

4/9/07

www.firstarchivistcircle.org

sourced from: <http://www2.nau.edu/libnap-p/protocols.html>

Protocols for Native American Archival Materials

with notations by NAAS (March 2019)

NAAS Notes: The following notations and markup that you will see throughout this document are intended to establish a coding and taxonomy of the *Protocols* (i.e. *best practices*). This is intended to provide for proper citation when referencing the *Protocols* in group discussions; case studies; etc. All markups (unoriginal to document) are highlighted in blue.

The anatomy of the *Protocols* follows as:

Themes which are bulleted in the “Preamble” Section of this document

- (THEME 1) The recognition of the sovereign governments and associated rights of Native American communities.
- (THEME 2) Issues in the collection, ownership, preservation, handling, access, and use of American Indian archival resources.
- (THEME 3) The importance of building relationships, balancing different approaches to knowledge management, and mutual respect.
- (THEME 4) The need to expand the nature of the information professions to include Native American perspectives and knowledge.

Chapters include summaries providing a description of the chapter

- (I) Building Relationships of Mutual Respect
- (II) Striving for Balance in Content and Perspectives
- (III) Accessibility and Use
- (IV) Culturally Sensitive Materials
- (V) Providing Context
- (VI) Native American Intellectual Property Issues
- (VII) Copying and Repatriation of Records to Native American Communities
- (VIII) Native American Research Protocols
- (IX) Reciprocal Education and Training
- (X) Awareness of Native American Communities and Issues

Protocols (i.e. **Best Practices; Guidelines**) are the body of the document and correlate to the **Chapter(s)**. Moreover, the protocols are divided into 2 categories (i.e. **Sections**) of:
(e.g. I, a) “*Archives and libraries guidelines for action*” (i.e. non-tribal institutional recommended best practices); and
(e.g. I, b) “*Native American communities guidelines for action*” (i.e. tribal institutional recommended best practices)

© First Archivist Circle. This document may be distributed for the noncommercial purpose of discussion. Permission to publish must be obtained from the contributors or home organization. Please send comments and inquiries to: archives.protocols@nau.edu.

The archives, the record, can provide not only our people but all people enlightenment, and hopefully a better humanity will result.

Kathryn “Jody” Beaulieu (Anishinabe/Ojibwe)

Introduction

Native American communities are sovereign governments. Tribes had their own traditional governments prior to European invasion. These governments maintain their own territories, their own laws, and their own legal restrictions surrounding cultural issues. Most Native American communities have federal recognition, while others hold state recognition. In Canada, many Native American communities have a similar status through federal treaties or provincial acknowledgement. Native Hawaiians are accorded special status by both federal law and state law. A number of federal laws in the United States specifically address both cultural and human rights of Native Americans and their communities. While we share a common commitment to the preservation and dissemination of knowledge, archivists and librarians should understand and respect Native American rights and laws, which are recognized in the United States Constitution. These statuses and associated rights form the basis of the principles behind the *Protocols for Native American Archival Materials*.

Over the past decade, tribal leaders, archivists, and librarians in the United States and Canada have expressed an interest in improving existing relationships and developing new relationships with non-tribal institutions which hold American Indian archival material. Numerous professional groups support this goal, such as the Society of American Archivists, the Council for the Preservation of Anthropological Records, the American Indian Library Association, the International Indigenous Librarians Forum, and the American Association for State and Local History. These *Protocols* outline many opportunities for collecting organizations to cooperate with Native communities.

In April 2006 a group of nineteen Native American and non-Native American archivists, librarians, museum curators, historians, and anthropologists gathered at Northern Arizona University Cline Library in Flagstaff, Arizona. The participants included representatives from fifteen Native American, First Nation, and Aboriginal communities. The group met to identify **best professional practices** for culturally responsive care and use of American Indian archival material held by non-tribal organizations.

Human rights themes, such as understanding Native American values and perspectives and providing contexts for Native American archival materials, repeatedly emerged in the discussions. Related policy and legal topics included:

- the importance of consultation with and concurrence of tribal communities in decisions and policies
- the need to recognize and provide special treatment for culturally sensitive materials
- rethinking public accessibility and use of some materials
- the role of intellectual and cultural property rights
- the need to consider copying, sharing, and/or repatriation of certain materials
- the recognition of community-based research protocols and contracts
- reciprocal education and training
- raising awareness of these issues within the profession

The *Protocols* build upon numerous professional ethical codes (Society of American Archivists, American Association for State and Local History, American Anthropological Association, and the Oral History Association); a number of significant international declarations recognizing Indigenous rights, including several now issued by the United Nations; and the ground-breaking *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives, and Information Services*.

The contributors to these North American best practices hope that the lines of communication opened by this work will serve as the genesis for an ongoing national discussion around different approaches to the management, preservation, and transmission of Native American knowledge and information resources. These Protocols urge archivists and librarians to consider Native American perspectives on professional policy and practice issues.

The proposed standards and goals articulated in *Protocols for Native American Archival Materials* are meant to inspire and to foster mutual respect and reciprocity. Institutions and communities are encouraged to adopt and adapt the culturally responsive recommendations to suit local needs. New issues for consideration will undoubtedly arise as the best practices are debated and implemented. The contributors intend this document to be a work in progress—subject to revision and enhancement.

North American libraries, archives, and American Indian communities will benefit from embracing the power of conversation, cooperation, education, negotiation, and compromise. As Sven Haakanson, Jr., (Alutiiq/Sugpiaq) reinforces in *Caring for American Indian Objects: A Practical and Cultural Guide*, “. . . it takes human connections to make positive changes happen.”¹

Acknowledgements

The *Protocols* project received generous support from the American Library Association Office for Diversity, the Gladys Krieble Delmas Foundation, the National Library of Medicine, the Wenner-Gren Foundation, The Bay and Paul Foundations, the Northern Arizona University Institute for Native Americans, and Mary and P. David Seaman.

The contributors wish to thank the Aboriginal and Torres Strait Islander Library and Information Resource Network for permission to draw upon the language and ideas presented in the *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives, and Information Services*.

Contributors:

Kathryn “Jody” Beaulieu

Anishinabe/Ojibwe
Director, Red Lake Tribal Library
Records Center and Archives

Briana Bob

Colville Confederated Tribes
Archivist, Archives & Records
Center

Sheree Bonaparte

Mohawk/Akwesasne
Tribal Historic Preservation Officer
Saint Regis Mohawk Tribe

Steve Crum

Shoshone
Professor, Native American
Studies
University of California at Davis

Amelia Flores
Mohave
Library/Archive Director
Mohave Colorado River Indian
Tribes

Alana Garwood-Houng
Yorta Yorta Nation
Senior Family History Officer
Australian Institute for Aboriginal
and
Torres Strait Islander Studies

David George-Shongo
Seneca Nation
Archivist

Eunice Kahn
Diné
Archivist, Navajo Nation Museum

Stewart Koyiyumptewa
Hopi Tribe
Archivist, Hopi Cultural
Preservation Office

Kim Lawson
Heiltsuk Nation
Librarian, Institute of Indigenous
Government /
Union of British Columbia Indian
Chiefs

Robert Leopold
Director
National Anthropological Archives
Smithsonian Institution

Gloria Lomahaftewa
Hopi Tribe
NAGPRA Specialist
Museum of Northern Arizona

James D. Nason
Comanche
Emeritus Professor of
Anthropology
Emeritus Director of Museology
Emeritus Curator of Pacific and
American
Ethnology, Burke Museum
University of Washington

Lotsee Patterson
Comanche
Professor, School of Library
Science
University of Oklahoma

Richard Pearce-Moses
President, Society of American
Archivists
Director, Digital Government
Information
Arizona State Library, Archives,
and Public Records

Jennifer R. Walele
Confederated Tribes of Grande
Ronde/Chinook
Archivist
U.S. Department of State
Office of the Assistant Legal
Adviser for Treaty Affairs

Alyce Sadongei
Kiowa/Tohono O'odham
Assistant Curator for Native
American Relations
Arizona State Museum

Karen J. Underhill
Head, Special Collections and
Archives
Northern Arizona University Cline
Library

Preamble

These *Protocols* are presented to guide libraries and archives in engaging in culturally responsive care of Native American archival materials and in providing culturally appropriate service to communities. Librarians and archivists should be aware that each tribe, band, and community is unique. The recommended best practices will need to be interpreted and applied by each collecting institution and community.

The *Protocols* address:

- (THEME 1) The recognition of the sovereign governments and associated rights of Native American communities.
- (THEME 2) Issues in the collection, ownership, preservation, handling, access, and use of American Indian archival resources.
- (THEME 3) The importance of building relationships, balancing different approaches to knowledge management, and mutual respect.
- (THEME 4) The need to expand the nature of the information professions to include Native American perspectives and knowledge.

Table of Contents

- (I) Building Relationships of Mutual Respect
- (II) Striving for Balance in Content and Perspectives
- (III) Accessibility and Use
- (IV) Culturally Sensitive Materials
- (V) Providing Context
- (VI) Native American Intellectual Property Issues
- (VII) Copying and Repatriation of Records to Native American Communities
- (VIII) Native American Research Protocols
- (IX) Reciprocal Education and Training
- (X) Awareness of Native American Communities and Issues

(I) Building Relationships of Mutual Respect

Native American communities have had extensive first-hand experience with the ways that information resources held in distant institutions can impact their quality of life, their practice of religion, and their future as a people—sometimes with disastrous consequences, sometimes to their benefit. Libraries and archives must recognize that Native American communities have primary rights for all culturally sensitive materials that are culturally affiliated with them. These rights apply to issues of collection, preservation, access, and use of or restrictions to these materials.

Collecting institutions and Native communities are encouraged to build relationships to ensure the respectful care and use of archival material. Meaningful consultation and concurrence are essential to establishing mutually beneficial practices and trust. Through dialogue and cooperation, institutions and communities can identify mutually beneficial solutions to common problems and develop new models for shared stewardship and reciprocity or for the appropriate transfer of responsibility and ownership for some materials.

(Chapter I, Section a) Archives and libraries guidelines for action:

- (I, a-1) Seek opportunities for Native American community consultation by contacting the chair's office of each tribe that is or may be culturally affiliated with collections held by the archives or library. Consultation may involve more than one person. As a professional courtesy, also contact the community's cultural center, library, or archives and/or the cultural preservation office. Appropriate personnel will appreciate being included in external discussions with mainstream archives and libraries. See:

Bureau of Indian Affairs *Tribal Leaders Directory*

<http://www.doi.gov/leaders.pdf>

National Directory of Tribal Archives, Libraries and

Museums www.statemuseum.arizona.edu/aip/leadershipgrant/directory/directory.shtml

American Indian Resource Directory

<http://www.indians.org./Resource/FedTribes99/fedtribes99.html>

National Association of Tribal Historic Preservation

Officers www.nathpo.org

Aboriginal Canada Portal

<http://www.aboriginalcanada.gc.ca/>

- (I, a-2) Inform Native communities about collections of relevant materials and explain the nature of the materials. Use the model summary or inventory letters required by the Native American Graves Protection and Repatriation Act of 1990, with a follow-up telephone call. More than one contact may be necessary. See: National Park Service, NAGPRA <http://www.cr.nps.gov/nagpra>
- (I, a-3) Evaluate institutional holdings and if a Native American collection is out of scope, transfer the collection to the community or the closest archives at the tribe or band's request.
- (I, a-4) Ensure equitable treatment in negotiations, whether a collection is culturally affiliated with one or more than one community. Offer comparable arrangements and agreements regarding access and use to all communities.
- (I, a-5) Document agreements with communities, through formal Memoranda of Agreement and/or other contracts, and honor commitments.
- (I, a-6) Be cautious in approving access or use requests, if the requests appear to conflict with the *Protocols*, until appropriate tribal community representatives can be consulted and have had ample time to consider these issues for culturally affiliated materials.
- (I, a-7) Appreciate that in most instances it will take years for institutions and staff to develop essential trust relationships with a community. Weeks, months, or longer may be required to gain an understanding of Native American perspectives on issues and to work through solutions and approaches to problems, in consultation with communities.
- (I, a-8) Require that auction houses and other sources certify that materials were acquired properly and that the possessor obtained the legal rights of disposition and any associated rights of copyright from any previous source(s).

- (I, a-9) Allow Native communities the right of first refusal for collections with strong cultural affiliation or sensitive content and act as a pass-through agency from the source to the community for such collections.
- (I, a-10) Respond to requests for assistance from tribal archives, libraries, and cultural organizations.

(Chapter I, Section b) Native American communities guidelines for action:

- (I, b-1) Publicize who may speak for them, by informing archives and libraries of the individuals who will act as community representatives for these matters, i.e. a tribal archivist, historic preservation officer, cultural liaison, records manager, etc.
- (I, b-2) Identify and contact collecting institutions which hold relevant materials, if possible. To access collection-level records and/or archival finding guides, see:

WorldCat OCLC www.oclc.org/worldcat

RLIN www.rlin.org

OAlster <http://oaister.umd.umich.edu/o/oaister/>

California Digital Library www.cdlib.org

The Online Archive of California www.oac.cdlib.org

Arizona Archives Online <http://aao.lib.asu.edu/index.html>

Online Archive of New Mexico elibrary.unm.edu/oanm

Texas Archival Resources Online <http://taro.lib.utexas.edu/>

Mountain West Digital Library www.lib.utah.edu/digital/mwdl

Galileo www.peachnet.edu

- (I, b-3) Understand that while the *Protocols* encourage a library or archives to be wary of providing access or use until tribes can be consulted, a collecting institution may proceed with providing access to and use of material as it deems appropriate, but only if a community fails to respond to a good-faith effort to request consultation.
- (I, b-4) Endorse partner collecting institutions; that is, establish formal relationships through memoranda of agreement with archives or libraries and recognize those partnerships publicly.
- (I, b-5) Offer expertise to institutions interested in developing culturally responsive archival management policies as well as exhibits, lectures, storytelling, teaching, workshops, and other forms of public education.

(II) Striving for Balance in Content and Perspectives

We're not looking at an issue paper by paper or record group by record group. It's a whole system of a way of life. Our knowledge systems don't make sense without spirituality. We are asking for respect for a system of knowledge.

Kim Lawson (Heiltsuk Nation)

Native American communities and collecting institutions share a desire to preserve cultural heritage and to serve as a bridge between the past, present, and future. However, differences exist in values, culture, knowledge systems, and approaches to learning. How should the needs of North American Indian tribes be balanced with a democratic society as a whole?

Archivists and librarians taught to champion intellectual freedom and unfettered access to resources may be troubled by the notion that in Native American and other Indigenous communities knowledge can be collectively owned and that access to some knowledge may be restricted as a privilege rather than a right. These views of information are not irreconcilable, given that archives and libraries often contain restricted materials, classified materials, secret materials, or materials that may not be accessed until some future date. Native American communities and individuals may also need to achieve an appropriate balance of rights and understandings with respect to archival materials and traditional knowledge. Archives and libraries should work with Native American communities on these issues as they apply to the general public.

(Section a) Archives and libraries guidelines for action:

- **(II, a-1)** Strive to develop institutional holdings that are comprehensive, inclusive, and reflect all key perspectives on Native American issues. Make an effort to collect resources created by rather than just about Native Americans. Consultation with members of the American Indian Library Association can be valuable to identify contemporary and appropriate resources, including lists of reference and other titles.
- **(II, a-2)** Respect and act on both Native American as well as “Western” approaches to caring for archival collections. Traditional knowledge systems possess equal integrity and validity. Actions and policies for preservation, access, and use based on Native American approaches will in some cases be priorities, as a result of consultations with a tribal community.
- **(II, a-3)** Examine assumptions about established library and archives practices which directly contradict Native American principles and practices.
- **(II, a-4)** At the request of a Native American community, avoid artificially prolonging the life cycle of sensitive documentary material. Some items, such as a photograph of a sacred ceremony, or object, or culturally sensitive documentation of a burial, should not be preserved forever or may need to be restricted or repatriated to the culturally affiliated group.
- **(II, a-5)** Respect traditional and customary practice. Some documentary collections may need to be kept together based on content, rather than segregated by format as often occurs in archival facilities, or have access restrictions based on a variety of culturally appropriate considerations.

(Section b) Native American communities guidelines for action:

- **(II, b-1)** Ask questions about and understand the ways in which archives and libraries manage collections that contain important Native American heritage to facilitate dialogue.
- **(II, b-2)** Recognize that libraries and archives can help preserve documentary materials, promote revitalization, and support community goals for the continuation of a positive culture based on strong cultural heritage.
- **(II, b-3)** Search for balance between long-standing, powerful oral traditions and the Western emphasis on the written word. Native American communities, as well as tribal archivists, must continually find ways to come to terms with relatively new Western archives concepts and practices. Many of the contemporary information resources about a community will arrive in written as well as aural or visual recording formats.

(III) Accessibility and Use

Native American requests for increased access to and sometimes control over information resources found in non-tribal collecting institutions is in keeping with current professional codes of ethics. These ethical codes (i.e., Society of American Archivists, American Library Association, American Association for State and Local History) instruct librarians and archivists to practice neutrality and to strive toward open and equal access for all patrons, in accordance with the law, cultural sensitivities, and institutional policy. Restrictions may be placed on a collection for reasons of group and individual privacy, confidentiality, or security. (See *Culturally Sensitive Materials*.)

Questions of access, ownership, and control of Native American archival material can prompt philosophical and practical concerns, particularly when there is inadequate information about community sovereignty and associated legal rights, community ownership of original source information, initial community restrictions on information sharing and distribution, and other related issues.

(Section a) Archives and libraries guidelines for action:

- **(III, a-1)** Recognize that the conditions under which knowledge can be ethically and legally acquired, archived, preserved, accessed, published, or otherwise used change through time. Some materials may have been collected or later restricted by a donor in contravention of community rights and laws or of contemporary federal laws or professional ethics. In all of these cases the rights of a Native American community must take precedence.
- **(III, a-2)** Seek active consultations with authorized Native American community representatives to review culturally affiliated collections in order to determine whether problems of original collection and ownership should lead to access and use restrictions being placed on some materials, whether some collections should be repatriated, (returned) or whether some materials should be available for access only with prior community review and approval.
- **(III, a-3)** Require researchers and collection sources to provide copies of any initial research contracts, agreements, or other comparable documents between themselves and a Native American community that pertain to the collection.
- **(III, a-4)** Involve communities in creating welcoming and comfortable spaces for Native American visitors and rethink the need for “credentials” from patrons.
- **(III, a-5)** Determine the types of resources and services Native communities want.
- **(III, a-6)** Offer to share a portion of commercial use fees derived from Native American collections with or otherwise provide copies of the final publications to the community of origin. Consult with communities if the proposed commercial use is questionable.
- **(III, a-7)** Consider the potential impact of worldwide digital access to resources once only available onsite at the collecting institution. Will the information be presented with sufficient context?
- **(III, a-8)** Honor access and use restrictions requested by tribes in the same manner when multiple institutions hold similar or identical materials.

(IV) Culturally Sensitive Materials

Most archives and libraries hold information of a confidential, sensitive, or sacred nature. The amount of this material may constitute a small percentage of the entire collection. For Native American communities the public release of or access to specialized information or knowledge—gathered with and without informed consent—can cause irreparable harm. Instances abound of misrepresentation and exploitation of sacred and secret information. Each community will understand and use the term “culturally sensitive” differently, although there are broad areas of common agreement for Native Americans about this issue.

Privacy rights extend to groups in some situations. The limited right of organizations, governments, and families to associate in confidence may apply to American Indian tribes who wish to minimize or prevent intrusion into their practices. Tribal groups have societies, bands, and clans that may be privileged vis-à-vis information. Archivists and librarians should understand that “the privacy of the information itself may be more paramount.”²

(Section a) Archives and libraries guidelines for action:

- **(IV, a-1)** Consult with culturally affiliated community representatives to identify those materials that are culturally sensitive and develop procedures for access to and use of those materials.³
- **(IV, a-2)** Request that researchers obtain clearance from Native American communities before accessing sensitive materials. A tribal community endorsement will strengthen the value of a research publication. In 1991, the Cline Library at Northern Arizona University and the Hopi Tribe agreed that sensitive ceremonial images would not be reproduced (or digitized for Internet access) without written permission from the Hopi Cultural Preservation Office. Access is still provided onsite. Other institutions have comparable policies; some institutions will not provide any access without prior written community authorization.
- **(IV, a-3)** Respect a community’s request to restrict access to and use of materials that describe and represent esoteric, ceremonial, or religious knowledge that is significant to the community. Protecting certain kinds of secret information may be a matter of “national security” for sovereign tribal governments.
- **(IV, a-4)** Review acquisition policies and forms with Native American community representatives in order to share suggestions for culturally responsive restrictions on deeds of gifts with potential donors.
- **(IV, a-5)** Ensure that any restrictions or agreed upon procedures are fully implemented and observed.
- **(IV, a-6)** Refrain from attempting to perform specialized care, such as smudging, offering corn pollen, or a general blessing, for sacred or spiritual items that have been removed from original contexts. Rituals or ceremonies should only be conducted by religious or cultural practitioners. Accommodate the needs of such practitioners (i.e. temporary suspension of a fire suppression system) as local circumstances permit.⁴

Examples of the kinds of archival materials—both human readable and digital—which may be culturally sensitive from a Native American perspective include:

Still and Moving Images (Photographs and Films)/Graphic Art

- human remains
- religious or sacred objects
- ceremonies of any kind
- burials, funerals
- archaeological objects (especially if from burials)
- hospitals, churches, cemeteries, kivas, sacred places

Recordings/Transcripts

- songs, chants
- music
- religious practice
- healing, medicine
- personal or family information
- oral histories
- community histories
- "myths," folklore

Cartographic Materials

- sacred sites or areas
- religious sites or areas
- village sites, territories, use areas

Records/Documents/Ephemera/Grey Literature/Theses and Dissertations/Published Texts

- personal or family information
- archaeological data
- religious materials
- ethnobotanical materials
- genealogical data

(V) Providing Context

A primary task for libraries and archives is to organize and describe information resources for efficient and effective retrieval. Collecting institutions also wish to share as much context as possible to enhance the value of resources for patrons. However, the use of outdated, inaccurate, derogatory, or Eurocentric language impedes access. Descriptive information can be improved with the addition of culturally appropriate and accurate language—from original titles through finding aids. Native American communities should be aware that offensive language or other injurious perspectives and information may be inherent in the content of some of the original materials.

(Section a) Archives and libraries guidelines for action:

- **(V, a-1)** Encourage culturally affiliated communities to provide context for the collections from their perspective. Supplement descriptive materials with cultural sensitivity statements. The Peabody Museum at Harvard has developed statements which inform researchers of community concerns and the existence of research protocols.

- (V, a-2) Inform patrons, at the request of a community, of potentially offensive content prior to use by adding a notice to descriptive tools or items such as “The [tribal name] finds information in this work inaccurate or disrespectful. To learn more contact . . .” Amelia Flores, the Colorado River Indian Tribes Library/Archive Director, applies a disclaimer to problematic publications acquired for the library, which states: *We do not endorse this publication.*
- (V, a-3) Work with community representatives to revisit indexing terminology, *Library of Congress Subject Headings*, *Anglo American Cataloging Rules* (second edition), and classification schemes. Indigenous and non-Indigenous librarians in Australia, for instance, have compiled a national thesaurus for describing Aboriginal and Torres Strait Islander records.⁵
- (V, a-4) Promote changes to established lexicons to allow retrospective conversion or enhancement of antiquated or inadequate catalog records to include contemporary, culturally responsive language. In consultation with communities, add cultural identifiers and information about language and geography.
- (V, a-5) Add explanations of derogatory words to original titles (e.g., [title created by xxxx in xxxx year]) or remove offensive terms from original titles and provide substitute language (e.g., replace “squaw” or “buck” with [woman] or [man]).
- (V, a-6) Actively gather metadata to accompany Native American archival collections to reflect the relationship between the creator or researcher and the community of origin.

(Section b) Native American communities guidelines for action:

- (V, b-1) Provide reviews of archival holdings in order to determine whether or not contextual issues exist in collections.
- (V, b-2) Assist, based on consultation reviews, in providing preferred language, in identifying people, places, and events, and in sharing additional context for archival materials.

(VI) Native American Intellectual Property Issues

We belong to the “property;” it doesn’t belong to us. We (my people-Onkwehonwe) belong to our land, our medicines, our communities, our philosophies, and our way of life. All these elements endure over time; we come and go.

Sheree Bonaparte (Mohawk/Akwesasne)

What is required at this moment is a fundamental acceptance that intellectual property and most especially esoteric knowledge are vital components of the living cultural heritage of Native American communities. . . . a way must be found to acknowledge and implement appropriate Native American controls over such knowledge.

James D. Nason (Comanche)

Borrowed Power: Essays on Cultural Appropriation

Numerous international declarations, many of which have been adopted by the United Nations, state that protection of cultural heritage and traditional knowledge is a right of Indigenous peoples. As Australian solicitor Terri Janke (Meriam, Wuthathi and Yadaighana Nations) observes, one problem with copyright from an Indigenous perspective is that it expires and protects authors

and publishers but not the interests of those whose culture is described or depicted. Indeed, Western copyright laws are based on principles which are diametrically opposite to Indigenous legal approaches to knowledge. Virtually every Indigenous society has traditions and laws regarding specialized knowledge, yet these practices are not recognized by Western law.

Existing copyright legislation does not address issues of significance to Native American communities such as: community ownership of works and management of rights; community interests in public disclosure of religious or sensitive information; protection of older or ancient works (e.g., rock art); the antiquity and accumulative nature of traditional knowledge; and the protection of oral traditions, songs, and other culturally sensitive intangible property. In some cases, Native American knowledge has been copyrighted by outsiders without appropriate permissions or approval.

(Section a) Archives and libraries guidelines for action:

- **(VI, a-1)** Recognize that the “right of possession”⁶ to some Native American materials may be held by communities of origin. Issues of “right of possession” are affected by previous original collecting that may have been carried out with deception, duress, subterfuge, and other unethical or illicit means. In other instances, someone in a community who did not have the right of disposition to Native American materials may have misappropriated the knowledge and/or materials. Under any of these circumstances, issues of title, copyright, and authorship are suspect. Only consultations with culturally affiliated communities can determine whether or not materials in archives are there illegally or unethically.
- **(VI, a-2)** Appreciate that discussing property in Native American communities can be antagonistic from the perspective of community members—based on the Western legal interpretation that only one person or entity can own it.
- **(VI, a-3)** Consider expanding the idea of moral rights (*droit moral*) to protect Native American cultural and intellectual property. The European notion of the *droit moral*, which exists to only a limited degree in countries with common law such as the United States, extends beyond copyright and specifies that a creator enjoys the right to attribution and to maintain the integrity of the work (no defamatory use, modification, or distortion). The *droit moral* is perpetual. American creators of visual art are entitled to the right of attribution and integrity under 17 USC Section 106A, known as the Visual Artists Rights Act of 1990. Other moral rights of authorship recognized by some nations include: the right of disclosure, the right to withdraw and retract, and the right to reply to criticism. Consult *Art and Museum Law* (Robert C. Lind, et al. Durham, NC: Carolina Academic Press, 2002), or the *Model Law for the Protection of Traditional Ecological Knowledge, Innovations, and Practices* http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf.

(VII) Copying and Repatriation of Records to Native American Communities

The draft U.N. Declaration of the Rights of Indigenous Populations and the 1993 *The Mata’atua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* recognize a fundamental right to protect traditional knowledge. Cultural patrimony is understood to mean any property (tangible or intangible) that is owned by a community as a whole, or by a group which holds such property in trust for the community, is inalienable except by community consent, and which may be fundamental elements of a community’s cultural identity and heritage.⁷

In the United States, a network of laws addresses cultural heritage protection, notably the 1966 National Historic Preservation Act and the 1990 Native American Graves Protection and

Repatriation Act (NAGPRA). The impact of NAGPRA has been largely positive as institutions and communities engage in conversations and often rewarding partnerships. NAGPRA not only recognized the sovereignty of tribes but also:

- established community legal rights and protection for key types of cultural materials, including funerary objects, sacred objects, and cultural patrimony as well as human remains.
- acknowledged special powers of individual and community ownership and control of cultural property, with the right to repatriate such property and human remains.
- determined that cultural patrimony is inalienable and corporate and placed the burden of proof with regard to “right of possession” on institutions.

Does the NAGPRA definition of “cultural patrimony” apply to culturally sensitive archival materials? The national NAGPRA committee and state and federal courts have yet to review a case involving documentary materials as opposed to objects. NAGPRA does not reference archival records or traditional knowledge. Some institutions have voluntarily, in the spirit of NAGPRA, offered to repatriate culturally sensitive archival materials as sacred and/or patrimonial objects, including images and recordings.

(Section a) Archives and libraries guidelines for action:

- [\(VII, a-1\)](#) Respond cooperatively to requests for copies of records for community use and retention. Resources held at a distance may become estranged from the people to whom they are most relevant.
- [\(VII, a-2\)](#) Understand that some materials were originally collected on the basis of a trust relationship between the community and the collector. These materials were assumed to remain under the control of responsible community representatives, or essentially “held in trust” for the community. These trust holdings can and should revert to community control upon request.
- [\(VII, a-3\)](#) Repatriate original records when the records have been obtained through theft or deception and/or the collecting institution cannot prove “right of possession” “Replevin,” an action by the legal authority to recover records, may also apply. (See *Native American Intellectual Property Issues*.)
- [\(VII, a-4\)](#) Recognize that archived materials may be associated with other cultural materials (including archaeological collections of human remains or associated funerary objects). When the latter are repatriated through federal law and revert to the control of a Native American community, a collecting institution should also consider transferring primary physical ownership and all copyright or literary rights for those archived materials.
- [\(VII, a-5\)](#) Request permission to hold copies of repatriated records. Institutions may need to keep copies to prove former ownership.
- [\(VII, a-6\)](#) Anticipate that communities may ask a collecting institution to retain records in trust or under a co-custody agreement until such time as a tribal archives or library requests a return of the original documents for long-term preservation and local access.
- [\(VII, a-7\)](#) Participate in “knowledge repatriation.” Who is the information intended to serve? What is the natural life cycle of the information?

(Section b) Native American communities guidelines for action:

- (VII, b-1) Provide in-depth consultation and review of archival collections in order to establish which materials may have been acquired inappropriately or require special conditions for handling, access, and use.
- (VII, b-2) Conduct research to establish which archival collections were acquired without right of possession.
- (VII, b-3) Consider in-trust holding agreements and other arrangements with archives and libraries, in the event the no proper tribal facility exists or other conditions.
- (VII, b-4) Ensure that copied and repatriated materials are properly cared for and managed. The state-of-the-art Seneca Nation Archives—the “Caretakers of the Old Words”—and the Mashantucket Pequot Archives and Special Collections serve as a model repositories.
- (VII, b-5) Request copies of legal agreements for copied and returned collections.

(VIII) Native American Research Protocols

Collecting institutions are dedicated to public education, research, and service. Just as many collecting institutions operate under the oversight of an institutional review board for the protection of human subjects, an increasing number of Native American tribes have developed formal research policies and procedures which may require legal contracts or agreements with individual researchers to defend against misappropriation and abuse of traditional knowledge.

Institutions and communities benefit when research is conducted in accordance with the highest possible ethical and legal standards. Community research protocols cover topics such as: intellectual property rights, ownership of data and subsidiary products, research controls, risks, informed consent, community rights, access, right of review, confidentiality, deposit with a tribally-designated repository, preference in employment and training, and safeguarding individual and communal privacy.

(Section a) Archives and libraries guidelines for action:

- (VIII, a-1) Consult with Native American communities regarding research protocols and adhere to existing community research and cultural property protocols, as related to archival and documentary materials.
- (VIII, a-2) Encourage patrons doing research on Native American cultures to inform the relevant community of their research and direct researchers to community protocols so that they may understand tribal concerns. A community will often endorse a project which complies with tribal guidelines.
- (VIII, a-3) Direct researchers to the collecting institution’s human subject protocols when research involves the privacy of individuals depicted in records.
- (VIII, a-4) Acquire copies of and respect agreements made between communities and researchers who donate their collections.

- (VIII, a-5) Ask potential donors if they have entered into such an agreement with a community.
- (VIII, a-6) Share information about existing agreements between institutions and communities for culturally responsive care and use of Native American archival collections with potential donors.

(Section b) Native American communities guidelines for action:

- (VIII, b-1) Provide archives and libraries with copies of their research protocols.
- (VIII, b-2) Review research protocols with archival or library staff.
- (VIII, b-3) Develop research protocols if they have not already done so and consider community-based agreements for specialized or traditional knowledge.
- (VIII, b-4) Provide names and contact information for the designated tribal representatives that collecting institutions can share with researchers.

(IX) Reciprocal Education and Training

It is much easier to teach someone library and archives skills than to try to teach them a culture.
Lotsee Patterson (Comanche)

The nature of our society and the information professions is dynamic. Archivists and librarians need to accelerate the acceptance of different approaches to designing and deploying knowledge management systems and to welcome Native American practitioners as equal partners in caring for cultural heritage. Cross-cultural training and exchange will enrich collecting institutions, communities, and academia. Organizations should strive to build a staff and governing structure that reflect the composition of communities served.

(Section a) Archives and libraries guidelines for action:

- (IX, a-1) Acknowledge, respect, and learn from the valuable knowledge of tribal archivists and librarians and other tribal specialists and elders. Appreciate that individuals are recognized within a tribal society as caretakers and knowledge workers. Many tribal archivists, historians, storytellers, teachers, orators, and others possess a unique understanding of their communities, their culture, and their oral and written traditions.
- (IX, a-2) Insist on cross-cultural training in information science programs and courses at all levels.
- (IX, a-3) Support Native American students in education and training programs—from recruitment to mentoring and study leave.
- (IX, a-4) Request assistance from tribal archivists, librarians, and communities in designing and implementing training for non-tribal archivists and in improving services. Orientation and training will allow staff to address the culturally specific needs of Indigenous patrons. Follow up by reviewing staff performance as it relates to practicing culturally respectful behavior.

- (IX, a-5) Invite Native American community members to participate in hiring processes, as appropriate, and employ American Indian staff in visible positions.
- (IX, a-6) Ensure diverse community representation on advisory bodies or boards but avoid tokenism.

(Section b) Native American communities guidelines for action:

- (IX, b-1) Encourage Native American archivists and cultural preservation staff to serve as mentors to a new generation of archivists and librarians and ensure that community personnel have appropriate archival training.
- (IX, b-2) Develop and maintain community archives and libraries and become familiar with specialized educational opportunities for undergraduate and graduate students. Examples include:

The *Knowledge River* program (<http://knowledgeriver.arizona.edu/>) at the University of Arizona

Honoring Generations: Developing the Next Generation of Native Librarians (<http://www.ischool.utexas.edu/~hg/index.html>) at the University of Texas at Austin

The School of Library and Information Studies (www.ou.edu/cas/slis) at the University of Oklahoma.

For scholarships and American Indian college resources, see:

American Library Association *Spectrum Initiative* (<http://www.ala.org/ala/diversity/spectrum/spectruminitiative.htm>)

Index of Native American College Resources (<http://www.hanksville.org/NAresources/indices/NAcollege.html>)

- (IX, b-3) Actively participate in regional and national professional organizations to represent and raise awareness of Native American concerns.
- (IX, b-4) Consider joining regional and national library and archives networks that offer opportunities for sharing resources, problem-solving, and cross-cultural training.

(X) Awareness of Native American Communities and Issues

Most archivists and librarians in the United States and Canada are well-intentioned and want to “do the right thing” when it comes to culturally respectful care and use of Native American archival materials. Who do you ask? How do you know? What if “I can’t do that!” is the initial reaction? As *Protocols* contributor Richard Pearce-Moses (Arizona State Library, Archives, and Public Records) joked, “Our hearts are in the right place, but maybe not our heads.”

The *Protocols for Native American Archival Materials* are intended to assist in answering these questions. All parties are encouraged to keep in mind the power of building relationships of mutual respect between collecting institutions and communities and the advantages to be derived from balancing different approaches to the collection, preservation, and transmission of knowledge. Non-tribal archivists and librarians should also remember the unique status of Native American communities as sovereign governments with associated rights.

(Ch. X, Section ab) Archives, libraries, and Native American communities guidelines for action:

- *(X, ab-1)* Become aware of issues surrounding the collection, ownership, preservation, handling, access, and use of physical and digital American Indian archival resources held in tribal and non-tribal repositories.
- *(X, ab-2)* Educate others about Native American archival issues and concerns and opportunities to improve traditional and contemporary practices.
- *(X, ab-3)* Cooperate to gather archival materials which contribute to a better future.
- *(X, ab-4)* Create and implement policies to identify and archive important community records.
- *(X, ab-5)* Promote the vitality of communities and collecting institutions through an array of joint public programs—tours, exhibitions, lectures, storytelling, publications, formal and informal workshops and classes, and celebrations.
- *(X, ab-6)* Collapse boundaries between libraries, archives, and cultural organizations to further life-long learning and better connect people to the human experience.
- *(X, ab-7)* Arrange for reciprocal visits to weave a stronger community fabric and establish long-term trust relationships. Archivists and librarians need to “get out from behind the desk.”

Brief Glossary of Terms

Cultural patrimony

Any property (tangible or intangible) that is owned by a community as a whole, or by a group which holds such property in trust for the community, is inalienable except by community consent, and which may be a fundamental element of a community’s cultural identity and heritage.

Culturally responsive

Tailored actions which demonstrate awareness and appreciation of the needs of a particular group, community, or nation.

Culturally sensitive

Tangible and intangible property and knowledge which pertains to the distinct values, beliefs, and ways of living for a culture. It often includes property and knowledge that is not intended to be shared outside the community of origin or outside of specific groups within a community. (See the list of information that is potentially cultural sensitive.)

Memorandum of Agreement

A formal written document between two parties (a Native American community and a collecting institution) which may or may not be binding regarding a course of action or activities.

Native American

Refers to Indian (First Nations), Eskimo (Inuit), and Aleut individuals and communities in the United States and Canada as well as to Native Hawaiians.

Property

Anything that can be possessed or disposed of in a legal manner.

Intellectual (Intangible) property

Personal property, including Native American cultural heritage, that could be subject to copyright, patents, trademarks, franchise agreement, business goodwill, and *droit de suite*.

Tangible property

Personal property in the form of any physical object with intrinsic value that is not real property (land, buildings, minerals, etc.) or intangible property.

Repatriation

In the United States, the transfer of all legal rights to and physical custody of Native American cultural materials to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations.

Secret

This term refers to tribal community information or knowledge that is kept from general public knowledge and is held in trust or owned by individuals or groups within the community. No single English word has the range of meanings associated with this kind of information or knowledge as it is meant in communities, and different communities may also have different perspectives on this. Such information or knowledge might be thought of as privileged or confidential, and may have restricted access, for example.

Sovereignty

Supremacy of authority or rule; independence and self-government. A territory existing as a separate state.

Traditional knowledge

Valued knowledge which is individually or communally owned in accord with established community rules of ownership; often sacred or sensitive and requiring specialized training or status for inheritance or use; often held in trust for a community by an individual; may include songs, oral traditions, customs, and specialized knowledge.

Bibliography

Aboriginal and Torres Strait Islander Protocols for Libraries, Archives, and Information Services <http://www.cdu.edu.au/library/protocol.html>

Aboriginal and Torres Strait Islander Library and Information Resource Network (ATSILIRN) <http://home.vicnet.net.au/%7Eatsilirn/>

American Anthropological Association *Code of Ethics*
<http://www.aaanet.org/committees/ethics/ethcode.htm>

American Association for State and Local History *Code of Ethics*
<http://www.aaslh.org/ethics.htm>

American Library Association *Code of Ethics*
<http://www.ala.org/ala/oif/statementspols/codeofethics/codeethics.htm>

Assembly of First Nations and the Canadian Museums Association “Task Force Report on Museums and First Peoples” *Museum Anthropology* June 1992, Vol. 16 (2)

Australian Institute of Aboriginal and Torres Strait Islander Studies www.aiatsis.gov.au
Guide to Ethical Research in Indigenous Studies
www.aiatsis.gov.au/corp/docs/EthicsGuideA4.pdf

Brown, Michael F. “Can Culture Be Copyrighted?” *Current Anthropology* April 1998

_____. “Cultural Records in Question: Information and Its Moral Dilemmas”
Cultural Resource Management National Park Service Vol. 21 (6) 1998

_____. *Who Owns Native Culture?* Cambridge, Mass: Harvard University Press, 2003

Byrne, Alex, Alana Garwood, Heather Moorcroft, and Alan Barnes. *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives, and Information Services*
Deakin, ACT: Australian Library and Information Association, 1995

Calliou, Brian. “Methodology for Recording Oral Histories in the Aboriginal Community” *Native Studies Review* Vol. 15 (1) 2004

Coffey, Wallace and Rebecca Tsosie. “Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations” *Stanford Law and Policy Review* Vol. 12 (2) 2001

Cooper, Amy. “Issues in Native American Archives” *Collection Management* Vol. 27 (2) 2002

Copyright Basics (U.S. Copyright Office) <https://www.copyright.gov/circs/circ01.pdf>

Council for the Preservation of Anthropological Records (CoPAR)
<http://archaeology.la.asu.edu/copar> and *Ethical Use of Anthropological Records*
(CoPAR Bulletin 10) <http://www.nmnh.si.edu/naa/copar/bulletin10.htm>

Fleckner, John A. *Native American Archives: An Introduction* Chicago: Society of American Archivists, 1984

Freedom of Information Act <http://www.usdoj.gov/04foia/foiastat.htm> and www.aclu.org

Greaves, Tom, ed. *Intellectual Property Rights for Indigenous Peoples: A Source Book*
Oklahoma City, Okla: Society for Applied Anthropology, 1994

_____. “Examining Indigenous Rights to Culture in North America” *Cultural Dynamics*
Vol. 14 (2) 2002

Gulliford, Andrew. *Sacred Objects and Sacred Places: Preserving Tribal Traditions*
Boulder: University of Colorado, 2000

Hendry, Joy. *Reclaiming Culture: Indigenous People and Self-Representation*
Palgrave Macmillan, 2005

Hopi Tribe Research Protocols <http://www.nau.edu/~hcpo-p/hcpo/index.html>

Indigenous Knowledge Systems and Intellectual Property Rights: An Enabling Tool for Development with Identity http://www.un.org/esa/socdev/unpfii/documents/TK_Paper_VSimIFAD_English.pdf

Janke, Terri. *Our Culture, Our Future: Report on Australian and Indigenous Cultural and Intellectual Property Rights* Surrey Hills, N.S.W.: Michael Frankel, 1998

Lawson, Kimberley L. *Precious Fragments: First Nations Materials in Archives, Libraries, and Museums* Vancouver: University of British Columbia, 2004

Lind, Robert C. *Art and Museum Law* Durham: NC: Carolina Academic Press, 2002

Lomawaima, K. Tsianina. "Tribal Sovereigns: Reframing Research in American Indian Education" *Harvard Educational Review* Spring Vol. 70 (1) 2000

The Mata'atua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples <http://aotearoa.wellington.net.nz/imp/mata.htm>

Model Law for the Protection of Traditional Ecological Knowledge, Innovations, and Practices http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf

Nakata, Martin et. al. *Mapping the Aboriginal and Torres Strait Islander Protocols for Libraries, Archives, and Information Services* University of Technology Sydney, 2005

Nakata, Martin and Marcia Langton. *Australian Indigenous Knowledge and Libraries* Canberra: Australian Academic & Research Libraries, 2005

Nason, James D. "Native American Intellectual Property Rights: Issues in the Control of Esoteric Knowledge" in Bruce Ziff and Pratima V. Rao, ed. *Borrowed Power: Essays on Cultural Appropriation* New Brunswick, N.J.: Rutgers University Press, 1997

_____. "Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation" *Stanford Law and Policy Review* Spring Vol.12 (2) 2001

_____. "Tribal Research: Tribal Models for Controlling Research" *Tribal College Journal* Fall Vol. 8 (2) 1996
<http://www.fdl.cc.mn.us/tcj/summer97/NASON.html>

National Museum of the American Indian "Native Languages Archives Repository Project, Reference Guide" (Unpublished) March 11, 2005

Ogden, Sherelyn. *Caring for American Indian Objects: A Practical and Cultural Guide* Minnesota Historical Society Press, 2004

Oral History Association *Evaluation Guidelines*
www.dickinson.edu/oha/pub_eg.html

Patterson, Lotsee. *Native American Libraries and Resources*
<http://faculty-staff.ou.edu/P/Lotsee.F.Patterson-1/nalib.htm#Articles%20&%20Reports>

Society of American Archivists *Code of Ethics*
http://www.archivists.org/governance/handbook/app_ethics.asp

Sullivan, Lawrence E. and Alison Edwards. *Stewards of the Sacred* Washington, DC:
American Association of Museums, 2005

Tuhiwai Smith, Linda. *Decolonizing Methodologies: Research and Indigenous Peoples*
London: Zed Books Ltd, 1999

UNESCO. Convention for the Safeguarding of the Intangible Cultural Heritage
<http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>

United Nations. Draft Declaration on the Rights of Indigenous People
<http://www.cwis.org/drft9392.html>

Sherelyn Ogden. *Caring for American Indian Objects: A Practical and Cultural Guide* (Minnesota Historical Society Press, 2004): 15.

James D. Nason. "Native American Intellectual Property Rights: Issues in the Control of Esoteric Knowledge" in *Borrowed Power: Essays on Cultural Appropriation*
Bruce Ziff and Pratima V. Rao, ed. (New Brunswick, N.J.: Rutgers University, 1997), p. 252.

The Provost at California State University at Chico formed a 12-member committee, composed of university personnel, members from the Maidu, Pomo, and Wintun tribes, and the Dorothy Moorehead Hill family for an item-by-item review of an ethnographic collection. See Taran March. "A Legacy in Trust: The Dorothy Moorehead Hill Collection" *Chico Statements* Spring 2002. Accessed online April 23, 2006 at: http://www.csuchico.edu/pub/cs/spring_02/site_map.html

For a full discussion of this recommendation, see Alyce Sadongei's observations in Sherelyn Ogden, *Caring for American Indian Objects: A Practical and Cultural Guide* (Minnesota Historical Society Press, 2004), pp. 18-19.

Heather Moorcroft and Alana Garwood. *Aboriginal and Torres Strait Islander Thesaurus* (Canberra: National Library of Australia, 1997).

The "Right of Possession" refers to possession obtained with the voluntary consent of an individual or group that had authority of alienation. An individual, agency, or institution that claims right of possession should be able to provide evidence that the prior Native American owners and the appropriate authority voluntarily agreed to the transfer of ownership.

Other international agreements have also recognized the importance of archival materials. The 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* Article 1(j) states that cultural property includes

"archives, including sound, photographic, and cinematographic archives." This Convention urges states to take appropriate action to legally protect and recover misappropriated materials.