

**NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT
(NAGPRA)**

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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 was designed to address the flagrant violation of the “civil rights of America’s first citizens.”¹ 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. In fact, correspondence from individuals engaged in robbing graves often speaks of the dangers these collectors faced when Indians caught them digging up burial grounds. 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. In cases where native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often 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.²

¹136 CONG.REC. S17174 (daily ed. Oct. 26, 1990) (statement of Senator Inouye).

² *Id.* Both the *House Report 101-877*, *infra* at 2 and *Senate Report 101-473*, *infra* at 10, acknowledge the importance in the legislative history of a document captioned “*Report of the Panel for a National Dialogue on Museum/Native American Relations*” (Feb. 28, 1990). The Senate Report specifically endorses the *Panel Report*: “The Committee agrees with the findings and recommendations of the Panel for a National

NAGPRA was enacted after years of legislative efforts by tribal representatives and their supporters,³ driven in large part by the widely held belief that the graves of tribal ancestors should not be disturbed and, in cases in which they have been disturbed, the human remains and funerary objects should be returned to descendants for reburial or other religiously prescribed treatment. Thus, the basic purposes of the statute are to declare that tribes and individual lineal descendants have rights in the remains of their ancestors and in certain kinds of cultural property and to establish procedures for vindication of these rights.⁴ Congress expressly stated in the statute that it 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.”⁵ Nonetheless, the bill that was enacted reflected a compromise forged by representatives of the museum, scientific, and Indian communities.⁶ 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 even exists – was to rectify centuries of discrimination against Native Americans. 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.⁷

NAGPRA applies in three different contexts: repatriation of items from the collections of federal agencies and museums to tribes and to lineal

Dialogue on Museum/Native American Relations.” *Senate Report 101-473, infra*, at 4. The *Panel Report*, which is reprinted at 24 ARIZ. ST. L. J. 487 (1992), expresses the belief that “human rights should be the paramount principle where claims are made by Native America groups that have a cultural affiliation with remains and other materials.” *Id.* at 494. The *Panel Report*, however, does not articulate this belief with reference to specific human rights norms. Although neither the *Panel Report* nor the Senate Report explicitly articulates ways in which human rights norms are implicated by NAGPRA, norms relating to freedom of religion are clearly implicated.

³ See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35 (1992). Committee Reports for the bill as enacted are: H.R. REP. NO. 877, 101st Cong., 2d Sess. 111-12 (1990), reprinted in 1990 U.S.C.C.A.N. 4367; S. REP. NO. 473, 101st Cong. 2d Sess., at 1-3 (1990), (describing series of hearings and other events beginning in February 1987); H.R. REP. NO. 101-877, 101st Cong., 2d Sess., at 9-11 (1990) (describing background of the bill), reprinted in 1990 U.S.C.C.A.N. 4367, 4368-70. Both the Senate Report and the House Report are available on a web site maintained by the National Park Service: <http://www.nps.gov/nagpra/MANDATES/INDEX.HTM> (Legislative and Regulatory History).

⁴ In the non-Indian context, items of cultural property and interred human remains are subject to common law principles of property law, and the rights of tribes and Indian lineal descendants can also be framed as property rights that should be protected by the U.S. Constitution. See Sherry Hutt and Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L. J. 363 (1999).

⁵ 25 U.S.C. § 3010.

⁶ 136 CONG. REC. S17173 (daily ed. Oct 26, 1990) (statement of Sen. McCain)

⁷ See, e.g., *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F.Supp.2d 1047 (D.S.D. 2000).

descendants where known;⁸ protection of burial sites and “cultural items” located on federal lands and “tribal lands”;⁹ and trafficking in Native American human remains and cultural items.¹⁰

a. Who has rights under NAGPRA?

Lineal descendants of those who have been interred, 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.”¹¹

“Indian tribe” is defined to mean “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”¹² A Federal District Court found that this definition includes both tribes recognized by the Secretary of Interior and other “aggregations” of Indians which have receiving funds and assistance from other departments of the Federal government.¹³ However, the Department of Interior, in regulations adopted after this court case, has indicated that only those tribes commonly thought of as “federally-recognized,” as well as Alaska Native corporations, are included under NAGPRA.¹⁴

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, tribes and other sub-groups should make

⁸ The statutory provisions relating to repatriation are set out, for the most part, in 25 U.S.C. §§ 3003, 3004, and 3005.

⁹ The statutory provisions relating to graves protection are set out, for the most part, in 25 U.S.C. §§ 3002.

¹⁰ The statutory provisions relating to illegal trafficking, enacted as section 4 of NAGPRA, are set out in 18 U.S.C. § 1170.

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

¹² 25 U.S.C. § 3001(7).

¹³ *Abenaki Nation of Missisquoi Indians v. Hughes*, 805 F.Supp. 234 (D.Vt. 1992), *aff'd* 990 F.2d 729 (2nd Cir. 1993)

¹⁴ 43 C.F.R. § 10.2(b)(2).

NAGPRA claims through an Indian tribe, rather than directly.¹⁵ Tribes have banded together and established organizations to act collectively on their behalf.¹⁶ Moreover, many of the claims that have been filed under NAGPRA have been joint tribal claims.¹⁷

“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.¹⁸

b. Who has responsibilities under NAGPRA?

NAGPRA’s repatriation, inventory and summary requirements are obligatory for federal agencies and museums. 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.

The term "federal agency" includes all federal governmental entities except for the Smithsonian Institution which is the subject of a separate law, the National Museum of the American Indian Act.¹⁹

The term “museum” means any institution receiving federal funds, or which is part of a larger unit that has received federal funds, and which possesses or controls Native American cultural items. This definition includes not only those institutions commonly thought of as museums, but also state and local governments, educational and other institutions.²⁰

c. What Types of Items are Covered?

¹⁵ 60 FED. REG. 62139 (December 4, 1995).

¹⁶ See Timothy McKeown and Sherry Hutt, “*In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After*”, 21 U.C.L.A. JOURNAL ENV. LAW AND POLICY 155, 185-186 (2003).

¹⁷ See 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 79, 84-85 (2000).

¹⁸ 25 U.S.C. § 3001(11).

¹⁹ 20 U.S.C. § 80q-9.

²⁰ 25 U.S.C. § 3001(8); 43 C.F.R. § 10.2(a)(3)(iii).

NAGPRA applies to 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 to include bones, teeth, hair, ashes and preserved soft tissue.²¹ 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.²² To date, human remains that have been repatriated pursuant to NAGPRA include “complete and partial skeletons, isolated bones, teeth, scalps, and ashes.”²³

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...”²⁴ 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. 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.²⁵ This is consistent with the definition of “burial site” in the statute which includes “any natural or prepared location, whether below, or, 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.”²⁶

There are two categories of funerary objects – associated and unassociated. Associated funerary objects are those where both the human remains and objects are in the possession of a federal agency or museum or those “made exclusively for burial purposes or to contain human remains.”²⁷ Unassociated funerary objects are those that can be related to specific human remains or a burial site where the human remains are not presently in the possession of an agency or museum.²⁸ Funerary objects that have been repatriated to date include beads, pottery, tools, trade silver, weapons and clothing.²⁹

“Sacred objects” are those objects which are

²¹ 43C.F.R. § 10.2(d)(1).

²² 43 C.F.R. § 10.2(d)(1).

²³ McKeown and Hutt, *supra*, at 164-165.

²⁴ 25 U.S.C. § 3001(3)(A) and (B).

²⁵ 43 C.F.R. § 10.2(d)(2).

²⁶ 25 U.S.C. § 3001(1)

²⁷ 25 U.S.C. § 3001(3)(A).

²⁸ 25 U.S.C. § 3001(3)(B).

²⁹ McKeown and Hutt, *supra*, at 165.

- Ceremonial in nature, and
- Needed by traditional Native American religious leaders for the present day practice of traditional Native American religions.³⁰ 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.³¹

This definition recognizes that the ultimate determination of continuing sacredness must be made by Native American religious leaders themselves since they must determine the current ceremonial need for the object.³² Sacred objects that have been repatriated to date include “medicine bundles, prayer sticks, pipes, effigies and fetishes, basketry, rattles, and a birch bark scroll.”³³

“Cultural patrimony” are those objects which

- Have “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself”, and
- Were the cultural property of the tribe, or a subgroup thereof such as a clan or band, and could not be sold or given away by an individual.³⁴

Congress intended cultural patrimony to refer to items of “great importance” such as Iroquois wampum belts.³⁵ Items of cultural patrimony repatriated under NAGPRA to date include “a wolf-head headdress, clan hat, several medicine bundles and ceremonial masks.”³⁶

d. What responsibilities do museums and federal agencies have to catalog items in their possession and control?

³⁰ 25 U.S.C. § 3001(3)(C).

³¹ 43 C.F.R. § 10.2(d)(3).

³² “Traditional religious leader” is defined 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.” 43 C.F.R. § 10.2(d)(3).

³³ McKeown and Hutt, *supra*, at 165-166.

³⁴ 25 U.S.C. § 3001(3)(D).

³⁵ *Senate Report 101-473, supra* at 7-8.

³⁶ McKeown and Hutt, *supra* at 166.

NAGPRA required museums and federal agencies to complete an item-by-item inventory of human remains and associated funerary objects³⁷ in consultation with Native American governmental and traditional leaders and the NAGPRA Review Committee.³⁸ 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.³⁹ This provision did not require museums to conduct "exhaustive studies and additional scientific research to conclusively determine" cultural affiliation.⁴⁰ In fact, NAGPRA is 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."⁴¹ Rather, NAGPRA's intent was merely to require a good faith effort to identify cultural affiliation based upon presently available evidence.⁴²

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.⁴³ The notice included information about the circumstances surrounding the acquisition of each identified item and information about cultural affiliation.⁴⁴ 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 may 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."⁴⁵

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.⁴⁶

NAGPRA also required that federal agencies and museums summarize their collections of unassociated funerary objects, sacred objects and items of cultural

³⁷ 25 U.S.C. § 3003(a).

³⁸ 25 U.S.C. § 3003(b)(1)(A), (C).

³⁹ *Id.*

⁴⁰ *Senate Report 101-473*, supra at 12.

⁴¹ 25 U.S.C. § 3003(b)(2).

⁴² *Senate Report 101-473*, supra at 12.

⁴³ 25 U.S.C. § 3003(d)(1), (2).

⁴⁴ 25 U.S.C. § 3003(d)(2).

⁴⁵ 25 U.S.C. § 3003(b)(2).

⁴⁶ See, e.g., General Accountability Office, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (July 2010) at 26.

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."⁴⁷ A consultation process with Native American governmental and traditional leaders was required.⁴⁸ Upon request, all tribes and Native Hawaiian organizations are entitled to obtain data pertaining to geographical origin, cultural affiliation and acquisition and accession of these objects.⁴⁹

e. When must cultural items be repatriated?

i.) 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.⁵⁰

"Cultural affiliation" 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."⁵¹ The House committee explained that this requirement "is intended to ensure that the claimant has a reasonable connection with the materials."⁵² 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.⁵³

In order for "cultural affiliation" to be established, it must be determined that it is likely that the remains are those of a member of a particular tribe or group

⁴⁷ 25 U.S.C. § 3004(a), (b)(1)(A).

⁴⁸ 25 U.S.C. § 3004(b)(1)(B), (C).

⁴⁹ 25 U.S.C. § 3004(b)(2).

⁵⁰ 25 U.S.C. § 3005(a)(1) and (4).

⁵¹ 25 U.S.C. § 3001(2).

⁵² *House Report 101-877, supra* at 14.

⁵³ *Id.*

which existed at the time that the deceased lived, and a reasonable connection (“shared group identity”) must be shown 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.⁵⁴ The identity of the earlier group can be established by such factors as its cultural characteristics, its production and distribution of materials item and its biological distinctiveness.⁵⁵ A finding of cultural affiliation is warranted when the evidence shows that it is more likely than not that there is an affiliation⁵⁶ and need not be established with scientific certainty.⁵⁷

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.⁵⁸ 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."⁵⁹ Thus, traditional knowledge is considered as relevant to this determination as scientific knowledge.

In general, repatriation is not to be delayed pending additional scientific research.⁶⁰ Two exceptions exist, however, to the requirement that human remains and associated funerary objects be "expeditiously returned" after cultural affiliation has been determined.⁶¹ The first 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."⁶² If this exception applies, the items must be returned within 90 days after the completion of the study.⁶³ 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.⁶⁴ The second exception applies if multiple requests for a cultural item are made and the federal agency or museum "cannot clearly

⁵⁴ 25 U.S.C. § 3001(2); H.R. Rep. 101-877, *supra*, at 14; 43 C.F.R. § 10.14(d).

⁵⁵ 43 C.F.R. § 10.14(c)

⁵⁶ 43 C.F.R. § 10.14(d) and (f)

⁵⁷ 43 C.F.R. § 10.14(f).

⁵⁸ 43 C.F.R. §10.14(d) and (f); 60 Fed.Reg. 62156 (1995).

⁵⁹ 25 U.S.C. § 3005(a)(4).

⁶⁰ See 25 U.S.C. §3003(b)(2); 25 U.S.C. § 3005(a).

⁶¹ 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.

⁶² 25 U.S.C. § 3005(b).

⁶³ *Id.*

⁶⁴ 25 U.S.C. § 3009(1)(B).

determine which requesting party is the most appropriate claimant".⁶⁵ 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.⁶⁶

As for human remains and associated funerary objects whose cultural affiliation cannot be determined, NAGPRA directed the statutorily-created Review Committee⁶⁷ to compile an inventory of culturally unidentifiable human remains and recommend "specific actions for developing a process for disposition of such remains."⁶⁸ The Review Committee's recommendations are to be made "in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups."⁶⁹ 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."⁷⁰

The Secretary of Interior recently issued regulations based upon the recommendations of the Review Committee.⁷¹ A museum or federal agency must offer to return any "culturally unaffiliated" human remains in its possession that were originally removed from land that is currently tribal land or the aboriginal land of a particular tribe.⁷² Before these remains are returned, there must be a consultation process involving all such tribes which must start within 90 days of a request for repatriation by a tribe or an offer by the museum or agency to return culturally unaffiliated human remains.⁷³ Aboriginal land includes lands recognized by a final judgment of the Indian Claims Commission of the United States Court of Claims, a treaty, Act of Congress or Executive Order.⁷⁴ (Most

⁶⁵ 25 U.S.C. § 3005(e).

⁶⁶ *Id.* Section 3005(e) also provides that the dispute may be settled "pursuant to the provisions of this Act". *Id.* 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.

⁶⁷ 25 U.S.C. § 3006.

⁶⁸ 25 U.S.C. § 3006(c)(5).

⁶⁹ 25 U.S.C. § 3006(e).

⁷⁰ *House Report 101-877, supra*, at 16. The House Interior Committee indicated that it "look[ed] forward" to the Committee's recommendations. *Id.* The Report of the Panel for a National Dialogue on Museum/Native American Relations also reflected a division on this issue. *Id.* at 11.

⁷¹ 43 C.F.R. § 10.11.

⁷² 43 C.F.R. § 10.11(c)(1)(i), (ii).

⁷³ 43 C.F.R. § 10.11(b).

⁷⁴ 43 C.F.R. § 10.11(b)(2)(ii).

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.⁷⁵ This is similar to the way in which the statute treats human remains discovered and unearthened on tribal or federal land after 1990.

The regulations acknowledge that some of the so-called "culturally unaffiliated 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.⁷⁶ 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.⁷⁷ 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 Interior or his designee so recommends.⁷⁸ The regulations also recommend, but do not require, repatriation of culturally unaffiliated funerary objects on the same basis as human remains.⁷⁹

ii.) 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.⁸⁰ Once it has been shown that an item is an unassociated funerary object, sacred object or item of cultural patrimony, either the cultural affiliation must be determined⁸¹ 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.⁸² A direct lineal

⁷⁵ 43 C.F.R. § 10.11(c)(1)(i), (ii).

⁷⁶ 43 C.F.R. § 10.11(c)(2)(ii)(A)

⁷⁷ 43 C.F.R. § 10.11(c)(2)(ii)(B).

⁷⁸ 43 C.F.R. § 10.11(c)(2), (3).

⁷⁹ 43 C.F.R. § 10.11(c)(4).

⁸⁰ See generally 25 U.S.C. §§ 3005, 3001(3).

⁸¹ 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).

⁸² 25 U.S.C. § 3005(a)(5).

descendant may also request repatriation of a sacred object.⁸³ If a tribe or Native Hawaiian organization is making a claim 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.⁸⁴

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.⁸⁵ 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.⁸⁶

"Right of possession" means "possession obtained with the voluntary consent of an individual or group that had authority of alienation."⁸⁷ 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"⁸⁸ and is designed to ensure that the object did not pass out of tribal, or individual Native American, possession without appropriate consent.⁸⁹

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."⁹⁰ Authority to alienate would be determined by the law of the governmental entity having jurisdiction over a transaction.⁹¹ In most cases, the initial transfer of the item out of tribal control would presumably be governed by tribal law or custom.⁹² 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

⁸³ 25 U.S.C. § 3005(a)(5)(A).

⁸⁴ 25 U.S.C. § 3005(a)(5)(C).

⁸⁵ 25 U.S.C. § 3005(c).

⁸⁶ 25 U.S.C. § 3004(b)(2).

⁸⁷ 25 U.S.C. § 3001(13).

⁸⁸ *Senate Report 101-473, supra*, at 8.

⁸⁹ See *Senate Report 101-473, supra*, at 8.

⁹⁰ 136 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)

⁹¹ See generally 16 Am.Jur.2d Conflict of Laws, §§ 43, 44.

⁹² See generally Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

public purpose without just compensation.⁹³ Where there would be a taking within the meaning of the constitutional provision, applicable federal, state or tribal law would apply.⁹⁴ 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.⁹⁵

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.⁹⁶ 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.

f. Embedded items: What kinds of lands are covered?

Sites located on federal land, tribal lands, and in one special instance, state land are covered by NAGPRA.

“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 1971.⁹⁷

“Tribal land” is defined to include

- all lands within the exterior boundaries of a reservation, whether or not the land is owned by the tribe, Indian individuals or non-Indians,
- all dependent Indian communities, and
- any lands administered for Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920, as amended, and the Hawaii Statehood Bill.⁹⁸

⁹³ 25 U.S.C. § 3001(13).

⁹⁴ *Id.*; see also *House Report 101-877, supra*, at 15.

⁹⁵ 25 U.S.C. § 3001(13).

⁹⁶ 25 U.S.C. § 3005(c).

⁹⁷ 25 U.S.C. § 3001(5).

⁹⁸ 25 U.S.C. § 3001(15).

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.⁹⁹ 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.¹⁰⁰

The one circumstance in which burial sites on state-owned lands are covered is found in the Water Resources Act¹⁰¹ 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.

g. What are the legal requirements that pertain to covered sites?

Whenever a party intends to intentionally excavate a site for any purpose:

1. That party must obtain a permit pursuant to ARPA.¹⁰² 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)¹⁰³ if
 - the applicant is qualified
 - the undertaking is designed to advance archeological knowledge in the public interest
 - the resources will remain the property of the United States and be preserved in an appropriate institution (except where NAGPRA provides for ownership or control by

⁹⁹ 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." *Id.* at 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. *Id.* at 62142.

¹⁰⁰ 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 imbedded on tribal lands.

¹⁰¹ 43 U.S.C. §§ 1198-1200e.

¹⁰² 25 U.S.C. § 3002(c)(1).

¹⁰³ 43 C.F.R. § 10.3(b)(1).

tribes, Native Hawaiian organization or lineal descendants), and

- the activity is not inconsistent with the applicable land management plan.¹⁰⁴
2. If tribal lands are involved, the items may be excavated only after notice to, and consent of, the tribe or Native Hawaiian organization.¹⁰⁵
 3. If federal lands are involved, the items may be excavated only after notice and consultation with the appropriate tribe or Native Hawaiian organization.¹⁰⁶

Where buried cultural items are inadvertently discovered as part of another activity, such as construction, mining, logging or agriculture,

1. 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.¹⁰⁷ In the case of Alaska Native Claims Settlement Act lands (still owned by the Federal government) selected by, but not conveyed to, the Alaska Native corporation or group, that corporation or group is the appropriate organization to be notified.¹⁰⁸
2. When notice is provided to the Federal agency, that agency has the responsibility to promptly notify the appropriate tribe or Native Hawaiian organization.¹⁰⁹
3. Activity may resume thirty days after the Secretary of the appropriate federal department, the Secretary of Interior, if authority has been delegated to her, or the Indian tribe or Native Hawaiian organization certifies that notice has been received.¹¹⁰ The activity which resulted in the inadvertent discovery may also resume prior to the 30 day period specified in the statute if a

¹⁰⁴ 16 U.S.C. §470cc(b).

¹⁰⁵ 25 U.S.C. §3002(c)(2).

¹⁰⁶ 25 U.S.C. §3002(c)(2).

¹⁰⁷ 25 U.S.C. §3002(d)(1).

¹⁰⁸ 43 C.F.R. §10.4(d)(1)(iv).

¹⁰⁹ 43 C.F.R. §10.4(d)(1)(iii)

¹¹⁰ 25 U.S.C. §3002(d)(1) and (3).

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 30 day period.¹¹¹ This requirement must be included in Federal leases and permits.¹¹²

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...30 days in which to make a determination as to appropriate disposition for these human remains and objects.”¹¹³ (Of note, there are special provisions dealing with Native Hawaiian land and organizations, as well as land owned by Alaska Native Corporations.)¹¹⁴

The commentary to the regulations indicates that one goal of NAGPRA is “in situ” preservation, and that this should be considered whenever possible.¹¹⁵ 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.¹¹⁶ 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 below, should in some instances diminish the incentive to excavate such sites simply for the purpose of excavation. Based upon a questionable interpretation of the statute, however, the regulations permit recording and analysis before unearthed items are “disposed of” to the tribe or lineal descendant with the right of control or ownership; this may lessen the disincentive to excavate to some extent.¹¹⁷ Moreover, the recent decision in *Bonnichsen v. United States*¹¹⁸ may also lead to increased excavation of sites, see section I. below.

h. What procedures are required?

¹¹¹ 43 C.F.R. § 10.4(d)(2).

¹¹² 43 C.F.R. § 10.4(g)

¹¹³ S. REP. 101-473, *supra*, at 10.

¹¹⁴ 25 U.S.C. § 3001(15)(c); 25 U.S.C. § 3002(d)(1).

¹¹⁵ 60 FED.REG. 62141, 62146 (December 4, 1995).

¹¹⁶ 25 U.S.C. § 3002(c) and (d); 43 C.F.R. § 10.4.

¹¹⁷ 43 C.F.R. § 10.5(e).

¹¹⁸ 357 F.3d 962 (9th Cir. 2004), *modified and rehearing en banc denied*, 367 F.3d 864 (9th Cir. 2004).

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.¹¹⁹ 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 and 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 imbedded items.¹²⁰

Written notification should be followed by telephone contact if there is no response within 15 days of the notice.¹²¹

At the consultation, the Federal officials

- must 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.¹²²
- 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

¹¹⁹ *House Report 101-877, supra*, at 16.

¹²⁰ 43 C.F.R. § 10.3(c)(1), 43 C.F.R. § 10.5(b)(1) and (2).

¹²¹ 43 C.F.R. § 10.3(c)(1).

¹²² 43 C.F.R. § 10.5(c).

Hawaiian organizations, as well as methods for contacting lineal descendants,

- obtain the name and address of the tribal contact person,
- obtain recommendations on how the consultation process should be conducted, and
- identify the kinds of objects that may be considered unassociated funerary objects, sacred objects and cultural patrimony.¹²³

Federal agencies are required to develop written action plans following consultation which include the following:

- kinds of objects considered cultural items,
- the information used to determine custody and how items will be disposed of in accordance with that determination,
- the planned care, handling and treatment (including traditional treatment) of cultural items,
- the planned archeological recording and analysis of items and reports to be prepared, and
- how tribes will be consulted at the time of excavation.¹²⁴

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.¹²⁵

¹²³ 43 C.F.R. § 10.5(b)(3), (d) and (g).

¹²⁴ 43 C.F.R. § 10.5(e).

¹²⁵ 43 C.F.R. § 10.5(f).

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.¹²⁶ 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.¹²⁷

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 sites¹²⁸ and require the agency to develop a written plan for excavation within a 30 day period in the case where excavation is necessary.¹²⁹

i. Ownership and Control Rights

Under NAGPRA, as it has been generally understood, Indian tribes, Native Hawaiian organization 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.¹³⁰

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.¹³¹ Where descendants of the human remains and associated funerary objects cannot be

¹²⁶ 43 C.F.R. § 10.4(b).

¹²⁷ 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).

¹²⁸ 43 C.F.R. § 10.4(d)(iv); 43 C.F.R. § 10.5(f).

¹²⁹ 43 C.F.R. § 10.4(d)(v); 43 C.F.R. § 10.3(c)(2).

¹³⁰ However, the case of *Bonnischen v. United States*, discussed in section 1. below, raises some problematic questions about whether this intent of the legislation will be fully fulfilled.

¹³¹ 25 U.S.C. § 3002(a)(1).

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.¹³²
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.¹³³ Agreements between tribes regarding disputed items are possible and the NAGPRA Review Committee may serve as a mediator if there is an intertribal dispute.¹³⁴
3. Where cultural affiliation of the items cannot be established, but the objects are discovered on federal land which the Indian Claims Commission 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.¹³⁵

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, a week apart, of the proposed disposition in a newspaper circulated in an area where the members of the tribe or organization reside. Transfer may not take place until 30 days after the second notice. If competing claimants come forward, the proper recipient must be determined in accordance with the statutory preferences.¹³⁶ The transfer of items must take place using appropriate procedures which respect traditional customs and practices.¹³⁷

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

¹³² 25 U.S.C. § 3002(a)(2)(A).

¹³³ 25 U.S.C. § 3002(a)(2)(B).

¹³⁴ 25 U.S.C. § 3006(c)(4); 43 C.F.R. § 10.17

¹³⁵ 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), *affid.* 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.

¹³⁶ 43 C.F.R. § 10.6(c).

¹³⁷ 43 C.F.R. § 10.6(c).

plan requirements build a significant delay into the process, beyond the 30 days contemplated by the NAGPRA statute itself, during which various types of recording and analysis can occur.¹³⁸

There is no time limit for submitting a repatriation claim.¹³⁹ However, a claim is waived if it is made after a valid repatriation of human remains or cultural items has already taken place.¹⁴⁰ 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.¹⁴¹

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, in consultation with the Review Committee established by the Act.¹⁴²

j. **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.”¹⁴³ It also prohibits trafficking in funerary objects, sacred objects and items of cultural patrimony obtained in violation of the Act.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

¹³⁸ 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.

¹³⁹ 60 FED.REG. 62154 (December 4, 1995)

¹⁴⁰ 43 C.F.R. § 10.15(a)(1).

¹⁴¹ 43 C.F.R. § 10.10(c)(2); 43 C.F.R. § 10.15(a)(2).

¹⁴² 25 U.S.C. § 3002(b).

¹⁴³ 18 U.S.C. § 1170(a), as amended by section 4(a) of P.L. 101-601; 25 U.S.C. § 3001(13).

¹⁴⁴ 18 U.S.C. § 1170(b), as amended by section 4(a) of P.L. 101-601.

¹⁴⁵ McKeown and Hutt, *supra*, at 208.

¹⁴⁶ 25 U.S.C. § 3009(5).

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 5 years in jail.¹⁴⁷

k. NAGPRA Review Committee

NAGPRA provides for the appointment of a Review Committee to monitor and review the implementation of the Act.¹⁴⁸ 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.¹⁴⁹ Federal officers and employees may not serve on the Committee.¹⁵⁰

The Review Committee's functions are to monitor the inventory and identification process,¹⁵¹ upon request, make findings relating to the cultural affiliation and return of cultural items and to help resolve disputes between interested parties,¹⁵² compile an inventory of culturally unidentifiable human remains and make recommendations as to an appropriate process for their disposition,¹⁵³ consult with the Secretary of the Interior in the development of regulations to implement NAGPRA,¹⁵⁴ make recommendations as to the future care of repatriated cultural items,¹⁵⁵ and submit an annual report to Congress.¹⁵⁶

l. Ancient human remains

Recently, the Ninth Circuit Court of Appeals issued a decision in the case of *Bonnichsen v. United States*.¹⁵⁷ *Bonnichsen* is a case involving the discovery of human remains in Kennewick, Washington that are approximately 9,000 years old. Several tribes filed a claim for repatriation of the remains, asserting that they are culturally affiliated with the remains or, alternatively, that they were discovered on their

¹⁴⁷ 18 U.S.C. § 1170(a), as amended by section 4(a) of P.L. 101-601.

¹⁴⁸ 25 U.S.C. § 3006

¹⁴⁹ 25 U.S.C. § 3006(b)(1).

¹⁵⁰ 25 U.S.C. § 3006(2).

¹⁵¹ 25 U.S.C. § 3006(c)(2)

¹⁵² 25 U.S.C. § 3006(c)(3), (4) and 25 U.S.C. § 3006(d)

¹⁵³ 25 U.S.C. § 3006(c)(5)

¹⁵⁴ 25 U.S.C. § 3006(c)(7)

¹⁵⁵ 25 U.S.C. § 3006(c)(9)

¹⁵⁶ 25 U.S.C. § 3006(h).

¹⁵⁷ 357 F.3d 962 (9th Cir. 2004), *modified and rehearing en banc denied*, 367 F.3d 864 (9th Cir. 2004).

aboriginal territory. These claims were upheld by the Secretary of the Interior. A lawsuit was filed by scientists seeking to study the remains.¹⁵⁸

The Ninth Circuit vacated the Secretary's judgment. It did so on the grounds 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, in order for NAGPRA to apply to human remains and cultural items found on federal and tribal lands, the Court held that there must be an initial showing that the remains or items "bear a significant relationship to a *presently existing* tribe, people or culture."¹⁵⁹ It is not clear from the opinion how this standard differs from the concept of "cultural affiliation."¹⁶⁰

Until this decision, it was thought 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). The *Bonnischen* requirement of some preliminary showing before the Act applies could change this paradigm, at least in the states of the Ninth Circuit. Thus far, however, no regulations have been altered by the Department of Interior as a result of this decision.¹⁶¹

m. Other provisions

An Indian tribe, Native Hawaiian organization or individual or other entity with protected rights under NAGPRA can file a law suit to enforce the provisions of NAGPRA if there is a violation of the Act.¹⁶² 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.¹⁶³ This is true even if the agency indicates that it will reopen its decision if it gets more

¹⁵⁸ *Bonnischen, supra*, 217 F.Supp. at 1120-1121, 1130-1131.

¹⁵⁹ *Bonnischen, supra*, 367 F. 3d at 874-876.

¹⁶⁰ The *Bonnischen* decision is highly suspect as a matter of law given that it would render numerous sections of the Act almost 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).

¹⁶¹ In another case involving ancient remains, *Fallon-Paiute Shoshone Tribe v. U.S. Bureau of Land Management*, 455 F.Supp.2d 1207 (D. Nev. 2006), the NAGPRA Review Committee found that the Fallon Paiute-Shoshone Tribe had provided sufficient evidence for it to conclude that it was likely that the Tribe was culturally affiliated (within the meaning of NAGPRA) with 1,500 to 2,000 years old human remains that were found in Spirit Cave in Nevada. *Id.* at 1211-1212. The BLM had come to the opposite conclusion and refused to reconsider that decision after the Review Committee's findings. *Id.* at 1212. The tribe filed suit and the Federal District Court found that although the BLM was not required to review its prior decision based solely on the Review Committee findings, it was arbitrary and capricious for the BLM to not review all of the evidence that was considered by the Review Committee. It remanded the case for a further review. *Id.* at 1222-1225.

¹⁶² 25 U.S.C. § 3013

¹⁶³ 43 C.F.R. § 10.15(c)

information about the requested item.¹⁶⁴ Federal courts have authority to issue any necessary orders.¹⁶⁵ The claiming party also has the option to seek review of the denial by the NAGPRA Review Committee before pursuing a court remedy, although the Review Committee's findings are non-binding and of evidential value only in any subsequent court proceeding.¹⁶⁶ 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, public trust or violations of state law.¹⁶⁷

Tribes and Native Hawaiian organizations also retain any pre-existing procedural or substantive legal rights which they may have possessed before NAGPRA.¹⁶⁸ NAGPRA is not meant to limit the general repatriation authority of federal agencies and museums.¹⁶⁹ 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.¹⁷⁰

NAGPRA provides for the Secretary of Interior to assess civil penalties against museums that do not comply with NAGPRA.¹⁷¹ The amount of the penalties are determined by (1) the archeological, historical or commercial value of the item involved; (2) economic and noneconomic damages suffered by an aggrieved party; and (3) the number of violations.¹⁷²

To facilitate implementation, NAGPRA authorizes the Secretary of Interior to make grants to museums to undertake the inventory and the summary.¹⁷³ Tribes and Native Hawaiian organizations may also receive grants to assist them in repatriating cultural items.¹⁷⁴

¹⁶⁴ *Fallon-Paiute Shoshone Tribe v. U.S. Bureau of Land Management*, *supra* note 274, 455 F.Supp.2d at 1214-1215.

¹⁶⁵ 25 U.S.C. § 3013. The language in the 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*, *supra* note 116, at 14.

¹⁶⁶ 43 C.F.R. § 10.16(b); 25 U.S.C. § 3006(d).

¹⁶⁷ 25 U.S.C. § 3005(f).

¹⁶⁸ 25 U.S.C. § 3009(3), (4).

¹⁶⁹ 25 U.S.C. § 3009(1)(A).

¹⁷⁰ 25 U.S.C. § 3009(1)(B).

¹⁷¹ 25 U.S.C. § 3007.

¹⁷² 25 U.S.C. § 3007(g).

¹⁷³ 25 U.S.C. § 3008(b).

¹⁷⁴ 25 U.S.C. § 3008(a).

INTERNATIONAL REPATRIATION

International Repatriation is an issue of increasing importance to tribes. It is estimated that approximately 1-2 million Native American ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony located in international repositories. Only a handful of Native American communities have been successful in international repatriation claims and some of these repatriations have taken up to twenty-two (22) years to complete.

Many difficulties exist for Native American communities seeking to repatriate internationally. These include: 1) perceptions internationally of Native American peoples; 2) cultural and language barriers; 3) the lack of knowledge that Native American communities have of ancestral remains and cultural objects outside of U.S. boundaries; 4) misidentifications in international collections; and 5) the lack of a legal infrastructure and framework in most countries of the world.

The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) clearly supports international repatriation in Article 12, which requires that "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." Thus, because all nation-states have signed on to the UNDRIP, international repatriation is now an international norm. UNDRIP is not self-executing, however, and efforts to bring national laws and policies in line with UNDRIP will be a long-term process.