

Chapter 1

The Case for NAGPRA¹

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Introduction

The Native American Graves Protection and Repatriation Act (NAGPRA) was part of a larger movement to recognize and rectify government actions taking place over centuries that had the goal of destroying Native American religions and cultures. For most of American history, the United States government actively discouraged and even outlawed the exercise of traditional Indian cultures and religions. For instance, from the 1890s until the 1930s, the federal government outlawed the sun dance, similar dances and religious ceremonies, and the practices of medicine men.² It was not until the 1970s that Congress enacted the American Indian Religious Freedom Act (AIRFA).³ Although not enforceable in court, AIRFA established a federal policy to protect and preserve the right of Native Americans to believe, express, and exercise their traditional religions, including access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.⁴

In the late 1980s and early 1990s, an effort was made by Indian tribes and national Indian organizations, with the support of traditional practitioners, to put teeth into this policy—to protect sacred sites and burial sites and the use of ceremonial objects such as eagle feathers, and to repatriate human remains, as well as funerary and sacred objects. In 1988, a broad-based national American Indian Religious Freedom Coalition (which became known as the AIRFA Coalition) was formed by the Association on American Indian Affairs (AAIA), Native American Rights Fund (NARF), and National Congress of American Indians (NCAI). Responding to the case of *Lyng v. Northwest Indian Cemetery Protective Association*,⁵ in which the United States Supreme Court interpreted the First Amendment to the Constitution in a manner that essentially precluded Native religious practitioners from using the First Amendment to protect their sacred sites, the Coalition ultimately included numerous Indian tribes, Indian organizations, and non-Native organizations, including human rights, environmental, and religious organizations.⁶

At that time, I was a staff attorney with AAIA and worked closely with other tribal advocates and Congressional staff on this broad range of legislative issues, including

what ultimately became NAGPRA. Simultaneously, I was working at the grass roots level with traditional tribal leaders to protect sacred sites from destructive development. Ever since, I have had the continued privilege of working on these profoundly important issues critical to the well-being of tribal communities and the continuation of tribal cultures.

Although the impetus for the creation of the AIRFA Coalition had been the *Lyng* case, laws mandating repatriation became the initial focus of the coalition. During 1989 and 1990, a concerted national effort to enact such laws took place. The result was the passage of NAGPRA and the repatriation provisions applicable to the Smithsonian in the National Museum of the American Indian Act (NMAI Act or Museum Act),⁷ probably the most significant accomplishments that arose as a result of the efforts of this coalition.⁸

Historical background

Respect for the dead is a value shared by almost all cultures. It is an integral part of the philosophical and legal structure of the United States, just as it is throughout most of the world. As noted by one analyst: "[American cases] all agree in principle: The normal treatment of a corpse, once it is decently buried, is to let it lie . . . [No] system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes compelling reasons."⁹

These principles are reflected in the laws of all fifty states and the District of Columbia in statutes that regulate cemeteries, prohibit grave robbing, and ensure the proper treatment of human remains. Many state laws seek to ensure that all persons are entitled to a decent burial, regardless of their economic or social status.¹⁰ In addition, judicially created common law protects the sanctity of the dead.¹¹ Disinterment is allowed only in the most unusual circumstances and under strict conditions set by the courts.¹²

Unfortunately, this legal structure failed to protect the grave sites and human remains of Native peoples in this country, yet another aspect of historical discrimination against Native Americans. State laws did not protect unmarked Native graves like they protected marked graves.¹³ The laws also did not recognize that an entire tribe may maintain a strong cultural connection with its ancestors; instead, the right to protect human remains and grave sites under most laws was limited to the immediate next of kin. The common law failed to take into account unique indigenous burial practices such as scaffold, canoe, or tree burials.¹⁴ The law also failed to take into account that many tribes were removed from their historic homelands, leaving behind (involuntarily) their burial grounds.

For example, in *Wana the Bear v. Community Construction, Inc.*, the court held that a historic Indian cemetery was not a "cemetery" within the meaning of state

cemetery protection laws.¹⁵ In *State v. Glass*, the court held that older human skeletal remains were not considered “human” for purposes of an Ohio grave robbing statute.¹⁶ In *Carter v. City of Zanesville*, the court held that a cemetery may be considered “abandoned” when no further burials are taking place—a holding that ensured that the burial places of relocated Indian tribes would not be protected.¹⁷

The results of these policies and the inadequacy of the legal system have been devastating to Native communities. Inventories prepared under NAGPRA have identified more than 180,000 human remains in the possession of museums and federal agencies¹⁸ (and under the Museum Act, another 18,000 have been inventoried by the Smithsonian Institution).¹⁹ Almost every Indian tribe has had their dead transported into collections held by well-known institutions all across the country.

The law also failed to protect against the transfer of huge quantities of cultural property—sacred objects and cultural patrimony. One historian explained this phenomenon:

During the half-century or so after 1875, a staggering quantity of material, both secular and sacred—from spindle whorls to soul-catchers—left the hands of their native creators and users for the private and public collections of the European world. The scramble . . . was pursued sometimes with respect, occasionally with rapacity, often with avarice. By the time it ended there was more Kwakiutal material in Milwaukee than in Mamallilikulla, more Salish pieces in Cambridge than in Comox. The City of Washington contained more Northwest Coast material than the state of Washington and New York City probably housed more British Columbia material than British Columbia itself. . . . In retrospect it is clear that the goods flowed irrevocably from Native hands to Euro-American ones until little was left in possession of the people who had invented, made, and used them.²⁰

The sordid history of how these human remains, funerary objects, and other cultural items were obtained has been documented in recent studies. One such study, the Bieder Report, was presented to Congress as an appendix to testimony submitted by the Association on American Indian Affairs at a Senate Select Committee on Indian Affairs hearing on NAGPRA.²¹ It is worth summarizing some of the findings of that report.

Dr. Bieder found that there were two primary reasons that Native American human remains were collected by Euro-Americans. One purpose was to advance certain scientific theories about the nature of the different races, particularly through the now thoroughly discredited “science” of phrenology (the study of skulls).²²

Dr. Samuel Morton, often thought of as the founder of American physical anthropology, authored *Crania Americana* in 1839, which analyzed the cranial capacity of the skulls of different races. He and like-minded scientists viewed this as a reflection of intelligence. Their conclusions were summarized by one phrenologist as follows, "The general size [of the Indian heads] is greatly inferior to that of the average European head; indicating inferiority in natural mental power."²³ In order to obtain these skulls, Morton and others actively sought assistance from "collectors" and this activity took place even though the objections of Native peoples were well known.²⁴

Later, the search for Indian body parts became official federal policy with the Surgeon General's Order of 1867. The policy directed army personnel to procure Indian crania and other body parts for the Army Medical Museum, "the chief purpose . . . in forming this collection is to aid in the progress of anthropological science by obtaining measurements of a large number of skulls of aboriginal races of North America."²⁵ These theories provided "scientific support" for the manifest destiny policies followed by the United States during the nineteenth century—policies that led to the relocation of Indian tribes and taking of tribal lands, and the aggressive policies that decimated tribal populations and suppressed tribal cultures and religions.

Bieder also documented that a second reason for the acquisition of Native human remains and cultural items was a competition between museums as to which could collect the most Indian bodies and "artifacts." These museums included many of the most prominent museums in the United States, including the Field Museum of Natural History in Chicago, the American Museum of Natural History in New York, and the Smithsonian Institution.²⁶

The means for obtaining bodies and grave goods were often unethical and unsavory. The Bieder Report documents the stripping of whole villages of both artifacts and human remains in the dead of night with the contents carted off to museums. These actions were often taken with full knowledge that Indian people objected to such actions, and those seeking to "excavate or seize" Indian remains were forced to resort to surreptitious means to obtain them, because they knew that the affected Indian people would resist the desecration of their burial sites.²⁷ One 1892 account of a rainy-night grave robbing of fifteen Blackfeet Indian graves is typical of what took place:

[T]he burial place is in plain sight of many Indian houses and very near frequent roads. I had to visit the country at night when not even the dogs were stirring . . . after securing one [skull] I had to pass the Indian sentry at the stockade gate which I never attempted with more than one [skull], for fear of detection. . . . On one occasion I was followed by an Indian who did not comprehend my movements, and I made a

circuitous route away from the place intended and threw him off his suspicions. On stormy nights—rain, snow or wind and bitter cold, I think I was never observed going or coming, by either Indians or dogs, but on pleasant nights—I was always seen but of course no one knew what I had in my coat . . . the greatest fear I had was that some Indian would miss the heads, see my tracks and ambush me, but they didn't.²⁸

As Franz Boas, the famous American anthropologist, observed in the 1880s, "It is most unpleasant work to steal bones from graves, but what is the use, someone has to do it."²⁹

Jerry Flute, a former tribal chairman of the Sisseton Wahpeton Sioux Tribe and a traditional practitioner of Dakota culture and religion, testified (as Assistant Director of the Association on American Indian Affairs) about the Bieder Report at the Senate hearing. In his words, "This is a very difficult report for an Indian to read . . . It's a very sad account of the atrocities. It's a shameful account of how museums—some of the museums who were here today—actually competed with each other and hired people to rob graves of Native American people."³⁰

Some other examples of the failure of "collectors" to respect the basic humanity of American Indians included the boiling of bodies of recently deceased Indians by Army physicians and others to secure "fresh" skulls for museums³¹ and the retention of the bodies of four Inuit men and one Inuit girl who died in New York City in the early part of this century by the American Museum of Natural History. In the latter case, not only were the bodies not properly buried, but a mock funeral was held to convince the surviving son of one of the men that proper funeral rituals were being observed and that his father had been buried in accordance with Inuit custom.³²

These activities continued well into the twentieth century. For example, in the late 1930s, scientists associated with the Smithsonian Institution descended upon Larsen Bay on Kodiak Island in Alaska and dug up a Native graveyard with more than 400 bodies and skeletons.³³

In fact, beginning in 1906, federal law defined dead Indians interred on federal lands as "archaeological resources" and, contrary to long-standing common law principles, converted these dead persons into "federal property."³⁴ Over the years, thousands of Indian dead were classified as "archaeological resources" and exhumed as "federal property."³⁵ These excavations rarely, if ever, involved the descendant communities in the permit decisions. When tribes did protest, they found the courts were not available to them as a means to seek basic human rights or property rights.

An example of how the American court system failed to protect basic tribal property rights can be seen in the case of the Haudenosaunee (Iroquois) Wampum belts. Wampum belts served the function of a written language for the Iroquois. By means

of belts of colored beads, different events and ideas could be communicated through the wampum belt. Elders familiar with the language of the wampum belts could read these belts and pass along the history, beliefs, and laws of the tribe from one generation to the next. In the late nineteenth century, some wampum belts were sold to a United States government official by an individual who had no right to transfer the belts under tribal law since they were the property of the tribe. A court case was brought in 1896; the tribe sought to have the wampum belts returned based upon conventional theories of property law, conversion, and removal without permission. The case was unsuccessful. The Haudenosaunee never gave up, however. The dispute was ultimately resolved in 1986, not by court action, but by the museum reviewing its own actions in receiving and holding the belts and coming to an agreement after consultation with the tribes.³⁶

What led to NAGPRA: legislative history

In 1986, some Northern Cheyenne representatives discovered that almost 18,500 human remains were warehoused in the Smithsonian Institution.³⁷ This discovery helped serve as a catalyst for a national effort by Indian tribes and organizations to obtain legislation to repatriate human remains and cultural items to Indian tribes and descendants of the deceased.

Initial proposals provided for the creation of a Native American Museum Claims Commission, which was intended to provide a mechanism to resolve disputes between museums and Native Americans regarding the repatriation of "skeletal remains, cultural artifacts, and other items of religious or cultural significance."³⁸

However, in the 101st Congress, this approach was abandoned in favor of legislation that would directly require the repatriation of human remains and cultural artifacts, as well as the protection of burial sites. This is the approach that was ultimately adopted by Congress when it enacted NAGPRA.

There were a few key events that preceded the enactment of NAGPRA. The first event was the enactment of the National Museum of the American Indian Act³⁹ (Museum Act) in November 1989. The Museum Act created a National Museum of the American Indian within the Smithsonian Institution.⁴⁰ The first draft of the Museum Act in 1987 had included an inventory and repatriation requirement.⁴¹ However, in 1989 as the act was gaining momentum, the bill had been watered down to require only a study about repatriation.⁴² At that time, there was a discussion within the Indian community about whether to insist upon stronger repatriation provisions in the Museum Act. Jerry Flute, then acting Director of the Association on American Indian Affairs, was a particularly strong advocate for this position. Based upon his discussion with traditional people, he believed that repatriation was of the utmost importance to Indian country, even more important than the creation of the

museum.⁴³ His advocacy on this issue convinced those who were fearful that a push for a stronger repatriation provision might jeopardize the Museum Act. Indian organizations (including the three founding members of the AIRFA Coalition: AAIA, NARF, and NCAI) and Indian tribes spearheading the effort decided to take a strong position in favor of repatriation and were prepared to oppose the bill if it did not provide for repatriation. At a House hearing on the proposed Museum Act, Flute testified, "[W]here the Smithsonian takes a position that there are few and maybe a small group of people raising this issue, we feel that they are totally out of touch as to what Indian people are actually feeling and how they view the issue of skeletal remains."⁴⁴ Then-Executive Director of the National Congress of American Indians Suzan Harjo stated that while NCAI supported the establishment of the museum, "We are not here to be the instruments of our own oppression." She added, "The establishment of the National Museum of the American Indian is the stuff of dreams, but the existence of a beetle room [where flesh-eating beetles "clean" skeletons before they are stored in cardboard boxes] in box upon box of skeletal remains of our people is the stuff of nightmares."⁴⁵ In his written testimony, another witness on the same panel, NARF attorney Walter Echo-Hawk, stated, "There are many Trails of Tears and one of those trails leads directly to the doors of the Smithsonian Institution."⁴⁶

Ultimately, the Smithsonian Institution came to an agreement with Indian leaders and a stronger repatriation provision was included.⁴⁷ The Museum Act required the Smithsonian, in consultation with Indian tribes and traditional Indian religious leaders, to inventory human remains and funerary objects in its possession or control. The goal of the inventory was to identify the origins of such remains based upon the best available scientific and historical documentation.⁴⁸ If the tribal origin of remains or objects were identified by a preponderance of the evidence, the Smithsonian was required to notify the Indian tribe,⁴⁹ and upon request of a lineal descendant or culturally affiliated tribe, human remains and funerary objects associated with those remains were required to be returned.⁵⁰

The Museum Act was considered an "important first step" in "rectifying injustices done to Indian people over the years" and ensuring "that one day their ancestors will finally be given the final resting place that they so deserve."⁵¹ In his statement during debate, Senator John McCain specifically noted that this bill "sends a clear signal to those in the museum community who have dismissed repatriation as a transitory issue that they would be wise to carefully consider the bills [pertaining to museums and federal agencies other than the Smithsonian] currently before the Congress."⁵² The Museum Act was an important precedent for NAGPRA.⁵³

The second key event that took place preceding the enactment of NAGPRA was a yearlong dialogue at the Heard Museum in Arizona, which included museum representatives, scientists and Native Americans. In early 1990, the *Report of the Panel for*

a National Dialogue on Museum/Native American Relations ("Panel") was issued. The major conclusions of the Panel were as follows:

The Panel found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony should be governed by respect for Native human rights . . . The Panel report indicated the need for federal legislation to implement the recommendations of the Panel. The Panel also recommended the development of judicially enforceable standards for repatriation of Native American remains and objects . . . Additional recommendations of the Panel included requiring regular consultation and dialogue between Indian tribes and museums; providing Indian tribes with access to information regarding remains and objects in museum collections; providing that Indian tribes should have the right to determine the appropriate disposition of remains and funerary objects and that reasonable accommodations should be made to allow valid and respectful scientific use of materials when it is compatible with tribal religious and cultural practices.⁵⁴

The legislative history indicates clearly that the Panel report "provided a framework" for NAGPRA.⁵⁵

NAGPRA legislative history: the process

NAGPRA was enacted after years of legislative efforts by tribal representatives and their supporters,⁵⁶ whose advocacy was based upon the widely held belief in tribal communities that the graves of tribal ancestors should not be disturbed and, in cases where they have been disturbed, the human remains and funerary objects should be returned to descendants for reburial or other culturally prescribed treatment. Thus, the basic purposes of the statute were to declare that tribes and individual lineal descendants have rights regarding the remains of their ancestors and certain kinds of cultural property, and to establish procedures for vindication of these rights. Achieving this goal was not easy. Many members of Congress started with the presumption that Native human remains and cultural items were collectibles and objects of study, and museums were the appropriate custodians for these objects. The right of scientists to possess and study these objects was often taken for granted.

Tribal people needed to reframe the debate. They had to educate Congress about their religious and cultural beliefs and their relationship with their ancestors. As part of this process, sympathetic articles were generated in the mainstream press, which

highlighted the plunder of items from grave sites and sometimes asked readers how they would feel if their grandmother had been dug up for scientific study without their consent.⁵⁷

The final legislative product went through many iterations, partly because of the refinement of the ideas and concepts that were incorporated into the legislation, and partly because of negotiations that took place between tribal representatives and those of the scientific and museum communities.

The bill that was ultimately enacted never lost its central focus: the need to provide redress to Native Americans whose human rights had been ignored. But it is also true that the enacted bill reflected a compromise forged by representatives of the museum, scientific, and Indian communities.⁵⁸ In negotiating, the primary objective of the tribal representatives was to ensure that the provisions dealing with human remains and associated funerary objects remained as strong as possible, since it was the possession of tribal ancestors by museums and federal agencies that was the primary catalyst for the tribal push for repatriation legislation. At the same time, those of us involved believed that compromises were necessary to get the legislation enacted. Indeed, the passage of NAGPRA was in doubt until the very end of the process.

Although by 1990 there was considerable momentum building in favor of a repatriation bill, there were some influential people in the museum and scientific communities who were very much opposed to a bill, and it is axiomatic that it is far easier to block a bill than to pass one. Two influential national museum and scientific organizations, the Society for American Archaeology (SAA) and American Association of Museums (AAM), were willing to negotiate with tribal representatives in response to the expressed intent of key senators to pass repatriation legislation.⁵⁹ In part, they were fearful of legislation that might pass without their input; but it was also the case that some of the individuals leading those organizations during this time period had modified their views about repatriation as a result of the "education" they had received from Native Americans. Thus, there was a narrow window of opportunity to negotiate modest changes to build consensus behind the bill and maximize its chances for passage. In order to obtain the support of the SAA, changes were made to the definition of "cultural affiliation" and to the provision addressing the ownership and control provisions dealing with grave sites. In order to gain the support of AAM, the definitions of "associated" and "unassociated funerary objects" and "sacred objects" were changed; the inventory requirement was modified and partially replaced by a summary requirement; the standard for repatriating unassociated funerary objects, sacred objects, and cultural patrimony was modified; and sections were added concerning competing claims and the federal-tribal trust relationship, as well as a museum "hold harmless" clause. (More details about some of these changes are included later in this chapter when specific NAGPRA sections are discussed.)

As it was, NAGPRA was passed on the last day of the 2nd Session of the 101st Congress. Adjournment had been scheduled two or three weeks earlier, but had been postponed due to an unrelated tax and budget dispute between President George H.W. Bush and Congress. If not for this unexpected extension of the legislative session, NAGPRA would not have passed in the 101st Congress.⁶⁰

No one knows for sure what would have happened if the process had started over in the 102nd Congress, but the result may very well have been a weaker NAGPRA. In fact, shortly before NAGPRA passed, the American Museum of Natural History in New York and a few other museums suddenly mobilized and were working to defeat the bill, even though AAM had agreed to support NAGPRA. This is an indication that if Congress had not passed the bill in the 101st Congress, the opposition forces might have better organized themselves and pushed back more strongly against the bill in the next Congress. It is from this perspective that the legislative process that took place (as well as some of the compromises reflected in NAGPRA) should be understood.

It should also be noted that, for a number of years, the "preferred" approach by legislators was to establish a case-by-case process for negotiating the return of human remains and cultural items. Thus, the evolution of this earlier approach to legislation *mandating* repatriation under certain circumstances was a big step forward, even with the compromises that were made as part of the process.

NAGPRA legislative intent: an overview

On November 16, 1990, the Native American Graves Protection and Repatriation Act was signed into law.⁶¹ NAGPRA provides various repatriation, ownership, and control rights over human remains and cultural items to descendants of a deceased Indian individual and to Indian tribes and Native Hawaiian organizations.

NAGPRA is, first and foremost, human rights legislation. It is designed to address the "flagrant violat[ion]" of the "civil rights of America's first citizens."⁶² When NAGPRA was passed by the Senate, Senator Daniel Inouye stated that:

When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th century, his demands were met not only by Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored . . . When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the world is that Indians are culturally

and physically different from and inferior to non-Indians. This is racism. In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community . . . [and] met with resistance from museums . . . [T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights . . . For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate.⁶³

NAGPRA was designed to create a process that would reflect both the needs of museums as repositories of the nation's cultural heritage and the rights of Indian people. Congress believed that NAGPRA would "encourage a continuing dialogue between museums and Indian tribes and Native Hawaiian organizations and . . . promote greater understanding between the groups."⁶⁴

Notwithstanding the accommodations made to scientific and museum interests, however, it is clear that the central purpose of NAGPRA—in fact, in the end, the only reason that it exists—was to rectify centuries of discrimination against Native Americans. As Congress stated, NAGPRA was intended to "establish a process that provides the dignity and respect that our Nation's first citizens deserve."⁶⁵ Congress viewed NAGPRA as part of its trust responsibility to Indian tribes and people, specifically stating that it "reflects the unique relationship between the federal government and Indian tribes and Native Hawaiian organizations."⁶⁶ As such, the canons of statutory construction applicable to Indian legislation apply here and warrant the interpretation of any ambiguities in favor of Indian people,⁶⁷ a canon of construction similar to that applicable to other types of remedial civil rights legislation.⁶⁸

NAGPRA applies in three different contexts: repatriation of items from the collections of federal agencies and museums to tribes and to lineal descendants where known,⁶⁹ protection of burial sites and "cultural items" located on federal lands and "tribal lands,"⁷⁰ and trafficking in Native American human remains and cultural items.⁷¹ The primary features of the Native American Graves Protection and Repatriation Act of 1990 are summarized in the remainder of this article in order to show the myriad issues that had to be resolved or defined for its creation and to

provide a fuller context for some of the chapters that follow. Of note, although there are many parts of NAGPRA whose interpretation is clear, there are still issues that arise, and it cannot be said that all of the issues surrounding NAGPRA's implementation have been settled.

The provisions of NAGPRA

Entities that have rights and responsibilities under NAGPRA. Lineal descendants of a deceased Native individual, Indian tribes, and Native Hawaiian organizations have rights under NAGPRA. "Lineal descendants" can be traced not only through the common law system used by federal and state courts, but "by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization."⁷² "Indian tribe" is defined to mean a tribe that is recognized by the federal government.⁷³ The Review Committee has approved voluntary repatriations to non-federally recognized tribes by federal agencies and museums, however.⁷⁴ Recently adopted regulations permit repatriations to be made to such groups, but do not require them.⁷⁵ These dispositions may take place only if, after consultation, no federally recognized tribe that could make a claim objects and the Secretary of the Interior or their designee so recommends.⁷⁶

Although an overall reading of the law would suggest that any culturally distinct tribal entity with the authority to decide traditional cultural issues should be able to make a claim under NAGPRA, the commentary to the implementing regulations indicates that bands,⁷⁷ tribes, and other sub-groups should make NAGPRA claims through an Indian tribe, rather than directly.⁷⁷ Tribes have banded together and established organizations to act collectively on their behalf.⁷⁸ Indeed, many of the claims that have been filed under NAGPRA have been joint tribal claims.⁷⁹

"Native Hawaiian organization" is defined as an organization which (1) serves and represents the interests of Native Hawaiians; (2) has a primary purpose of providing services to Native Hawaiians; and (3) has expertise in Native Hawaiian affairs. The Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei are specifically included as Native Hawaiian organizations.⁸⁰

NAGPRA's repatriation, inventory and summary requirements are obligatory for federal agencies (except for the Smithsonian Institution, which is the subject of a separate law, the Museum Act, as previously discussed⁸¹) and all museums receiving federal funds, provided that they possess or control Native American cultural items.⁸² This would include a museum that is part of a larger unit that has received federal funds, such as state and local governments, educational and other institutions.⁸³ Federal agencies and Indian tribes also have responsibilities in regard to sites that contain human remains and Native cultural items that are located on federal and tribal land.

Items covered by NAGPRA. NAGPRA covers Native cultural items. Cultural items are defined as human remains, funerary objects, sacred objects, and cultural patrimony.

Human remains are not defined in NAGPRA, but the term has been interpreted by the regulations to include bones, teeth, hair, ashes, and preserved soft tissue.⁸⁴ The regulations make clear that body items that were freely given or naturally shed by an individual (e.g., hair made into ropes) are not considered to be human remains.⁸⁵ To date, human remains that have been repatriated pursuant to NAGPRA include "complete and partial skeletons, isolated bones, teeth, scalps, and ashes."⁸⁶

Funerary objects are "objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later . . ." ⁸⁷ The regulations make clear that objects placed near human remains as part of a death rite or ceremony are covered by NAGPRA as funerary objects, in addition to those placed with human remains, which is the explicit statutory language. This provision reflects the variances in tribal funerary practices.

There are two categories of funerary objects: associated and unassociated. "Associated funerary objects" includes two categories of objects: (1) Objects "reasonably believed to have been placed with individual human remains either at the time of death or later . . . as part of a death rite or ceremony" where both the human remains and objects are presently in the possession or control of a federal agency or museum. The remains and objects need not be in the possession or control of the same agency or museum, only in the possession or control of a museum or agency so that a connection between the objects and remains is possible; and (2) Objects "exclusively made for burial purposes or to contain human remains."⁸⁸ The "possession or control" language indicates congressional intent to include objects consigned to individuals or museums not covered under NAGPRA, if a federal agency or museum covered by NAGPRA is responsible for the ultimate disposition of those objects.⁸⁹

"Unassociated funerary objects" are those funerary objects which were found with human remains where (1) the objects can be related to specific individuals, families, or known human remains or to a specific burial site of a culturally affiliated individual; and (2) the human remains are not presently in the possession or control of a federal agency or museum.⁹⁰

Funerary objects that have been repatriated to date include beads, pottery, tools, trade silver, weapons, and clothing.⁹¹

"Sacred objects" are those objects that are (1) ceremonial in nature, and (2) needed by traditional Native American religious leaders for the present day practice of traditional Native American religions.⁹² This includes both the use of the objects in ceremonies currently conducted by traditional practitioners and instances where

the objects are needed to renew ceremonies that are part of a traditional religion.⁹³ The operative part of the definition is that there must be "present day adherents" that need the items.⁹⁴ Congress recognized that "the practice of some ceremonies has been interrupted because of government coercion, adverse societal conditions, or the loss of objects through means beyond the control of the tribe at the time."⁹⁵ Although part of the purpose of the definition was to reassure museums that not everything in their collections would be considered "sacred," at the same time the definition was a groundbreaking definition from a tribal perspective. It recognized that the ultimate determination of continuing sacredness must be made by the Native American religious leaders themselves; they must determine the current ceremonial need for the object. Thus, the term "sacred" is not defined explicitly in the legislative definition. Rather the definition will vary in accordance with the traditions of the tribe or community.⁹⁶ The regulations define "traditional religious leader" as a person "recognized by members of an Indian tribe or Native Hawaiian organization," as an individual who is "responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization," or who exercises "a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices."⁹⁷ Sacred objects that have been repatriated to date include "medicine bundles, prayer sticks, pipes, effigies and fetishes, basketry, rattles, and a birch bark scroll."⁹⁸

"Cultural patrimony" are those objects that have "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself," and were owned by the tribe, or a subgroup thereof such as a clan or band, and could not be sold or given away by an individual.⁹⁹ The object must have been considered inalienable by the Native American group when the object was separated from such group; thus, tribal law or custom would be determinative of the legal question of alienability at the time that the item was transferred.¹⁰⁰ Examples given by Congress of "cultural patrimony" were the Zuni war gods and the Wampum belts of the Haudenosaunee.¹⁰¹ Items of cultural patrimony repatriated under NAGPRA to date include "a wolf head headdress, clan hat, several medicine bundles, and ceremonial masks."¹⁰²

Responsibilities of museums and federal agencies for items in their possession or control. When NAGPRA was enacted in 1990, it required museums and federal agencies to complete an item-by-item inventory of human remains and associated funerary objects¹⁰³ in consultation with Native American governmental and traditional leaders.¹⁰⁴ As part of the inventory, the museum or agency was required to identify the geographical and cultural affiliation of each item, to the extent possible, based upon information within its possession.¹⁰⁵ This provision did not require museums to conduct "exhaustive studies and additional scientific research

to conclusively determine" cultural affiliation.¹⁰⁶ NAGPRA was not to "be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects."¹⁰⁷ Rather, NAGPRA's intent was merely to require a good faith effort to identify cultural affiliation based upon presently available evidence.¹⁰⁸

Final notice was required within six months after the completion of the inventory to all tribes that were reasonably believed to be culturally affiliated with human remains or associated funerary objects in the possession or control of the museum or agency.¹⁰⁹ The notice had to include information about the circumstances surrounding the acquisition of each identified item and information about cultural affiliation.¹¹⁰ NAGPRA broadly intended that all potential tribal claimants, including Native Hawaiian organizations, receive notice. A tribe or Native Hawaiian organization that received, or should have received, notice could request additional background information from the museum or agency relevant to the "geographical origin, cultural affiliation, and basic facts surrounding [the item's] acquisition and accession."¹¹¹ In addition, museums were required to make the inventory and identification process available to the NAGPRA Review Committee for monitoring and review.¹¹²

Inventories have been prepared pursuant to the statutory mandate, but even though the deadline for completing inventories has long passed, there has not yet been full compliance with the inventory requirement.¹¹³

NAGPRA also required that federal agencies and museums summarize their collections of unassociated funerary objects, sacred objects and items of cultural patrimony. The summary was in lieu of an object-by-object inventory and required the museum or agency to "describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable."¹¹⁴ A consultation process with Native American governmental and traditional leaders was required.¹¹⁵ Upon request, all tribes and Native Hawaiian organizations were entitled to obtain data pertaining to geographical origin, cultural affiliation and acquisition and accession of these objects.¹¹⁶

This was one of the major concessions made to museum interests during negotiations. The museums believed that the costs of an item-by-item inventory of all objects defined under the act would be exorbitant. Tribal representatives agreed to limit the inventory requirement to human remains and associated funerary objects, and replace it with preparation of a summary for other items covered by NAGPRA.

Repatriation of human remains and associated funerary objects. NAGPRA requires federal agencies and museums to return human remains and associated funerary objects as quickly as possible (1) upon request of a direct descendant of the

deceased, or (2) upon request of an Indian tribe or Native Hawaiian organization where the tribe or organization has a "cultural affiliation" with the human remains and associated funerary objects.¹¹⁷

"Cultural affiliation" is a key term in NAGPRA. It is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."¹¹⁸ The House committee explained that this requirement "is intended to ensure that the claimant has a reasonable connection with the materials."¹¹⁹ Congress recognized, however, that "it may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record."¹²⁰

Thus, in order for "cultural affiliation" to be established, it must be determined that (1) it is likely that the remains are those of a member of a particular tribe or group which existed at the time the deceased lived; and (2) there is a reasonable connection ("shared group identity") between the present-day tribe or organization making the request and the earlier tribe or group based upon the totality of the circumstances and evidence.¹²¹ A finding of cultural affiliation is appropriate when the evidence shows it is more likely than not that there is an affiliation.¹²² Cultural affiliation need not be established with scientific certainty.¹²³

Cultural affiliation can be determined by a museum or federal agency through the inventory process; the determination of cultural affiliation in an inventory should be based upon information within the current possession of the museum or agency.¹²⁴ Cultural affiliation may also be proven by a tribe or Native Hawaiian organization. Many types of evidence can be used to prove cultural affiliation, including "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."¹²⁵ Thus, traditional knowledge is considered as relevant to this determination as scientific knowledge. Factors that may be relevant to a determination of cultural affiliation include the cultural characteristics and biological distinctiveness of, and the production and distribution of, material items by the earlier group and current day tribe.¹²⁶

The concept of a "shared group identity" was developed in negotiations with the Society for American Archaeology (SAA). It was a middle course between the Senate bill (S. 1980), which would have required a showing of a "continuity" of group identity, and the House bill (H.R. 5237), which would have created a presumption of cultural affiliation for all items that had been collected from tribal land or aboriginal territory.

In general, repatriation is not to be delayed pending additional scientific research.¹²⁷ The only exception is in those circumstances where the item is "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States."¹²⁸ If this exception applies, the items must be returned within ninety days after the completion of the study.¹²⁹ There is no prohibition, however, against voluntary agreements between claimants and agencies or museums that would permit additional studies or other arrangements in regard to cultural items.¹³⁰

The other exception to the requirement that human remains and associated funerary objects be "expeditiously returned" after cultural affiliation has been determined is a situation where multiple requests for a cultural item are made and the federal agency or museum "cannot clearly determine which requesting party is the most appropriate claimant."¹³¹ In such a case, the federal agency or museum may retain the item until the parties agree upon disposition (with the Review Committee available for a mediating role) or the dispute is resolved by a court of competent jurisdiction.¹³²

As for human remains and associated funerary objects whose cultural affiliation cannot be determined, NAGPRA provides that the statutorily created Review Committee¹³³ compile an inventory of culturally unidentifiable human remains and recommend "specific actions for developing a process for disposition of such remains."¹³⁴ The Review Committee's recommendations are to be made "in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups."¹³⁵ This issue was referred to the Review Committee because there was "general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are unidentifiable, they would be of little use to science and should be buried and laid to rest."¹³⁶

The Secretary of the Interior recently issued regulations based upon the recommendations of the Review Committee.¹³⁷ A museum or federal agency must offer to return any culturally unidentifiable human remains in its possession that were originally removed from land that is currently tribal land or the aboriginal land of a particular tribe.¹³⁸ Before these remains are returned, there must be a consultation process involving all such tribes, which must start within ninety days of a request for repatriation by a tribe or an offer by the museum or agency to return culturally unidentifiable human remains.¹³⁹ Aboriginal land includes lands recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, a treaty, act of Congress, or executive order.¹⁴⁰ (Most land in the United States has been recognized as aboriginal land through one of these legal mechanisms.) In some cases, the consultation may result in a finding of cultural affiliation. Where this does

not happen, it is anticipated that tribes will agree upon a disposition in most cases. If tribes cannot agree, the regulations provide that claims from a tribe from whose tribal land the remains were removed would have the first priority, followed by claims from tribes that are aboriginal to the area.¹⁴¹ This is similar to the way in which the statute treats human remains discovered and unearthed on tribal or federal land after 1990.

The regulations acknowledge that some of the so-called "culturally unidentifiable remains" may be culturally affiliated with tribes not recognized by the federal government. The regulations permit repatriations to be made to such groups, but do not require them.¹⁴² The regulations also permit museum and federal agencies to rebury the human remains under state or other law if no tribe agrees to accept control.¹⁴³ Both of these dispositions may take place only if, after consultation, no federally recognized tribe that could make a claim objects and the Secretary of the Interior or his designee so recommends.¹⁴⁴ The regulations also recommend, but do not require, repatriation of culturally unidentifiable associated funerary objects on the same basis as human remains.¹⁴⁵

Repatriation of unassociated funerary objects, sacred objects, and cultural patrimony. The act requires museums and federal agencies to repatriate unassociated funerary objects, sacred objects, and cultural patrimony pursuant to a four-step process.

First, the claimant must show that the item claimed is an unassociated funerary object, sacred object, or item of cultural patrimony.¹⁴⁶ Once it has been shown that the item meets one of these definitions, either the cultural affiliation must be determined¹⁴⁷ or, in the case of sacred objects and items of cultural patrimony, the requesting tribe or Native Hawaiian organization must show that the object was previously owned or controlled by the tribe, organization, or a member thereof.¹⁴⁸ A direct lineal descendant may also request repatriation of a sacred object.¹⁴⁹ If a tribe or Native Hawaiian organization is making a claim to a sacred object based upon prior ownership or control by a tribal member, as opposed to the tribe, the claimant must show that no identifiable lineal descendants exist or that the lineal descendants have been notified and have failed to make a claim.¹⁵⁰

The third step in the process requires a claimant to present "evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the federal agency or museum did not have the right of possession" of the items.¹⁵¹ Since the original "transfer" of many of these objects occurred when recordkeeping of such transactions was virtually nonexistent, and because of the near impossibility of proving that a legal document does not exist, evidence, by necessity, may include oral traditional and historical evidence, as well as documentary evidence. In making its *prima facie* case, the claimant is entitled to "records, catalogues,

relevant studies or other pertinent data" possessed by the federal agency or museum that relate to "basic facts surrounding acquisition and accession" of the items being claimed.¹⁵²

"Right of possession" means "possession obtained with the voluntary consent of an individual or group that had authority of alienation."¹⁵³ This term was intended "to provide a legal framework in which to determine the circumstances by which a museum or agency came into possession of these . . . objects,"¹⁵⁴ and is designed to ensure that the object did not pass out of tribal, or individual Native American, possession without appropriate consent.¹⁵⁵

Right of possession is based upon the general property law principle that "an individual may only acquire the title to property that is held by the transferor."¹⁵⁶ Authority to alienate would be determined by the law of the governmental entity having jurisdiction over a transaction.¹⁵⁷ In most cases, the initial transfer of the item out of tribal control would most likely be governed by tribal law or custom.¹⁵⁸ The definition does not apply only in the rare instance where its application would result in a Fifth Amendment taking of private property for a public purpose without just compensation.¹⁵⁹ Where there would be a taking within the meaning of the constitutional provision, applicable federal, state, or tribal law would apply.¹⁶⁰ In this rare instance, however, the party asserting a Fifth Amendment taking would first be required to obtain a ruling from the Court of Claims upholding such an assertion, before federal, state, or tribal laws would be used to replace the statutory standard.¹⁶¹

If the claimant surmounts these three hurdles, the fourth step places a burden upon the museum or agency to prove that it has a right of possession in regard to the items in question.¹⁶² If the museum or agency cannot prove right of possession, the unassociated funerary object, sacred object, or item of cultural patrimony must be returned unless the scientific study or competing claims exceptions apply.

An example of how the right of possession provisions work in practice was a case involving a sacred Hawaiian spear rest in the possession of a museum owned by the city of Providence, Rhode Island. I represented Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs in this case. Whether the item in question had been obtained with the consent of the Native Hawaiians was an important issue. To meet the initial *prima facie* burden, the Native Hawaiians introduced evidence before the NAGPRA Review Committee about Hawaiian history, specifically information that prior to 1819 it would have been extremely unlikely that an item such as this would have been freely given away. This information was combined with information about the ship captain that was the likely source of the "gift" to the museum's predecessor in interest (the Franklin Society), including the fact that the two ships that he had commissioned were in Hawaii in 1815 and 1818. The Native Hawaiians asserted that this testimony constituted a *prima facie* case that the museum did not

have right of possession and that the burden should be shifted to the museum to prove right of possession. The case was ultimately settled and legal findings on right of possession were never made. Nonetheless, this is an instructive example of how these legal provisions can play out in the context of an actual repatriation.

Protection of embedded human remains and cultural items. Burial sites located on federal land and tribal lands are covered by NAGPRA.¹⁶³ "Burial site" as defined in the statute includes "any natural or prepared location, whether below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited."¹⁶⁴ In addition, the regulations clearly recognize rock cairns, funeral pyres, and other customary depositories for human remains which may not fall within the ordinary definition of a grave site.¹⁶⁵

"Federal land" is defined as non-tribal land controlled or owned by the United States, including lands selected by, but not yet conveyed to, Alaska Native corporations and groups pursuant to the Alaska Native Claims Settlement Act of 1971.¹⁶⁶

"Tribal land" is defined to include (1) all lands within the exterior boundaries of a reservation, whether or not the land is owned by the tribe, Indian individuals, or non-Indians, (2) all dependent Indian communities, and (3) any lands administered for Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920, as amended, and the Hawaii Statehood Bill.¹⁶⁷

Of note, the commentary to the regulations clarifies that lands held in trust by the United States for an Indian tribe that are not within a reservation boundary or an Indian community are considered to be federal lands.¹⁶⁸ The regulations exclude non-tribal land within reservation boundaries if application of the statute to that land would constitute the unconstitutional taking of land without just compensation.¹⁶⁹

Whenever a party intends to intentionally excavate a burial site on federal or tribal land, that party must obtain a permit pursuant to the Archaeological Resources Protection Act (ARPA).¹⁷⁰ An ARPA permit may be issued by the agency managing the land upon which a burial site is located or, in the case of tribal lands, by the Bureau of Indian Affairs.¹⁷¹ In order for a permit to be issued, the applicant must be "qualified" and the undertaking must be designed to advance archaeological knowledge in the public interest. The "resources" remain the property of the United States and the permittee must agree to preserve them in an appropriate institution (except where NAGPRA provides for ownership or control by tribes, Native Hawaiian organization, or lineal descendants). Finally, the activity must not be inconsistent with the applicable land management plan.¹⁷²

If tribal lands are involved, the items may be excavated only after notice to, and consent of, the tribe or Native Hawaiian organization.¹⁷³ If federal lands are involved,

the items may be excavated only after notice and consultation with the appropriate tribe or Native Hawaiian organization.¹⁷⁴

Where buried cultural items are inadvertently discovered as part of another activity, such as construction, mining, logging, or agriculture, the person who has discovered the items must temporarily cease activity and notify the responsible federal agency in the case of federal land, or the tribe on whose land the site is located in the case of tribal land.¹⁷⁵ In the case of Alaska Native Claims Settlement Act lands (still owned by the federal government and considered federal land) selected by, but not conveyed to, the Alaska Native corporation or group,¹⁷⁶ that corporation or group is the appropriate organization to be notified.¹⁷⁷ When notice is provided to the federal agency, that agency has the responsibility to promptly notify the appropriate tribe or Native Hawaiian organization.¹⁷⁸ Activity may resume thirty days after the secretary of the appropriate federal department (the Secretary of the Interior if authority has been so delegated) or the Indian tribe or Native Hawaiian organization certifies that notice has been received.¹⁷⁹ The activity that resulted in the inadvertent discovery may also resume prior to the thirty-day period specified in the statute, if a written agreement on a recovery plan is executed by the Indian tribe or Native Hawaiian organization and the federal agency prior to the expiration of the thirty-day period.¹⁸⁰ This requirement must be included in federal leases and permits.¹⁸¹ Other federal agencies may delegate their responsibilities under this provision to the Secretary of the Interior.¹⁸²

The intent of this provision is to "provide for a process whereby Indian tribes . . . have an opportunity to intervene in development activity on federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony . . . [and to afford] Indian tribes . . . thirty days in which to make a determination as to appropriate disposition for these human remains and objects."¹⁸³

The commentary to the regulations indicates that one goal of NAGPRA is "in situ" preservation, and that this should be considered whenever possible.¹⁸⁴ However, "in situ" preservation of sites is not required by NAGPRA or the regulations, except in the case of intentional excavations on tribal lands where the required tribal consent has not been obtained.¹⁸⁵ This is a significant limitation of NAGPRA, particularly where a site is considered to be an "obstacle" to completion of an unrelated development project. Nonetheless, the ownership and control rules established by the statute, laid out in the following summary, diminish the incentive to excavate such sites simply for the purpose of excavation.

The regulations spell out in detail the notice and consultation that is required in the case of excavations on federal lands. Consultation is meant to be a process involving open discussion and joint deliberation.¹⁸⁶ Written notice must be sent prior to

the issuance of any approval or permit, proposing a time and a place for meetings and consultation, and describing the planned activity, its location, the basis for believing that excavation may occur, the government's proposed treatment, and disposition of the objects which are to be excavated.

This notice must be sent to any known lineal descendants, Indian tribes, and Native Hawaiian organizations that are likely to be culturally affiliated with the items at the site, any Indian tribe which aboriginally occupied the area where the activity is taking place, and any Indian tribe or Native Hawaiian organization that may have a cultural relationship with the embedded items.¹⁸⁷ Written notification should be followed by telephone contact if there is no response within fifteen days of the notice.¹⁸⁸

At the consultation, the federal officials must (1) provide a list of all lineal descendants, Indian tribes, and Native Hawaiian organizations that have been consulted, and information stating that additional documentation on cultural affiliation is available if requested;¹⁸⁹ (2) seek to identify traditional religious leaders (although tribal officials are under no obligation to identify such leaders), lineal descendants, and culturally affiliated Indian tribes and Native Hawaiian organizations, as well as methods for contacting lineal descendants; (3) obtain the name and address of the tribal contact person; (4) obtain recommendations on how the consultation process should be conducted; and (5) identify the kinds of objects that may be considered unassociated funerary objects, sacred objects, and cultural patrimony.¹⁹⁰

Federal agencies are required to develop written action plans following consultation which include the following information: (1) the kinds of objects considered cultural items, (2) the information that will be used to determine custody and how items will be disposed of in accordance with that determination, (3) the planned care, handling, and treatment (including traditional treatment) of cultural items, (4) the planned archaeological recording and analysis of items and reports to be prepared, and how tribes will be consulted at the time of excavation.¹⁹¹

The regulations also encourage the development of comprehensive agreements between Indian tribes, Native Hawaiian organizations, and federal agencies which would "address all federal agency land management activities that could result in the intentional excavation or inadvertent discovery" of NAGPRA items, and establish processes for consultation and determination of custody, treatment, and disposition of such items.¹⁹²

In the case of inadvertent discoveries, the responsible federal official must be immediately notified by telephone in the case of federal land, or the tribal official in the case of tribal land. Telephone notification must be followed by written confirmation.¹⁹³ In the case of federal lands, the federal official has three working days to certify receipt of the notification, take steps to secure and protect the items, and provide notice to the same categories of tribes and Native Hawaiian organizations

specified in the intentional excavation section.¹⁹⁴ The regulations governing consultation are similar to those pertaining to intentional excavations, and specifically encourage tribal-federal agency agreements in terms of specific discoveries and more generally in advance of a project that involves an area that could include such sites¹⁹⁵ and require the agency to develop a written plan for excavation within a thirty-day period in the case where excavation is necessary.¹⁹⁶

Ownership and control rights. Under NAGPRA, Indian tribes, Native Hawaiian organizations, or descendants of the deceased will usually have ownership and control over human remains and cultural items which may be discovered or excavated on federal and tribal lands in the future, regardless of whether such discovery or excavation is intentional or inadvertent.¹⁹⁷

In the case of human remains and associated funerary objects, any lineal descendant of the buried person has the initial right of ownership or control of that person's remains and funerary objects associated with the remains.¹⁹⁸ Where descendants of the human remains and associated funerary objects cannot be determined and in the case of unassociated funerary objects, sacred objects and items of cultural patrimony, NAGPRA establishes the following rules. (1) The tribe or Native Hawaiian organization owns or controls all cultural items discovered on tribal land.¹⁹⁹ (2) In the case of federal land, the tribe or Native Hawaiian organization with the closest cultural affiliation to the items has ownership or control.²⁰⁰ Agreements between tribes regarding disputed items are possible and the NAGPRA Review Committee may serve as a mediator if there is an intertribal dispute.²⁰¹ (3) Where cultural affiliation of the items cannot be established, but the objects are discovered on federal land which the Indian Claims Commission (ICC)²⁰² or United States Court of Claims (now known as the United States Court of Federal Claims) has determined to be the aboriginal land of a particular tribe, the tribe which obtained the judgment has the right of ownership and control over the items unless another tribe can show a stronger cultural relationship.²⁰³

The limitation of aboriginal land to land that has been recognized by an ICC or Court of Claims judgment was the result of negotiations with the SAA. Their concern about aboriginal land as a concept was that it would be so broad that continual disputes would arise regarding which tribes might make a claim. Tying an aboriginal land claim to specific legal determinations was meant to provide more certainty to the process. At the same time, the provision allowing a tribe with a "closer cultural connection" to make a claim was added in recognition that ICC and court judgments are linked to particular time periods, and that grave sites discovered from different time periods might have a closer connection to a tribe other than the one with the ICC or court judgment. Thus, the provision on "closer cultural connection" was

meant to increase the chance that the most appropriate tribe would ultimately have ownership of, or control over, the item and/or human remains.

Prior to transferring ownership or control of embedded cultural items to lineal descendants, tribes, or Native Hawaiian organizations, the federal agency must publish at least two general notices of the proposed disposition, a week apart, in a newspaper circulated in the area of removal and, if applicable, the area where the members of the tribe or organization reside. Transfer may not take place until thirty days after the second notice. If competing claimants come forward, the proper recipient must be determined in accordance with the statutory preferences.²⁰⁴ The transfer of items must take place using appropriate procedures that respect traditional customs and practices.²⁰⁵

Unlike the regulations dealing with repatriation from museum and federal agency collections, there are no time limits placed upon the transfer of excavated items to the appropriate claimant. Indeed, the notice provisions and the written plan requirements build a significant delay into the process beyond the thirty days contemplated by the NAGPRA statute itself, during which various types of recording and analysis can occur.²⁰⁶ For that reason, these regulations have been viewed by some as a questionable interpretation of the statute, which unduly delays the transfer of items to tribes.

There is no time limit for submitting a repatriation claim.²⁰⁷ However, a claim is waived if it is made after a valid repatriation of human remains or cultural items has already taken place.²⁰⁸ If more than one tribe makes a claim and the federal agency cannot clearly determine which party is the appropriate claimant, the agency may retain the item until the parties agree or a court decides who should receive the items.²⁰⁹

The statute provides that Native American cultural items not claimed pursuant to these provisions will be disposed of in accordance with regulations adopted by the Secretary of the Interior, in consultation with the Review Committee established by the act.²¹⁰ These regulations have not yet been promulgated. (See Chapter 2 for a further explanation of the process followed to promulgate NAGPRA regulations.)

Trafficking. NAGPRA prohibits trafficking in Native American human remains for sale or profit unless the remains have been "excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization."²¹¹ This prohibition applies to human remains wrongfully acquired at any time, whether before or after the enactment of NAGPRA. It also prohibits trafficking in funerary objects, sacred objects, and items of cultural patrimony obtained in violation of the act.²¹² This section may be violated by removing cultural items from federal or Indian lands without a permit or in a manner inconsistent with the ownership provisions

in NAGPRA.²¹³ This provision in NAGPRA applies only to wrongful acquisitions after the date that NAGPRA was enacted (November 16, 1990). Of course, existing state or federal law involving theft or stolen property would be available should an individual have obtained possession of a cultural item by such means before or after the enactment of NAGPRA.²¹⁴ Violators are subject to a fine of up to \$100,000 and face up to a one-year jail sentence for a first offense; subsequent violations subject the offender to a fine of up to \$250,000 and a maximum of five years in jail.²¹⁵

NAGPRA Review Committee. NAGPRA provides for the appointment of a Review Committee to monitor and review the implementation of the act.²¹⁶ The Review Committee consists of seven members: three are appointed by the Secretary of the Interior from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders (at least two of the three must be traditional Native American religious leaders); three are appointed by the Secretary of the Interior from nominations submitted by national museum organizations and scientific organizations; and one person is chosen from a list compiled by the other six members.²¹⁷ Federal officers and employees may not serve on the committee.²¹⁸

The Review Committee's functions are to monitor the inventory and identification process,²¹⁹ upon request, make findings relating to the cultural affiliation and return of cultural items and to help resolve disputes between interested parties,²²⁰ compile an inventory of culturally unidentifiable human remains and make recommendations as to an appropriate process for their disposition,²²¹ consult with the Secretary of the Interior in the development of regulations to implement NAGPRA,²²² make recommendations as to the future care of repatriated cultural items,²²³ and submit an annual report to Congress.²²⁴

Other provisions. An Indian tribe, Native Hawaiian organization or individual, or other entity with protected rights under NAGPRA can file a lawsuit to enforce the provisions of NAGPRA if there is a violation of the act.²²⁵ Once a written claim has been submitted and denied, this constitutes "exhaustion of remedies," and a claiming party may seek review of the determination by a federal court.²²⁶ Federal courts have authority to issue any necessary orders.²²⁷ The claiming party also has the option to seek review of the denial by the NAGPRA Review Committee before pursuing a court remedy. The Review Committee's findings are non-binding, but may be used as evidence (similar to an independent expert's opinion) in any subsequent court proceeding.²²⁸ If a museum repatriates an item in good faith, however, it is not liable for claims against it predicated upon a claim of wrongful repatriation, breach of fiduciary duty or public trust, or violations of state law.²²⁹

Tribes and Native Hawaiian organizations also retain any pre-existing procedural or substantive legal rights which they may have possessed before NAGPRA.²³⁰ NAGPRA is not meant to limit the general repatriation authority of federal agencies and museums.²³¹ Further, NAGPRA does not preclude agencies or museums from entering into agreements with tribes and organizations regarding any Native American objects owned or controlled by the museums or agencies.²³²

NAGPRA provides for the Secretary of the Interior to assess civil penalties against museums that do not comply with the act.²³³ The amount of the penalties are determined by (1) the archaeological, historical, or commercial value of the item involved; (2) economic and noneconomic damages suffered by an aggrieved party; and (3) the number of violations.²³⁴

To facilitate implementation, NAGPRA authorizes the Secretary of the Interior to make grants to museums to undertake the inventory and summary, and to tribes and Native Hawaiian organizations to assist them in repatriating cultural items.²³⁵

Conclusion

After centuries of discriminatory treatment, the Native American Graves Protection and Repatriation Act finally recognizes that Native American human remains and cultural items are the remnants and product of living people, and that descendants have a cultural and spiritual relationship with the deceased. Human remains and cultural items can no longer be thought of as merely "scientific specimens" or "collectibles."

NAGPRA is a part of a larger historical tragedy: the failure of the United States government, and other institutions, to understand and respect the spiritual and cultural beliefs and practices of Native peoples. Governmental policies that threaten Native American religions are not merely historical anachronisms, but continue to have an impact upon contemporary Native Americans. While much progress has been made in the twenty years since NAGPRA was enacted, sites sacred to traditional Indian religious practitioners are still threatened with destructive development and craftsman producing items for ceremonial use sometimes still have eagle feathers seized from them by federal law enforcement officials. It is important that the policies of the United States continue to move in the direction of protecting the practice of traditional Native American cultures.

The law provides the legal standards, framework, and the process, but the actual results rely largely upon those with the actual knowledge: the tribes and Native Hawaiian organizations. NAGPRA was human rights legislation at its core, but its goal was also to foster cooperation and understanding. Where it has worked well, museums and federal agencies have begun to work with tribes in all areas of their domain that should or could involve tribes.

NAGPRA was unique legislation because it was the first time the federal government and non-Indian institutions were required to consider what is sacred from an Indian perspective. NAGPRA is a law that has served as an example to the world and as a catalyst for other countries to address these fundamental issues of human dignity. In fact, article 12 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which has been unanimously endorsed by all of the nations of the world that have considered it, provides that "Indigenous peoples have . . . the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains . . . States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned." If not for NAGPRA, it is very unlikely this concept would have been embraced by the international community. Thus, NAGPRA has had a profound impact not only in the United States, but in the area of international indigenous human rights, as well.

Notes

- 1 This chapter was adapted in part from Jack F. Trope and Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 *Arizona State Law Journal*, 35, 42 (1992), and Section 1, Chapter 1 and Supplement 1 (authored by Jack F. Trope) in *Mending the Circle: A Native American Repatriation Guide* (New York: American Indian Ritual Object Repatriation Foundation, 1996-1997). (Articles used with the permission of the publishers and authors.)
- 2 Jack F. Trope, "Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act," *N.Y.U. Review of Law and Social Change* 373, 374 (1993).
- 3 Public Law 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. 1996).
- 4 *Ibid.*
- 5 485 U.S. 439 (1988).
- 6 Trope, "Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act," 384-385.
- 7 20 U.S.C. 80q-1 et seq.
- 8 Another significant accomplishment of the coalition was the passage in 1992 of a federal law protecting the ceremonial use of peyote, 42 U.S.C. 1996a. At about the same time, the National Historic Preservation Act (NHPA) was amended to recognize properties of traditional religious and cultural importance as eligible for the National Register of Historic Places, to mandate tribal consultation pertaining to these places, and to authorize tribes to assume the responsibilities of a SHPO on tribal lands. 16 U.S.C. 470a(d)(6). The AIRFA Coalition was supportive of this effort, but did not take the lead. Instead, a loose coalition of tribal and federal historic preservation staff, working closely with Indian law advocates and attorneys in Washington, DC (some of whom had previously worked with the NCAI), spearheaded

the effort to obtain these amendments. Senator Wyche Fowler (D-GA) was instrumental in including tribal concerns in this legislation. The effort by the AIRFA Coalition to enact broader legislation providing specific and judicially enforceable substantive protections for sacred lands located on federal lands was unsuccessful, however. See Trope, *supra* note 2, 386–388, for an analysis of the proposed Native American Free Exercise of Religion Act (only the peyote provisions in that bill were ultimately enacted). A non-binding executive order on sacred sites was issued by President Bill Clinton, which still remains in force. Executive Order 13,007 (1996).

- 9 R. F. Martin, "Annotation, Removal and Reinterment of Remains," 21 *American Law Reports* 2d 472, 475–76 (citations omitted).
- 10 See generally Catherine Bergin Yalung and Laurel I. Wala, Comment, "Survey of State Repatriation and Burial Protection Statutes," 24 *Arizona State Law Journal* 419 (1992); see also *Hearings Before the Senate Select Committee on Indian Affairs on S. 1021 and S. 1980*, 101st Cong., 2d Sess. (May 14, 1990), 248–266 (Exhibit 5 to Statement of Walter R. Echo-Hawk entitled "State-to-State Survey on Laws to Protect Dead Bodies and to Guarantee Decent Burials") (hereinafter *Senate Hearing on S. 1021 & S. 1980*).
- 11 See generally Percival Jackson, *The Law of Cadavers and of Burials and Burial Places* (2d. Ed. New York: 1950).
- 12 See, e.g., *Stastny v. Tachovsky*, 132 N.W. 2d 317 (Neb. 1964); Neb. Rev. Stat. 71-605 (5)-(6) (specifying that disinterment may only be done by a licensed funeral director under a permit from the Bureau of Vital Statistics requested by next of kin; if more than one human body is concerned then the applicant must also obtain a court order which must specify the place for reinterment).
- 13 See generally Yalung and Wala, "Survey of State Repatriation and Burial Protection Statutes."
- 14 See generally David Bushnell, "Burials of the Algonquian, Siouan, and Caddoan Tribes West of the Mississippi, Smithsonian Institution," *Bureau of American Ethnology Bulletin* 83 (1927); H.C. Yarrow, *North American Indian Burial Customs* (Ogden, UT: Eagle's View Publishing, 1988).
- 15 128 Cal.App. 3d 536, 180 Cal.Rptr. 423, 425–427 (1982).
- 16 273 N.E.2d 893, 896–898 (Ohio Ct. App. 1971).
- 17 52 N.E. 126, 127 (Ohio 1898).
- 18 This information can be found on the National Park Service, National NAGPRA website at <http://www.nps.gov/history/nagpra/ONLINEDB/INDEX.HTM#SumDB>.
- 19 This information can be found on the Smithsonian National Museum of Natural History website at <http://anthropology.si.edu/repatriation/collections/index.htm>.
- 20 Douglas Cole, *Captured Heritage: The Scramble for Northwest Coast Artifacts* (Norman, OK: University of Oklahoma Press, 1995), 286–310.
- 21 Robert Bieder, *A Brief Historical Survey of the Expropriation of American Indian Remains* (Boulder, CO: Native American Rights Fund, 1990) (hereinafter *Bieder Report*), reprinted in *Senate Hearing on S. 1021 & S. 1980*, 278–363. See also Robert Bieder, *Science Encounters the Indian, 1820-1880* (Norman, OK: University of Oklahoma Press, 1986); Douglas Cole, *Captured Heritage: The Scramble for Northwest Coast Artifacts*; Stephen J. Gould, *The Mismeasure of Man* (New York: W.H. Norton & Company, 1981); Orlan J. Svingen, *History of the Expropriation of Pawnee Indian Graves in the Control of the Nebraska State Historical Society* (Boulder, CO: Native American Rights Fund, 1989); James T. Riding In, "Report Verifying the Identity of Six Pawnee Scout Crania at the Smithsonian and the National Museum of Health and Medicine" (1990), reprinted in *Senate Hearing on S. 1021 & S. 1980*, Cole, *Captured Heritage: The Scramble for Northwest Coast Artifacts*, 211–229.

- 22 Senate Hearing on S. 1021 & S. 1980, Cole, *Captured Heritage: The Scramble for Northwest Coast Artifacts*, 290–318.
- 23 Ibid., 294.
- 24 Ibid., 290–293.
- 25 Ibid., 319–320. The Surgeon General's Order is reproduced in full in the *Bieder Report*.
- 26 Ibid., 306–318.
- 27 Ibid., 292–295, 301–303.
- 28 Ibid., 329.
- 29 Ibid., 313.
- 30 Ibid., 76.
- 31 Ibid., 321–322.
- 32 Kenn Harper, *Give Me My Father's Body: The Life of Minik, The New York Eskimo* (New York: Simon and Schuster, 1986), 89–95.
- 33 See generally, Tamara L. Bray and Thomas W. Killion, eds., *Reckoning with the Dead: The Larsen Bay Repatriation and the Smithsonian Institution* (Washington DC: Smithsonian, 1994).
- 34 American common law has always held that a dead body is not "property". See 22 *American Jurisprudence* 2d. *Dead Bodies*, Sec. 4; 25A C.J.S. *Dead Bodies*, Sec. 2; Annotation: *Corpse—Removal and Reinterment*, 21 *American Law Reports* 2d. 472, 480, 486; Jackson, *The Law of Cadavers and of Burials and Burial Places*, 129–31, 133–34; 88-73 Kan. Op. Atty. Gen. (1988).
- 35 Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act," 42.
- 36 Martin Sullivan, "A Museum Perspective on Repatriation: Issues and Opportunities," *Arizona State Law Journal* 283, 284–290 (1992); see also *Onondaga Nation v. Thatcher*, at 61 N.Y.S. 1027 (Sup. Ct. Onondaga Co. 1899), 65 N.Y.S. 1014 (App. Div. 1900), and 62 N.E. 1098 (N.Y. 1901).
- 37 Douglas J. Preston, "Skeletons in our museums' closets: Native Americans want their ancestors' bones back," *Harper's*, Feb. 1989, 68.
- 38 Hearing on S. 187 Before the Senate Select Committee on Indian Affairs on Native American Museum Claims Commission Act, 1 (Statement of Senator Daniel K. Inouye).
- 39 20 U.S.C. 80q-1-80q-15.
- 40 20 U.S.C. 80q-1.
- 41 S. 1722, 100th Cong., 1st Session, sections 202–206 (1987).
- 42 S. 978, 101st Cong., 1st Session, section 9 (1989).
- 43 See e.g., May 18, 1989, Memo from Jerry Flute and Jack Trope to AAIA Board of Directors which can be found in the Association on American Indian Affairs Archives housed in the Seeley G. Mudd Manuscript Library at Princeton University, Princeton, New Jersey.
- 44 Joint Hearing Before the House Committee on Interior and Insular Affairs, House Committee on House Administration, Subcommittee on Libraries and Memorials, and the House Committee on Public Works and Transportation, Subcommittee on Public Works and Grounds, on H.R. 2668, 101th Cong., 1st Sess. (July 20, 1989) at 183.
- 45 Ibid., 225.
- 46 Ibid., 157–158.
- 47 135 Cong. Rec. S12388 (Oct. 3, 1989) (Statement of Senator Daniel Inouye during debate on passage of the bill by the Senate).
- 48 20 U.S.C. 80q-9(a)(1), (2).
- 49 20 U.S.C. 80q-9(b).
- 50 20 U.S.C. 80q-9(c).

- 51 Ibid.; 135 Cong. Rec. H8448 (daily ed., Nov. 13, 1989) (Statement of Rep. Nick J. Rahall, II, during the debate preceding passage of the bill by the House of Representatives); 135 Cong. Rec. S12397 (daily ed., Oct. 3, 1989) (Statement of Senator John McCain).
- 52 135 Cong. Rec. S12397 (daily ed. Oct. 3, 1989) (Statement of Senator John McCain).
- 53 136 Cong. Rec. H 10988-10989 (daily ed., Oct. 22, 1990) (Statements of Representative Ben Nighthorse Campbell and Representative John J. Rhodes III); 136 Cong. Rec. S 17174-17175 (daily ed., Oct. 26, 1990) (statements of Senators Daniel K. Inouye and Daniel K. Akaka).
- 54 S. Rep. No. 473, 101st Cong. 2d. Sess. (1990) (hereinafter *Senate Report 101-473*), 2-3. The House Report pertaining to NAGPRA noted further that the "majority [of the Panel] believed that 'Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made . . .'" H.R. Rep. No. 877, 101st Cong., 2d Sess. (1990) (hereinafter *House Report 101-877*), 10-11.
- 55 136 Cong. Rec. S 17173 (daily ed., Oct. 26, 1990) (Statement of Senator John McCain, one of the sponsors of NAGPRA in the Senate); See also 136 Cong. Rec. H10989 (daily ed., Oct. 22, 1990) (Statement of Representative John J. Rhodes III) (report "helped immensely to shape the policies in this bill"); 136 Cong. Rec. S17174 (daily ed., Oct. 26, 1990) (Statement of Senator Daniel K. Inouye); *Senate Report 101-473*; Martin, "Annotation, Removal and Reinterment of Remains," 6 ("The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations.").
- 56 Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act."
- 57 Preston, "Skeletons in our museums' closets," 66-76.
- 58 136 Cong. Rec. S17173 (daily ed. Oct 26, 1990) (Statement of Senator John McCain).
- 59 135 Cong. Rec. S12397 (daily ed. Oct. 3, 1989) (Statement of Senator John McCain).
- 60 In addition, we also knew that some elements in the Bush Administration were against the bill and we concluded that it was more likely that President Bush would sign a "consensus" bill. In the end, a joint letter urging President Bush to sign the bill was sent by the American Anthropological Association, American Association of Physical Anthropologists, Archaeological Institute of America, Association on American Indian Affairs, Native American Rights Fund, National Conference of State Historic Preservation Officers, National Congress of American Indians, National Trust for Historic Places, Preservation Action, Society for American Archaeology, Society for Historical Archaeology, and Society for Professional Archaeology. Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History."
- 61 25 U.S.C. 3001-3013 (Supp. 1991).
- 62 136 Cong. Rec. S17174 (daily ed., Oct. 26, 1990). (Statement of Senator Daniel K. Inouye at the time of the enactment of the bill by the Senate).
- 63 Ibid. Other parts of the legislative history also emphasize the "human rights" genesis of NAGPRA, the *Panel Report*, which is reprinted in 24 *Arizona State Law Journal* 487 (1992), expresses the belief that "human rights should be the paramount principle where claims are made by Native American groups that have a cultural affiliation with remains and other materials."
- 64 *Senate Report 101-473*, 6.
- 65 136 Cong. Rec. S 17173 (daily ed., Oct. 26, 1990) (statement of Senator John McCain). Both Senators McCain and Inouye recognized the importance of museums in maintaining our cultural heritage, as well as the interest of Native Americans in the return of ancestral human remains and funerary objects, sacred objects and cultural patrimony. 136 Cong. Rec. S17173-17175 (daily ed., Oct. 26, 1990).

56 25 U.S.C. 3010. The trust responsibility of the federal government to Indian tribes and people is a judicially created concept that requires the United States to "adhere to fiduciary standards in its dealings with Indians." Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* (Dayton, OH: Lexix Law Publishing, 1982), 207. Ironically, the museum community strongly supported this section for another reason. They believed that it would limit the precedential value of this legislation in terms of international claims of repatriation that might be made to their institutions in the future.

67 See e.g., *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F.Supp.2d 1047 (D.S.D. 2000).

68 See e.g., *Green v. Dumke*, 480 F.2d 624, 628 n.7 (9th Cir. 1973); *Schorle v. City of Greenhills*, 524 F. Supp. 821, 825 (S.D. Ohio 1981).

69 The statutory provisions relating to repatriation are set out, for the most part, in 25 U.S.C. 3003, 3004, and 3005.

70 The statutory provisions relating to graves protection are set out, for the most part, in 25 U.S.C. 3002.

71 The statutory provisions relating to illegal trafficking, enacted as section 4 of NAGPRA, are set out in 18 U.S.C. 1170.

72 43 C.F.R. 10.2(b)(1); 43 C.F.R. 10.14(b).

73 25 U.S.C. 3001(7). A Federal District Court found that the definition of Indian tribe includes both tribes recognized by the Secretary of the Interior and other "aggregations" of Indians that have been receiving funds and assistance from other departments of the Federal government. *Abenaki Nation of Missiquoi Indians v. Hughes*, 805 F.Supp. 234 (D.Vt. 1992), aff'd 990 F.2d 729 (2nd Cir. 1993). However, the Department of Interior, in regulations adopted after this court case, included only those tribes commonly thought of as "federally recognized." 43 C.F.R. 10.2(b)(2).

74 Timothy McKeown and Sherry Hutt, "In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After," 21 *UCLA Journal of Environmental Law and Policy* (2003): 155, 178.

75 43 C.F.R. 10.11(c)(2)(ii)(A).

76 43 C.F.R. 10.11(c)(2).

77 60 *Fed. Reg.* 62139 (December 4, 1995).

78 McKeown and Hutt, "In the Smaller Scope of Conscience," 185-186.

79 Jason C. Roberts, "Native American Graves Protection and Repatriation Act Census: Examining the Status and Trends of Culturally Affiliating Native American Human Remains and Associated Funerary Objects Between 1990 and 1999," *Topics in Cultural Resource Law* (2000): 79, 84-85.

80 25 U.S.C. 3001(11).

81 20 U.S.C. 80q-9.

82 25 U.S.C. 3001(8).

83 *Ibid*; 43 C.F.R. 10.2(a)(3)(iii).

84 43 C.F.R. 10.2(d)(1).

85 43 C.F.R. 10.2(d)(1).

86 McKeown and Hutt, "In the Smaller Scope of Conscience," 164-165.

87 25 U.S.C. 3001(3)(A) and (B).

88 25 U.S.C. 3001(3)(A).

89 25 U.S.C. 3001(3)(A),(B), 3001(8), 3003(a), 3004(a).

90 25 U.S.C. 3001(3)(B).

- 91 McKeown and Hutt, "In the Smaller Scope of Conscience," 165.
- 92 25 U.S.C. 3001(3)(C).
- 93 43 C.F.R. 10.2(d)(3); House Report 101-877.
- 94 Ibid.
- 95 Ibid.
- 96 *Senate Report 101-473*.
- 97 43 C.F.R. 10.2(d)(3).
- 98 McKeown and Hutt, "In the Smaller Scope of Conscience," 165-166.
- 99 25 U.S.C. 3001(3)(D).
- 100 25 U.S.C. 3001(3)(C)(D), see Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History."
- 101 *Senate Report 101-473*.
- 102 McKeown and Hutt, "In the Smaller Scope of Conscience," 166.
- 103 25 U.S.C. 3003(a).
- 104 25 U.S.C. 3003(b)(1)(A), (C).
- 105 Ibid.
- 106 *Senate Report 101-473*.
- 107 25 U.S.C. 3003(b)(2).
- 108 *Senate Report 101-473*.
- 109 25 U.S.C. 3003(d)(1), (2).
- 110 25 U.S.C. 3003(d)(2).
- 111 25 U.S.C. 3003(b)(2).
- 112 25 U.S.C. 3006(a).
- 113 *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*. (Washington DC: GAO-10-768, July 28, 2010), 26.
- 114 25 U.S.C. 3004(a), (b)(1)(A).
- 115 25 U.S.C. 3004(b)(1)(B), (C).
- 116 25 U.S.C. 3004(b)(2).
- 117 25 U.S.C. 3005(a)(1) and (4).
- 118 25 U.S.C. 3001(2).
- 119 *House Report 101-877*.
- 120 Ibid.
- 121 25 U.S.C. 3001(2); 43 C.F.R. 10.14(d).
- 122 43 C.F.R. 10.14(d) and (f).
- 123 *Senate Report 101-473*.
- 124 43 C.F.R. 10.14(d) and (f); 60 Fed.Reg. 62156 (1995).
- 125 25 U.S.C. 3005(a)(4).
- 126 43 C.F.R. 10.14(c).
- 127 See 25 U.S.C. 3003(b)(2); 25 U.S.C. 3005(a).
- 128 25 U.S.C. 3005(b).
- 129 Ibid.
- 130 25 U.S.C. 3009(1)(B).
- 131 25 U.S.C. 3005(e). 25 U.S.C. 3005(a)(1) and the portion of 25 U.S.C. 3005(a)(4) applicable to human remains and associated funerary objects refer only to subsections (b) and (e) of 25 U.S.C. 3005 as exceptions to the repatriation requirement.

- 132 Ibid. Section 3005(e) also provides that the dispute may be settled "pursuant to the provisions of this Act". Ibid. This refers to the authority of the Review Committee created by 25 U.S.C. 3006 to "facilitat[e] the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable." 25 U.S.C. 3006(c)(4). Although any findings of the committee are admissible in a court proceeding, the committee has no binding authority upon any of the parties. 25 U.S.C. 3006(d). Thus, while the committee can certainly play an important role in resolving these disputes, ultimately the disputes must be resolved by agreement or judicial determination.
- 133 25 U.S.C. 3006.
- 134 25 U.S.C. 3006(c)(5).
- 135 25 U.S.C. 3006(e).
- 136 *House Report 101-877*. The House Interior Committee indicated that it "look[ed] forward" to the committee's recommendations. Ibid. The Report of the Panel for a National Dialogue on Museum/Native American Relations also reflected a division on this issue. Ibid, 11.
- 137 43 C.F.R. 10.11.
- 138 43 C.F.R. 10.11(c)(1)(i), (ii).
- 139 43 C.F.R. 10.11(b).
- 140 43 C.F.R. 10.11(b)(2)(ii).
- 141 43 C.F.R. 10.11(c)(1)(i), (ii).
- 142 43 C.F.R. 10.11(c)(2)(ii)(A).
- 143 43 C.F.R. 10.11(c)(2)(ii)(B).
- 144 43 C.F.R. 10.11(c)(2), (3).
- 145 43 C.F.R. 10.11(c)(4).
- 146 See generally 25 U.S.C. 3005, 3001(3).
- 147 Cultural affiliation can be determined by the summary process, 25 U.S.C. 3005(a)(2), or, in the case of unassociated funerary objects, by the claimant making a showing by a preponderance of the evidence, 25 U.S.C. 3005(a)(4).
- 148 25 U.S.C. 3005(a)(5).
- 149 25 U.S.C. 3005(a)(5)(A). An object of cultural patrimony cannot be owned by an individual.
- 150 25 U.S.C. 3005(a)(5)(C).
- 151 25 U.S.C. 3005(c).
- 152 25 U.S.C. 3004(b)(2).
- 153 25 U.S.C. 3001(13).
- 154 *Senate Report 101-473*.
- 155 *Senate Report 101-473*.
- 156 136 Cong. Rec. S17176 (daily ed., Oct. 26, 1990) (Statement by Senator McCain during debate at time of the passage of the bill by the Senate).
- 157 See generally 16 *American Jurisprudence 2d, Conflict of Laws*, secs. 43, 44.
- 158 Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act," 68.
- 159 25 U.S.C. 3001(13).
- 160 Ibid.; see also *House Report 101-877*.
- 161 25 U.S.C. 3001(13).
- 162 25 U.S.C. 3005(c).
- 163 In one instance, subsequent legislation has made NAGPRA applicable to state land. The one circumstance in which burial sites on state-owned lands are covered is found in the Water

Resources Development Act of 1999, P.L. 106-53, which transferred certain federal land to the State of South Dakota, but requires the federal government to comply with NAGPRA if any covered sites are located on the transferred land. *Ibid.*, section 605(h)(3).

- 164 25 U.S.C. 3001(1). It had been understood that NAGPRA provisions automatically applied to any grave site on federal or tribal land (except for those that are clearly non-indigenous in nature, e.g., Euro-American). However, the Ninth Circuit Court of Appeals issued a decision in the case of *Bonnichsen v. United States*. 367 F. 3d 864 (9th Cir. 2004), where it held that the term "Native American" in NAGPRA, which modifies the terms "human remains, objects and cultural items" in the grave sites section of the act, refers only to aboriginal tribes, peoples, and cultures that exist in modern times. Thus, according to the court in *Bonnichsen*, in order for NAGPRA to apply to human remains and cultural items found on federal and tribal lands, there must be an initial showing that the remains or items "bear a significant relationship to a presently existing tribe, people or culture." *Ibid.*, 874-876. The *Bonnichsen* decision is highly suspect as a matter of law, given that it would render numerous sections of the act virtually superfluous, e.g., 25 U.S.C. 3002(a)(2)(C) (claims based solely upon aboriginal occupation), 25 U.S.C. 3006(c)(5) (disposition of culturally unaffiliated remains). Thus far, no regulations have been altered by the Department of Interior as a result of this decision.
- 165 43 C.F.R. 10.2(d)(2).
- 166 25 U.S.C. 3001(5).
- 167 25 U.S.C. 3001(15).
- 168 60 Fed.Reg. 62142 (December 4, 1995). The commentary also expresses the secretary's interpretation that allotted Indian lands that are not located within the boundaries of a reservation or dependent Indian community are not "tribal lands." *Ibid.*, 62140. Presumably they would be federal lands, although the commentary is not explicit about this. The commentary also suggests that lands held in fee simple by an Indian tribe that are not within the reservation or part of a dependent Indian community are not covered by NAGPRA. *Ibid.*, 62142.
- 169 43 C.F.R. 10.2(f)(2)(iv). This is a questionable interpretation of the law. The "Fifth Amendment takings" exception in NAGPRA is found in the "right of possession" definition, 25 U.S.C. 3001(13), which applies only to repatriation of remains and objects which are in the possession of museums or federal agencies and not to the issue of the excavation of cultural items that are still embedded on tribal lands.
- 170 25 U.S.C. 3002(c)(1).
- 171 43 C.F.R. 10.3(b)(1).
- 172 16 U.S.C. 470cc(b).
- 173 25 U.S.C. 3002(c)(2).
- 174 25 U.S.C. 3002(c)(2).
- 175 25 U.S.C. 3002(d)(1).
- 176 Although the regulations provide for notice to the Alaska Native corporations, the Interior Solicitor's Office has also indicated that Alaska Native corporations are not to be considered tribes within the meaning of NAGPRA. See memo dated March 18, 2011 from Associate Solicitor Blackwell to National NAGPRA Program Manager Hutt, which can be found at http://www.nps.gov/nagpra/DOCUMENTS/Solicitors_Memo_ANCSA_03182011.pdf. Thus, in this case, there is a bit of disconnect between the entity that receives notice (the corporation) and the entity (the Alaska Native village) that has the right to file a repatriation claim.
- 177 43 C.F.R. 10.4(d)(1)(iv).
- 178 43 C.F.R. 10.4(d)(1)(iii).
- 179 25 U.S.C. 3002(d)(1) and (3).

- 180 43 C.F.R. 10.4(d)(2).
181 43 C.F.R. 10.4(g).
182 25 U.S.C. 3002(d)(3).
183 *Senate Report 101-473*. (Of note, there are special provisions dealing with Native Hawaiian
land and organizations, as well as land owned by Alaska Native corporations.) 25 U.S.C.
3001(15)(c); 25 U.S.C. 3002(d)(1).
184 60 Fed.Reg. 62141, 62146 (December 4, 1995).
185 25 U.S.C. 3002(c) and (d); 43 C.F.R. 10.4.
186 *House Report 101-877*.
187 43 C.F.R. 10.3(c)(1), 43 C.F.R. 10.5(b)(1) and (2).
188 43 C.F.R. 10.3(c)(1).
189 43 C.F.R. 10.5(c).
190 43 C.F.R. 10.5(b)(3), (d) and (g).
191 43 C.F.R. 10.5(e).
192 43 C.F.R. 10.5(f).
193 43 C.F.R. 10.4(b).
194 43 C.F.R. 10.4(d). In the case of tribal lands, the tribe may (but is not required to) certify
receipt of the notice, take steps to secure and protect the items and ensure proper distribution
of the items if excavated. 43 C.F.R. 10.4(e).
195 43 C.F.R. 10.4(d)(iv); 43 C.F.R. 10.5(f).
196 43 C.F.R. 10.4(d)(v); 43 C.F.R. 10.3(c)(2).
197 However, the case of *Bonnichsen v. United States*, discussed in footnote 164, raises some
problematic questions about whether this intent of the legislation will be fully fulfilled.
198 25 U.S.C. 3002(a)(1).
199 25 U.S.C. 3002(a)(2)(A).
200 25 U.S.C. 3002(a)(2)(B).
201 25 U.S.C. 3006(c)(4); 43 C.F.R. 10.17.
202 The Indian Claims Commission was established in 1946 to hear claims by tribes seeking
compensation for territory lost as a result of broken federal treaties. Judicial findings about
tribal aboriginal territories were an integral part of the process. In 1978, its pending docket of
170 cases was transferred to the United States Court of Claims.
203 25 U.S.C. 3002(a)(2)(C). This clause has been interpreted by the Department of the Interior
to include preliminary findings of fact, and not just final judgments, and the department ruled
that joint aboriginal use is sufficient to meet the criteria of this section; a finding of exclusive
use and occupancy is not required. This interpretation was rejected by the federal magistrate
judge in *Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D.Or. 2002), *affd.* 357 F.3d 962
(9th Cir. 2004), modified and rehearing en banc denied, 367 F.3d 864 (9th Cir. 2004). That
part of the magistrate's decision was not addressed in the Ninth Circuit opinion.
204 43 C.F.R. 10.6(c).
205 43 C.F.R. 10.6(c).
206 It is conceivable that this will give rise to a legal dispute in a case where the ownership or
control of the items to be excavated is clear and the claimant wants immediate return of the
items without analysis.
207 60 Fed.Reg. 62154 (December 4, 1995).
208 43 C.F.R. 10.15(a)(1).
209 43 C.F.R. 10.10(c)(2); 43 C.F.R. 10.15(a)(2).
210 25 U.S.C. 3002(b).

- 211 18 U.S.C. 1170(a), as amended by section 4(a) of P.L. 101-601; 25 U.S.C. 3001(13).
- 212 18 U.S.C. 1170(b), as amended by section 4(a) of P.L. 101-601.
- 213 McKeown and Hutt, "In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After," 208.
- 214 25 U.S.C. 3009(5).
- 215 18 U.S.C. 1170(a), as amended by section 4(a) of P.L. 101-601.
- 216 25 U.S.C. 3006.
- 217 25 U.S.C. 3006(b)(1).
- 218 25 U.S.C. 3006(2).
- 219 25 U.S.C. 3006(c)(2).
- 220 25 U.S.C. 3006(c)(3), (4) and 25 U.S.C. 3006(d).
- 221 25 U.S.C. 3006(c)(5).
- 222 25 U.S.C. 3006(c)(7).
- 223 25 U.S.C. 3006(c)(9).
- 224 25 U.S.C. 3006(h).
- 225 25 U.S.C. 3013.
- 226 43 C.F.R. 10.15(c).
- 227 25 U.S.C. 3013. The language in NAGPRA is that "any person" may bring an action to enforce the law's provisions. The senate report explains this provision as meaning that "any party, including an Indian tribe, Native Hawaiian organization, museum or agency" may bring a cause of action. *Senate Report 101-473*.
- 228 43 C.F.R. 10.16(b); 25 U.S.C. 3006(d).
- 229 25 U.S.C. 3005(f).
- 230 25 U.S.C. 3009(3), (4).
- 231 25 U.S.C. 3009(1)(A).
- 232 25 U.S.C. 3009(1)(B).
- 233 25 U.S.C. 3007.
- 234 25 U.S.C. 3007(g).
- 235 25 U.S.C. 3008(a). As the summaries and inventories have been completed, the grant program has evolved and grants are currently focused on consultation and documentation, as well as repatriation.