such permits, the relevant agency must first consult with the affected tribes.³¹

While these statutes seem to provide ample protection for indigenous peoples within the United States, at least the NHPA and NEPA contain a notable flaw: namely, they require the interested native tribe to share information about the site in question before the agency can decide whether that site qualifies for protection. This mandate creates a Catch-22 for such tribes, because often the traditions that render any particular piece of land culturally important are secret, and thus a tribe must pick between protecting either (1) the sacred land, or (2) the sacred information related to that land. Such a dilemma illustrates the problem created by a legal regime that treats tangible, intangible and natural cultural heritage as three distinct realms.

Admittedly, the existence of this Catch-22 does not necessarily indicate that such statutory schemes are flawed, for there is only a problem if Native American tribes are justified in maintaining secrecy in the first place. However, as the following section discusses, indigenous people have many valid reasons for protecting their traditions and keeping them out of the public eye.

III. WHY THE SECRECY?

Before delving into this topic, I would like to note that I have no intention of suggesting that native populations should not be permitted to keep secrets, or that such keeping of secrets is somehow anathema to Western ideals. Such a statement would be contrary to the constitutional right to privacy we hold so dear.³² Instead, the issue of whether Native Americans should be

³⁰ 25 U.S.C.A. § 3002(c) (West 2010).

³¹ 25 U.S.C.A. § 3002(c) (West 2010); 16 U.S.C.A. §§ 470a(a) *et seq.* (West 2010).

³² The right to privacy is not explicitly enumerated in the Constitution of the United States. However, our Supreme Court has determined that such a right exists, and it is located somewhere in the emanations and penumbras of the

able to withhold cultural information arises solely from the interplay between the sharing of information and the granting of federal protection. In other words, it is a question of whether we should allow the tribes to demand legal protection without providing any explanations as to what is actually being protected and why. Beyond the basic constitutional freedom giving us the right to maintain our privacy, there are three very good reasons why we should consider permitting Native Americans to safeguard their cultural heritage: (1) respect for traditional norms, (2) maintenance of social hierarchies, and (3) prevention of the commodification and destruction of tradition.

A. *Traditional Norms Often Mandate Secrecy*

The first and possibly most obvious reason for maintaining secrecy is that cultural norms often dictate that information cannot be shared with those outside the culture. This is most often the case with sacred or religious knowledge, which many cultures view as a “limited good that cannot properly exist in several places at once.”³³ When such knowledge is disseminated among non-members, the power of the knowledge is weakened or distorted,³⁴ and often the dissemination itself is a violation of religious tenets.³⁵ For example, the Zuni War Gods must remain hidden in their natural shrines if they are to protect the Zuni tribe,³⁶ while Brazilian Suyá believe that terrible things will happen if their songs are sung by the wrong individuals or at the

First Amendment, or possibly in the Ninth or Fourteenth Amendments. *See Griswold v. Conn.*, 381 U.S. 479 (1965).

³³ *See* Michael F. Brown, *Can Culture Be Copyrighted*, 39 CURRENT ANTHROPOLOGY 197, 201 (1998).

³⁴ *Id.*; *see also* Harding, *supra* note 2 at 313-14 (stating that many cultures cannot not share traditional knowledge without “a corresponding loss in power, significance, and meaning.”)

³⁵ *See* Suzan Shown Harjo, *Perspectives, Fact Sheet: Protection of Native American Sacred Places*, INDIAN COUNTRY TODAY, June 22, 2002 (noting that many native religious mandate that issues surrounding that religion cannot be revealed).

³⁶ *See* Adele Merenstein, *The Zuni Quest for Repatriation of the War Gods: An Alternative Basis for Claim*, 17 AM. INDIAN L. REV. 589, 590 (1992).

wrong time,³⁷ and Aboriginal artists believe that improper replications of their dream motifs and patterns interfere with and offend those familiar with the dreaming.³⁸

While those of us in Western society may initially balk at these assertions,³⁹ we must recognize that such beliefs and reasoning are not limited to indigenous populations. Consider for instance the papal conclave, where Catholic tradition mandates that the process by which a new pope is selected remain entirely secret.⁴⁰ Similarly, the Church of Scientology is adamant that certain doctrinal knowledge be shared only with elite members of the faith, because they believe that “their secrets can save the world, but that they must be doled out only to those who have proven ready to receive them.”⁴¹ Given that sacred and religious knowledge is treated with such respect by Western society, it would be hypocritical on our part to reject the complaint raised by indigenous groups that certain religious or sacred knowledge cannot be shared.

B. Native Social Structures May Rely on Secrecy

A second reason for maintaining secrecy is that native groups are often hierarchical and require that information be compartmentalized. Those in power do not want important knowledge to leave the community only to be “discovered” by the lower echelons of that community not authorized to possess such knowledge.⁴² Such justifications for secrecy have

³⁷ See Anthony Seeger, *Ethnomusicology and Music Law*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 52, 55-7 (Bruce Ziff and Pratima V. Rao eds., 1997).

³⁸ See Harding, *supra* note 2 at 308.

³⁹ “Balk” may seem too strong of a term here, as we all like to see ourselves as enlightened and accepting of other cultures. However, the fact remains that we all approach the unknown with prejudices and preconceived notions, and I am willing to bet that most people would have trouble showing the same level of deference to the Zuni religion as they do to, say, Christianity.

⁴⁰ Anonymous, *Choosing a pope*, BBC News, Special Reports, available at <http://news.bbc.co.uk/2/shared/spl/hi/world/pope/choosing/html/>.

⁴¹ Wendy M. Grossman, *alt.scientology.war*, Wired 3.12, Dec. 1995, available at <http://www.wired.com/wired/archive/3.12/alt.scientology.war.html>.

⁴² See Brown, *supra* note 32 at 197-198.

been expressed by the Hobi and Taos Pueblo⁴³ tribes in the Southwest United States, as well as by Australian aboriginal populations.⁴⁴

Although such a coercive use of secrecy seems anathema by Western standards – which instead promote governmental transparency and social mobility – we should disregard these concerns for two reasons. First, often times the hierarchy itself is an important aspect of the native culture. As Michael Brown explained, “[s]trict compartmentalization of knowledge is necessary to maintain the community’s religious hierarchy and ultimately the integrity of traditional institutions, which are based on theocratic principles.”⁴⁵ In other words, the social stratifications are integral to the culture; and if we are going to bother ourselves with protecting the culture, it makes little sense for us to pass judgment on it at the same time.

Second, indigenous people oppressed by such societal norms have the option of shrugging off their native traditions and entering into mainstream Western culture where, in theory, they are granted the same rights as everyone else.⁴⁶ For these reasons, even though many shudder at the thought of using secrecy as a means of social control, we should not summarily condemn such a practice by indigenous groups, nor cite this phenomenon to discourage legal reform aimed at accommodating cultural secrecy.

C. *Secrecy Allows Indigenous Peoples to Define and Maintain Their Cultures*

⁴³ See Elizabeth Brandt, *On Secrecy and the Control of Knowledge: Taos Pueblo*, in *SECRECY: A CROSS-CULTURAL PERSPECTIVE* 123, 138 (Stanton K. Tefft ed., 1980) (discussing the religious hierarchy of the Taos Pueblo and the Pueblo’s insistence on restricting the flow of knowledge to the outside world in order to prevent such knowledge from cycling back to the general Pueblo population)

⁴⁴ See Erich Kolig, *Darragu – Sacred Objects in a Changing World*, in *POLITICS OF THE SECRET* 27, 31 (Christopher Anderson ed., 1995) (discussing the control of religious information among certain aboriginal groups, stating that the “view of sacred objects as a device in a conspiratorial and oppressive social mechanism is neither too far-fetched nor is it totally without empirical evidence.”)

⁴⁵ See Brown, *supra* note 32 at 198.

⁴⁶ Such freedom is arguably not available to indigenous groups located in the developing world. However, that is a topic for another day.

A third reason for cultural secrecy is that it allows native peoples to more clearly demarcate the bounds of their culture and to control how the outside world views their traditions. As mentioned earlier, Western society has developed an almost fervent obsession with indigenous ways of life, and particularly indigenous religions.⁴⁷ For example, in the United States, average citizens are turning to traditional practices such as ersatz Medicine Wheel ceremonies, sweat lodges, vision quests, and ayahuasca-induced healing sessions as a means of release, renewal, and rebirth (or any other number of titillating verbs contained in the New Age literature).⁴⁸ As a result, these native traditions become part of mainstream Western culture and the native groups from which the traditions were derived become less unique.⁴⁹ This form of cultural piracy has become so prevalent, in fact, that the Lakota tribe has actually declared war on the “absurd public posturing” of native traditions.⁵⁰

Further, it is not simply intangible cultural heritage that has been modified. The physical manifestations of culture, such as artwork and textiles, are in danger as well. For example, in Australia, there has been an outcry over the use of traditional aboriginal art for “decorating a host of mundane products primarily developed for the tourist trade, such as tea-towels, pencil cases, key rings,” and more.⁵¹ Because the promulgation of indigenous traditions and products cheapens the cultures that sired such traditions, it is understandable why many groups endeavor to limit access to those traditions they hold most sacred.

⁴⁷ See Brown, *supra* note 32 at 201.

⁴⁸ See Elizabeth Sandager, *Ethical Implications of the Documentary Record*, 21(2) NEW ENGLAND ARCHIVISTS NEWSL. (The New England Archivists, Mass.) 1994, at 4, 5.

⁴⁹ Interestingly, claims of cultural piracy are not made solely against members of Western society. For instance, the Hopi tribe has accused the Navajo of stealing various Hopi traditions, such as the belief in sacred colors and the gathering of eagle feathers. An employee of the Hopi Cultural Preservation office has remarked that “we’re afraid that if we say something, the Navajos will say that it’s theirs too.” See Michael F. Brown, WHO OWNS NATIVE CULTURE? 19 (2003).

⁵⁰ See Brown, *supra* note 32 at 201.

⁵¹ See Michael Blakeney, *Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law*, 17 EUR. INTELL. PROP. REV. 422, 422 (1995).

Another concern voiced by native peoples is that of cultural distortion. As soon as a cultural tradition or aspect enters the mainstream, it is exposed to countless mutating forces. Thus, in much the same way that a word gets twisted out of shape in a game of “telephone,” a tradition can be tweaked, ‘improved,’ and altered over time. For this reason, what was once an Eastern spiritual discipline meant to cleanse the mind and tame the body is now a yoga class down at the local gym.⁵²

A more concrete example of cultural appropriation occurred in 1996, when Michael Cretu released the single “Return to Innocence.” The song featured the vocals of an Ami elder Lifvon Guo who, as a young child, was entrusted with the task of “keeper” of the traditional Ami folksongs.⁵³ Guo, who performed for the Ministries of Culture of Taiwan and France, had no knowledge that his chants had ever been recorded or that non-Ami parties owned the rights to the recordings.⁵⁴ When “Return to Innocence” hit the radios and topped the charts, Guo and the Ami people had no legal recourse.⁵⁵ Instead, they simply had to watch as a piece of their culture slipped away from them in the form of a pop song.⁵⁶ Such mangling of cultural traditions has taught native groups that the integrity of their cultures often depends on secrecy.

Given this history of adoption, promulgation and mutilation of cultural heritage, indigenous peoples certainly seem justified in guarding their secrets from non-members. For this reason, it would be wise of us to actually address the issue of secrecy when creating legal

⁵² The question of whether distortion of cultural norms is necessarily a bad thing is not easily answered. Consider for instance whether there is truly any harm in offering yoga classes at the local gym. Sure, the class is substantially different from the original practice, but in its current form it offers people access to a health and fitness regime that they wouldn’t otherwise be part of. The point I hope to make in this section is not that the distortion of cultural heritage is regrettable, but that at least many native peoples view it as such. For a lengthier discussion on the pros and cons of cultural distortion, *see* generally Brown, *supra* note 49.

⁵³ *See* Angela R. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 KAN. J. L. & PUB. POL’Y 155, 159-60 (2004).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

regimes aimed at protecting native cultures, rather than simply forcing such cultures to adapt to our information-driven legal customs.

IV. AMERICAN HESITANCY IN REGARDS TO PROMOTING SECRECY

A. *Freedom of Information*

In the United States, secrecy has long been viewed as threatening to our democratic processes, which require governmental transparency and shared power.⁵⁷ This fear was summed up well by Woodrow Wilson when he stated “secrecy means impropriety.”⁵⁸ Thus, in the United States, the public domain is used as a means of preventing secrecy and curbing governmental power; for “[i]njecting information into the public domain is the perfect antidote to government abuses that are carried out by means of secrecy. The public domain counters secrecy with public scrutiny.”⁵⁹

This fear of governmental abuse has manifested itself most notably in the Freedom of Information Act (“FOIA”), which requires governmental units to disclosure information upon request, unless that information falls within a few well demarcated exemptions.⁶⁰ This Act has proven particularly problematic for Native Americans, for such groups must rely on the federal agencies in order to assert their rights, and the agencies are in turn bound by the disclosure rules of the FOIA.⁶¹ Thus, any information provided to the agencies is potentially discoverable under the FOIA, and no amount of bargaining can get around this reality. Although information provided by indigenous groups arguably might be covered by the one of the FOIA exemptions,

⁵⁷ For a discussion on the interplay between secrecy and liberal democracy, *see* Brown *supra* note 32 at 198; Harding *supra* note 2 at 314-315.

⁵⁸ For a discussion of Woodrow Wilson’s comment and its relation to Western views on secrecy, *see* Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* 8 (1982).

⁵⁹ Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 97 (2003).

⁶⁰ Freedom of Information Act, 5 U.S.C.A. § 522 *et seq.* (West 2010), exemptions at § 522(b)(1)-(9).

⁶¹ For a detailed analysis of the role the FOIA plays in sacred site management, *see* generally Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 ECOLOGY L. Q. 137 (2009).

there is no guarantee that an agency or a Court would see things this way.⁶² Additionally, the Supreme Court has specifically rejected the possibility of reading an “Indian Trust” exception into the Act.⁶³ These factors paint a bleak picture for Native Americans, and it is understandable that some groups would prefer to withhold information and risk losing protection rather than disclosing information and subjecting themselves to the caprice of the agencies and courts.

Given that such an emphasis is placed on the free flow of information in the United States, it should come as no surprise that the statutory schemes designed to protect Native Americans do not respect concerns for cultural secrecy. Instead, as discussed above, the laws make a simple, yet problematic offer: the exchange of traditional information for federal protection. As a result, if an indigenous group hopes to use the NHPA, NEPA, or other such laws to its benefit, it must first be willing to provide the government with sensitive cultural information. Understandably, this has led to conflicts between Native Tribes and the agencies entrusted with the implantation of the NHPA, NEPA, NAGPRA, among others.

B. U.S. Courts’ Inability to Adequately Address the Issue of Secrecy

There are relatively few instances where questions on the role of secrecy have made their way from the federal agencies into the courts. Notwithstanding this dearth of judicial precedent, the limited case law available sheds ample light on this problem. The first case of note is *Havasupai Tribe v. United States*.⁶⁴ There, the Havasupai Tribe of Arizona challenged a decision by the Forest Service to approve a plan for the development of a uranium mine in Kaibab National Forest.⁶⁵ When the development of the mine was first proposed, the Forest

⁶² *Id.* at 161-62.

⁶³ *Dep’t. of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 15 (2001).

⁶⁴ 752 F. Supp. 1471 (D. Ariz. 1990).

⁶⁵ *Id.* at 1475-1476.

Service distributed copies of the plan to any party who might be interested or affected.⁶⁶ Many parties raised concerns, and the Forest Service determined that it needed to compile Environmental Impact Statement (“EIS”) to address such concerns.⁶⁷ Once again, all interest parties were informed of the EIS and were allowed to comment on the drafts.⁶⁸ Shortly after the completion of the EIS, the plan was approved.⁶⁹

The Havasupai Tribe subsequently brought suit, claiming that development of the mine would interfere with various sacred sites, but they refused to provide additional details.⁷⁰ The reasons for their secrecy centered on the belief that if uninitiated people visited the site, the visit would “violate the universe.”⁷¹ Ultimately, the court did not look favorably upon the plight of the Havasupai, holding that:

[The tribe members] continuously claim that they are the only ones that know their religion, yet the record clearly shows that they were not forthcoming on the subject during the scoping process or the comment period leading up to the publication of the final EIS, nor would they identify specific sites of religious significance. The Havasupai Tribe argues that the Forest Service did not make a sufficient effort, but the record reflects that the plaintiffs did not respond to numerous attempts for more specific information.⁷²

In this way, the court placed blame on the Havasupai tribe, rather than on the statutory enactment which failed to address the issue of cultural secrecy.

The second case of note is *Pueblo of Sandia v. United States*.⁷³ In *Pueblo of Sandia*, and pursuant to the NHPA, a Native American tribe brought suit for declaratory and injunctive relief against the United States and a Forest Service supervisor in an attempt to prevent the

⁶⁶ *Id.* at 1476-77.

⁶⁷ *Id.* at 1477.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1500

⁷¹ *Id.* at 1496; *It's Their Rite, Religion Links Tribe to Canyon Home*, SAN DIEGO UNION-TRIBUNE, Dec. 5, 1989, at C1.

⁷² *Havasupai Tribe*, 752 F. Supp. at 1500.

⁷³ 50 F. 3d 856 (10th Cir. 1995).

modification of Las Huertas Canyon in the Cibola National Forest.⁷⁴ The primary issue was whether the Forest Service made a reasonable and good faith effort⁷⁵ to comply with section 106 of NHPA, which required the Forest Service to “take into account the effect of [any] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”⁷⁶ Pursuant to this provision, the Forest Service mailed letters to the local tribes, requesting “detailed information describing the location of the sites, activities conducted there, and the frequency of the activities.”⁷⁷ The Forest Service also requested “maps of the sites, drawn at a scale of 1:24,000 or better, as well as documentation of the historic nature of the property.”⁷⁸ When the tribes failed to produce the requested documentation, insisting generally that the canyon was “of great religious and traditional importance,” the Forest Service determined that the site was not eligible for inclusion in the National Registrar.⁷⁹ At this point, the Pueblo of Sandia Tribe brought suit.⁸⁰

In reversing summary judgment in favor of the Forest Service,⁸¹ the Tenth Circuit held that the mere request of information from the local tribes did not constitute a reasonable effort at compliance with section 106.⁸² The court focused on the fact that the “Forest Service should have known that tribal customs might restrict the ready disclosure of specific information,” and held that “the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of regulations warning that

⁷⁴ *Id.* at 857.

⁷⁵ The “reasonable and good faith effort” standard is detailed in 36 C.F.R. 800.4, which expounds upon the NHPA.

⁷⁶ *Pueblo of Sandia*, 50 F. 3d at 859; 16 U.S.C.A. § 470(f).

⁷⁷ *Pueblo of Sandia*, 50 F. 3d at 860.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 858.

⁸¹ *Id.* at 863.

⁸² *Id.* at 860.

tribes might be hesitant to divulge this type of information.”⁸³ The court then remanded the matter for further proceedings.⁸⁴

Shortly after the ruling in *Pueblo of Sandia*, the Ninth Circuit addressed a similar issue in *Muckleshoot Indian Tribe v. U.S. Forest Service*,⁸⁵ the third and final case on point. In *Muckleshoot*, the Muckleshoot Tribe brought an action against the United States Forest Service for declaratory and injunctive relief, challenging a land exchange between the Forest Service and a private party.⁸⁶ After the Forest Service had conducted its own research on the lands to be exchanged, the tribe requested additional studies in order to more fully address the issue of historic cultural sites.⁸⁷ The Forest Service declined, and instead simply asked the tribe to turn over all information it had on the potential historic sites.⁸⁸ The tribe was either unwilling or unable to comply, and land exchange was approved.⁸⁹ The Muckleshoot Tribe then brought suit and, relying on *Pueblo of Sandia*, argued that the Forest Service’s actions did not constitute a reasonable and good faith effort to comply with the NHPA.⁹⁰ The Ninth Circuit disagreed, stating that:

[T]he record shows that the Forest Service resisted the Tribe’s requests for a formal study of cultural properties because it would impede the finalization of the Exchange. Given more time or a more thorough exploration, the Forest Service might have discovered more eligible sites. However, the record also shows that the Tribe had many opportunities to reveal more information to the Forest Service. Although the Forest Service could have been more sensitive to the needs of the Tribe, we are unable to conclude that the Forest Service failed to make a reasonable and good faith effort to identify historic properties.⁹¹

⁸³ *Id.*

⁸⁴ *Id.* at 863.

⁸⁵ 177 F. 3d 800 (9th Cir. 1999).

⁸⁶ *Id.* at 804.

⁸⁷ *Id.* at 806.

⁸⁸ *Id.*

⁸⁹ *Id.* at 806-7

⁹⁰ *Id.* at 807.

⁹¹ *Id.*

Thus the Ninth Circuit summarily dismissed the contention in *Pueblo of Sandia* that in order to be a “reasonable” effort, that effort must take into account and comport with the needs and cultural standards of the affected tribes.

These cases demonstrate the problems facing any Native American effort to solicit government protection for their sacred lands pursuant to any of the relevant statutory schemes. Additionally, despite the suggestion in *Pueblo of Sandia* that agencies should be concerned about the issue of cultural secrecy, the court did not articulate a manner in which to address this issue going forward. Therefore, if a court were to look at a similar problem today, it would see that two of the three cases hold that cultural secrecy is not to be accommodated, and that these two cases provide a clearer analytic route to resolving the problem.

V. POSSIBLE SOLUTIONS

While there is much literature on the manner in which Western societies should protect sensitive traditional knowledge, relatively little has been written about this issue as it relates to the statutory protection of land. Moreover, as discussed above, the few courts that have addressed the interplay between the protection of land and the maintenance of cultural knowledge have either (1) disregarded entirely the importance of secret knowledge, or (2) encouraged deference to such knowledge without providing a framework for the agencies that must ultimately address these issues. For this reason, it is paramount that a more reliable agency process be established. The following framework is an attempt at just that.

A. *Framework for Addressing Cultural Secrecy as it Relates to Land*

First and foremost, Congress needs to either explicitly create an FOIA exemption for sacred-site information provided by native groups in the context of tribal-agency consultations under any federal scheme, or Congress should amend both the NHPA and NEPA so as to exempt

any information provided thereunder by native groups from disclosure under the FOIA.⁹² Without this initial step, analysis beyond this point is moot, as any attempt to improve the process would be met by FOIA obstacles.

Second, indigenous groups should compile lists describing the land which they deem particularly sacred, the protection of which is integral to their cultures.⁹³ These lists should not be made public knowledge. Rather, the lists should be deposited with the interested federal agencies, and they should remain sealed until a dispute arises. Additionally, these lists need not include any details as to why a particular site is culturally important.⁹⁴

Third, once the lists are complete, if any native group seeks to protect land under the NHPA, but cannot divulge their reasons for such action, the relevant agency should look to the lists. If the land is indeed included, then there would be a strong presumption that the group's claim is valid and it would shift the burden to the agency or any interested third party to prove by a preponderance of the evidence that the claim is invalid. The agency can meet this burden by providing anthropological work that suggests the claim is false, competing testimony from those

⁹² The creation of this particular FOIA exemption was first posited by Ethan Plaut in *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*. See *supra* note 60. There, Plaut discusses in detail the relationship between the NHPA, NEPA, and FOIA, and explains how the underlying purpose of these Acts supports the recognition of an additional exemption for sacred-site information.

⁹³ The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage promotes a similar database in the realm of traditional knowledge as a means of increasing IP protection for indigenous groups. This proposal has been met with distrust on the part of native peoples, for such a database could ultimately increase the rate at which their knowledge is pirated. The database for which I advocate is substantially different from its IP counterpart for two reasons. First, the traditional knowledge contained in this database would be limited to geographical locations and nothing more. If a person were able to secure a copy of list, the extent to which that person could appropriate native culture would be extremely limited. Second, it would be clear from the beginning that any knowledge contained therein would remain classified unless and until a dispute over land arose. Thus, indigenous groups would not be faced with the issue of preemptively preventing cultural piracy by releasing their knowledge to the world. For a discussion on the issue of IP databases, see Coenraad Visser, *Making Intellectual Property Laws Work for Traditional Knowledge*, in *POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* (Michael Finger & Philip Shuler eds., 2004); Slattery *supra* note 5 at 244-47.

⁹⁴ The lists could also be updated on a regular basis – perhaps every five years – in order to account for shifts in tradition which are bound to occur. However, agencies would need to guard against tactical updates, whereby native tribes might add sites when they learn of potential upcoming land transactions. One possible solution would be (1) to include in the lists the dates on which each site was added and then (2) to permit the agencies and courts to consider these dates when rendering decisions under the relevant statutory schemes.

with the indigenous community, and any other factual evidence that tends to negate the community's claim.

Fourth, if the land is not included on the list, or if an agency or third party intends to fight the claim, the agency must explain to the indigenous group that they may lose the land if they don't provide an explanation as to why the land is culturally meaningful. At this point, the interested agency and the members of the community should determine the circumstances under which the group would be willing to divulge information about the sacred site. For instance, the tribe might require that only a certain type of person can review the information, such as occurred in the famous Australian case of *Chapman v. Tickner*⁹⁵ where secret knowledge could be provided to women only. Regardless of the circumstances, it must be abundantly clear that the agency is willing to work with the indigenous group and address their concerns, but that complete silence on the part of that group will likely result in an unfavorable outcome.⁹⁶

Fifth, once the agency and the native group have agreed on which individuals will have access to the information and to what extent the information can be shared, those limited members should resolve the dispute based on 1) the presence or absence of the land on the initial list, 2) the evidence provided by the party opposing the indigenous group, and 3) the cultural information subsequently divulged by the native population. Beyond this point, the process should be dictated by the general rules of administrative law. However, assuming a matter is

⁹⁵ (1995) 37 ALD 1; (1995) 55 FCR 316. In *Chapman*, plans for the construction of bridge between mainland Australia and a nearby island were derailed when a group of Aboriginal women claimed that the bridge would significantly interfere with their cultural traditions. The women refused to publically explain the importance of the island, claiming that it was tied to sacred "women's business" to which no man could be privy. Although the Aboriginal women eventually lost this battle, it had created such a public storm that the bridge project was unable to go forward.

⁹⁶ Although simply cooperating with an indigenous group seems like a minor step in this analysis, it is actually an effect yet under-utilized tool. For example, while filming *The Lord of Rings*, director Peter Jackson ran into problems when the local Maori opposed the filming of Mount Ruapehu, which Jackson intended to transform into Mount Doom. Rather than get involved in a legal dispute, Jackson agreed to film Ruapehu from a nearby ski resort and then digitally alter the image so that it would not be immediately recognizable. The Maoris approved of this plan, and both parties went home happy. See Yu, *supra* note 4 at 487.

appealed to the Courts, the affected tribe should have the option of limiting the record to exclude that information which the affected tribe deems most sensitive.

B. Benefits of the Framework

While this proposed method is by no means perfect, it is a vast improvement over the current state of affairs for a few reasons. First, this method provides federal agencies with a balanced means by which to determine such sensitive claims. This is particularly important given the highly deferential standard under which agency decisions are to be reviewed, because when a decision is extremely difficult to overturn, we want to make sure that decision is well informed.⁹⁷

Second, it provides the parties with a clear method they should pursue in order to succeed, and it also allows them to determine the likelihood of success. One of the primary goals of our legal system is to provide stability and to guarantee that like cases are treated alike. However, when there are various statutory schemes in place to deal with the same issue, and when every single one of those schemes fails to address a basic problem that is tied to that issue, Native Americans have little indication as to whether an agency or legal proceeding is even worth pursuing. This is further complicated by the unclear judicial precedent which, as discussed above, fails to establish how these issues should be reviewed when they make it to the courts. A framework which clearly delineates each party's burden and which clarifies what information must be taken into account will significantly reduce these shortcomings.

And finally, this method helps to establish a far more detailed factual record for the judicial bodies who are often the ultimate arbiters of such disputes. In the three cases we have looked at, the court had little or no factual evidence from the affected tribe; and such a dearth of

⁹⁷ Under the Administrative Procedure Act, agency decisions are not subject to reversal unless they fall within a few specific categories such as arbitrary and capricious, making it extremely difficult to convince the court that an agency's ruling should be overturned. 5 U.S.C.A. § 706(2) (West 2010).

information appears to have irked the courts rather than convinced them of the validity of the tribes' claims. Under this framework, the courts will have a much larger record to review and the hope is that their decisions will no longer be affected by indigenous tribes' hesitation to share information with the agencies and the court.

VI. CONCLUSION

Western society stands at a crossroads. We have come to realize the error of our colonizing ways and we are now attempting to redress the many wrongs that we have wrought in past centuries. However, despite a plethora of national and international law on the subject, there is still no consensus on how we can best protect cultural heritage, or even whether our attempts are merely a more subtle form of control and domination. Regardless of these uncertainties, it appears that our determination to protect cultural heritage is here to stay.

Although there are much larger and arguably far more pressing concerns resulting from this trend, I have chosen to address a single, limited question: How should governmental agencies and judicial bodies in the United States address the issue of cultural secrecy, when that secrecy interferes with legislation aimed at protecting the natural cultural heritage of the very tribe that refuses to speak? The framework I have provided, which seeks to balance concerns over privacy with the need for disclosure, is one such attempt. Although admittedly not perfect, the framework is superior to the current state of affairs, which wholly fails to address the issue of cultural secrecy. Obviously no single law or convention will remedy the shortcomings of our current cultural heritage legal system. However, with small steps in the right direction, we can hopefully arrive at a point where, at the very least, our good intentions are not undone by our failure to account for intangible heritage and cultural secrecy. The framework I have proposed is just that: one small step.