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Right of Possession: A Comparative Legal Analysis of NAGPRA

By

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Bachelors of Arts, University of Montana, Missoula, Montana, 2008

Thesis

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Right of Possession: A Comparative Legal Analysis of NAGPRA

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Repatriation attempts to reconcile opposing values regarding human skeletal remains. Repatriation has sometimes been contentious because it raises the question of which aspect of human remains is more important, cultural or scientific values. Repatriation is also an issue of power. The Native American Graves Protection and Repatriation Act (NAGPRA) provides a procedural framework with which to negotiate power relationships between scholars, tribes, and the U.S. government. Property rights are integral to power, as the holder controls the use of and access to and interpretation of indigenous skeletal remains. Property rights concerning Native American human remains are an integral part of indigenous cultural self-representation. Property rights over human remains are part of the struggle of Native American communities for political and cultural sovereignty. Applying the concept of ownership to human remains is controversial, however, because such rights determines who controls access and interprets human remains and associated cultural materials.

NAGPRA is a multifaceted law that strives to address the issue of possession of indigenous human remains and cultural objects. NAGPRA draws upon many aspects of the American legal system, such as property, constitutional, and tribal sovereignty law. The Act has equally complex regulations, some of which have sparked controversy and animosity between repatriation advocates and opponents. This thesis creates a legislative history of NAGPRA by examining the socio-historical processes that lead up its passage. The Act has been described as a property law, a procedural law, and as human rights legislation. The Act is partly all of these, which creates conflict in interpreting and applying its regulations. This thesis addresses the need for an examination of NAGPRA through the various fields of law that make up its legislative history and legal framework. This thesis will also examine the different legal aspects of the Act, such as property law and tribal sovereignty. Repatriation policies and case studies from the United States and abroad will be briefly discussed to examine NAGPRA in an international context.

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Introduction

Repatriation attempts to reconcile opposing values regarding human skeletal remains. Human remains are imbued with aspects of personhood, individual identity, and cultural identity. Each society has a different set of social rules as well as spiritual beliefs regarding the disposition of human remains. Beyond their social properties, human remains can provide researchers with evidence of past lifeways, disease, and human evolution. Repatriation has at times been contentious as it attempts to balance the demands of both cultural and scientific values.

As repatriation legislation has been defined by the American legal system, which is largely concerned with property rights, ownership of human remains often comes into question. Whom should be the owners of indigenous human remains? Living descendants? Scientific institutions in which the remains have been housed? Applying the concept of ownership to human remains is controversial because it determines who controls access and guides research, as well as who interprets the remains and associated cultural materials. Does applying a property law paradigm to the complex set of personal and cultural beliefs attached to human remains advance scientific interests over social values?

To understand the need for repatriation legislation, it is important to be aware of the origins of human remains in museum and academic collections. The push for medical and scientific advancement in the 19th century encouraged grave robbing in colonial countries such as the United States, Canada, Australia, and New Zealand. Early anthropological and medical research focused on morphological classifications and differences between peoples of different heritages, creating a demand for human skulls and other skeletal materials to measure (Yasaitis 2005; Cooper 2008). In the United States, Native American graves were often plundered for

human remains during this era, as those graves lacked the protection of common law afforded to non-indigenous graves. Looting of Native American graves gained official support with Surgeon General William A. Hammond's Circular No. 2 in 1867, which called for troops to collect Indian crania and cultural materials for the Army Medical Museum and Library (Trope and Echo-Hawk 1992). These problems were co-occurring in Australia and New Zealand as well. Edward Ramsay, then curator of the Australian Museum, encouraged indigenous grave robbing, while in New Zealand European traders tapped into the lucrative scientific and medical curios market by trading firearms for elaborately tattooed and preserved human heads of the indigenous Maori population.

In the United States, the Antiquities Act of 1906 was created to address the extensive looting of American Indian archaeological sites, artifacts, and unmarked burials on government lands. This Act protected archaeological sites and Native American remains by bringing them under the protection and ownership of the U.S. government. In this way, Native American human remains and cultural objects became property of the federal government to be managed by universities and other federally associated repositories (Yasaitis 2005).

As a result of this collection history, the most prominent repatriation efforts come from these former colonial nations, including Canada. This thesis will examine the root cause of repatriation legislation in the United States through a discussion of significant social movements. It will start with a discussion of the civilizing movement in the 19th century, move on to the civil rights movement in the 1960s, and end with the repatriation movement in the 1980s. The repatriation movement, which ultimately led to the passage of the Native American Graves Protection and Repatriation Act in the United States, garnered attention abroad and encouraged the creation of repatriation policies in Australia and New Zealand.

The Native American Graves Protection and Repatriation Act (NAGPRA) is a multifaceted law that strives to address the issue of possession of indigenous human remains and cultural objects. NAGPRA is a complex law that draws upon many aspects of the American legal system, such as property, constitutional, and tribal sovereignty law. The Act has equally complex regulations, some of which have sparked controversy and animosity between repatriation advocates and critics.

This thesis creates a legislative history of NAGPRA by examining the socio-historical processes that lead up its introduction. Repatriation laws and case studies from the United States, Canada, Australia and New Zealand will be briefly discussed to examine NAGPRA in an international context. This thesis will also examine the different legal aspects of the Act, such as property law and tribal sovereignty.

Research Goals

The goal of this thesis is to provide a multi-disciplinary examination of NAGPRA in order to address common misunderstandings of its provisions and disagreements concerning its regulations. NAGPRA has been described separately as a property law, a procedural law, and as human or civil rights legislation. The Act is partly all of these, which creates conflict when interpreting and applying its regulations. This thesis addresses the need for an examination of NAGPRA through the various fields of law that make up its legislative history and legal framework.

Nearly three decades after NAGPRA's enactment, acrimonious critiques of the Act are still being made by both proponents and critics. These critiques sometimes include inflammatory or accusatory statements that fuel ongoing repatriation debates while clouding the real issues of power, identity, and self-representation. It should be acknowledged, however, that the vast

majority of repatriation cases in the United States are settled amicably without controversy or judicial involvement. This thesis, however, highlights controversial repatriation cases and prominent problems with the Act's implementation to identify weak areas in the law, potential causes, and possible solutions. This thesis makes the argument that NAGPRA was fundamentally constructed as a property law, which is responsible for many of the problems associated with its implementation as well as the controversial cases studies that have arisen since its enactment.

Research Method and Thesis Organization

This thesis will make use of qualitative research methods. Qualitative research aims to understand the reasoning behind human behavior and social constructs. Qualitative research methods ask the who, how, why, and when questions of human decision making. Textual analysis is the primary method of qualitative research. Qualitative research uses small, focused samples that produce information on the particular cases studied, but does not provide empirical data on its own. In this way, qualitative data is limited, producing only general conclusions and informed assertions. These assertions, however, can be used to guide future investigations seeking empirical support.

This thesis will begin with a brief historical examination in Chapter 1 of the social and political actions against Native Americans during the 19th and early 20th centuries that lead to the passage of NAGPRA in 1990. In Chapter 2, the legislative precursors to NAGPRA will be discussed before reactions to the Act and problems that have arisen during its implementation. Chapter 3 includes brief comparisons of repatriation policies in the United States, Canada, Australia, and New Zealand. Domestic and international repatriation cases studies will be discussed to highlight successes and troubles in repatriation legislation around the world. While repatriation often involves objects of material culture, this thesis will focus on repatriation cases

involving human remains, as such cases are often controversial and challenge the extent of repatriation regulations. In Chapter 4, NAGPRA as a legal entity will be examined through the lenses of property, constitutional, and sovereignty law. Many acromyms will be used throughout this thesis. All acronyms used are listed below with the date of creation as well as the definition.

AHA	1988	Aboriginal Heritage Act
AHRPA	1965	Aboriginal Historic Relics Protection Act (Australia)
AIM	1968	American Indian Act
AIRFA	1978	American Indian Religious Freedom Act
ARPA	1979	Archaeological Resources and Protection Act
ATSIHPA	1984	Aboriginal and Torres Strait Islander Heritage Protection Act
BLM	1946	Bureau of Land Management
CFR	NA	Code of Federal Regulations
FR	NA	Federal Regulation
ICOM	1946	International Council of Museums
IRA	1934	Indian Reorganization Act
NAGPRA	1990	Native American Graves Protection and Repatriation Act
NARF	1970	Native American Rights Fund
NCAI	1944	National Congress of American Indians
NMAIA	1989	National Museum of the American Indian Act
UNDRIP	2007	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	1945	The United Nations Educational, Scientific and Cultural Organization
UNIDROIT	1940	International Institute for the Unification of Private Law
USCOE	1775	US Corps of Engineers
WAC	1986	World Archaeological Congress

Figure 1. Acroymns used throughout this thesis, listed with dates of creation and definition.

Research Materials

Analyzing a variety of texts over a temporal range can illuminate shifts in social values and power relationships. A qualitative analysis of legislative documents and academic articles was considered appropriate for this thesis. Analysis of academic articles, legislative texts, and legal documents formed the body of this research.

Theoretical Framework

Political economy is an interdisciplinary theoretical framework for studying human societies. Political economy draws upon the philosophies and research methods of economics,

law, and the social sciences to explain how social agents and institutions influence each other. In anthropology, political economy is used to investigate how social constructs and practices come about through historical, political, and cultural processes. Social processes are modes of interaction, negotiation, and change within a society. The social movements that will be discussed in Chapter 1 of this thesis are examples of a social process. Political processes are modes of formulation and administration of law and policy through interactions between social individuals, groups and political institutions. Laws and other government mandates that shaped the relationship between the U.S. government and American Indians in the 19th century are examples of political processes. The formulation of NAGPRA in the U.S. Congress and the negotiations involved in creating its regulations are also examples of political processes. These social and political processes will be discussed further throughout this thesis.

History documents these processes and the outcomes of these interactions. Sociology uses political economy to study how individuals' actions are shaped through involvement in society as members of cultural and groups and social institutions. On an international scale, political economy is concerned with the interactions between sovereign states and the impact of these interactions on local cultures. The Native American Graves Protection and Repatriation Act is a legal construct that resulted from historical, political, and sociological processes. This thesis will draw from the fields of history, sociology, and anthropology as well as domestic and international law, using political economy as a theoretical framework to examine the processes that lead to the enactment of NAGPRA in the United States.

Chapter 1—Legislative Acts and Social Movements, 1880-1990

1.1 Introduction

This thesis will begin with an assessment of the historical, social and legislative events that lead to the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990. A timeline of these events is provided in Figure 2. To fully understand the basis of repatriation claims in the United States, it is important to acknowledge the persecution of Native Americans through punitive social and legal actions by the U.S. government during the 19th and early 20th centuries. During this time, Native Americans were often denied consent in the collection of ancestral human remains and cultural materials. In the United States, appeals for Native American cultural self-representation and interpretation in museum settings as well as calls for the return of illegally obtained Native American human remains and cultural materials highlighted the need for repatriation legislation.

This chapter will examine the root cause of repatriation legislation in the United States through a discussion of American social movements, starting with the civilizing movement in the 19th century, moving on to the civil rights movement in the 1960s, and ending with the repatriation movement in the 1980s. The first two movements established the social conditions necessary for the repatriation movement, and ultimately the passing of NAGPRA legislation. This chapter will finish by briefly articulating reactions to NAGPRA after its enactment.

Time Period	Name of Event	Description of Historical Significance
1879 - 1960	The Civilizing Movement	Actions taken by American citizens and the Federal government to reform the cultures of American Indians by encouraging assimilation into White society. Born from a desire for a common standard set of cultural values and practices to be held by all peoples of America. Mandated education in Western property, religion, and industry systems was the primary method in the acculturation process.
1879 - 1920s	Government Boarding Schools	Based on the curriculum and practices of the Carlisle Indian School, the Bureau of Indian Affairs managed boarding schools for Indian children and mandated attendance. English, Christianity, and Euro-American customs were enforced.
1884	Practice of Native American Religions Prohibited	the Secretary of the Interior prohibited traditional funerals, ritualistic ceremonies, dances, potlatches, and feasts. Violators of this mandate could be arrested and imprisoned by the Office of Indian Affairs.
1887	The Dawes Act	Also known as the Allotment Act and the Americanization Movement, broke reservation land into parcels for individual sale, attempting to assimilate Indians into White industries of agriculture and animal husbandry.
1934	Indian New Deal	Created by John Collier, Commissioner of Indian Affairs, as an extension of President Roosevelt's New Deal. Sought to end the practice of allotting communal tribal lands and to return land to tribes as communal property to be self-governed.
1934	Indian Reorganization Act	Part of the deal centered around the Indian Reorganization Act (IRA) of 1934, intending to remedy the social, legal, and economic injustices in federal policy toward Native Americans since the Dawes Act.
1944	National Congress of American Indians	An American Indian and Alaska Native rights organization founded in 1944 in response to termination and assimilation policies enforced by the US government upon the tribes in contradiction of their status as sovereign nations.
1950s	Termination Laws	Policies of the Indian Claims Commission, seeking to eliminate reservations and put Indians under state authority, removed from Federal protection. In 1953, Federal protection was lifted from 109 tribes.
1968	Indian Civil Rights Act	The act extended civil liberties to tribal members and set up a framework for tribal laws and polices. The act mandated tribal governments to extend the US Bill of Rights to tribal members, protecting personal freedom and ensuring due process.
1968	American Indian Movement	Formed in 1968 in Minneapolis, Minnesota, by Native American activists from multiple tribes. AIM elicited media attention with confrontational campaigns seeking self-governance, economic reform, and religious freedom for Native Americans.
1968 - 70s	Red Power Movement	Branch of the American Indian Movement mostly comprised of young and confrontational Native Americans. Along with AIM, the Red Power Movement exposed the deplorable living conditions in many reservations and urban areas, demanding that the government financially provide education, housing and healthcare improvements.
1989	National Museum of the American Indian Act	Required the Smithsonian Institute to inventory and repatriate Native American remains and funerary objects in its own collections.
1990	NAGPRA	Pertains to Native American human remains, associated objects, and objects of cultural patrimony which are held in federally funded institutions. Requires institutions to inventory their collections, assess cultural affiliation, and notify the proper tribe of intent to repatriate.

Figure 2. A timeline of the historic events and legislative acts discussed in Chapter 1 including the date of occurrence and a brief description of the historical significance.

1.2 The Civilizing Movement

The civilizing movement was an effort to assimilate American Indians into the Euro-American population by imposing Euro-American culture, religion, and economy on them. In the 19th century, the Christian church often worked with the U.S. government toward assimilation. The first concerted effort of the movement came from misguided white activists who claimed that conflicts between Native and Euro-Americans could be settled through total assimilation of Indians into Christian society (Bellfy 2004:695; Dominguez 2004:703; McNulty 2004:699; Straus and Low 2004:730). Assimilation was also attempted through a series of legislative acts and government mandates from the late 1870s through the middle of the 20th century.

One of the most concerted efforts to convert American Indians to Euro-American lifeways began in the late 1870s when the U.S. government mandated that Native American children attend Christian boarding schools. The first such school was The Carlisle Indian School, founded in 1879 in Carlisle, Pennsylvania by Captain Richard Henry Pratt (Dominguez 2004:703). Native American names, dress, language, and religious practices were banned in these schools. Children were trained in Euro-American economy and lifeways, such as agriculture, animal husbandry, English, and Christianity (Fine-Dare:50; Dominguez 2004:703).

The next two steps toward assimilation came in the 1880s, when the U.S. government prohibited the practice of Native American religions. In 1884, the Secretary of the Interior directed the Commissioner of Indian Affairs to prohibit the traditional funerals, ritualistic ceremonies, dances, potlatches, and feasts, as these ceremonies were deemed expressions of Indian religion (Dominguez 2004:705). Those found guilty of advocating or participating in traditional Native American religious practices could be imprisoned (Dominguez 2004:705).

In 1887, the Dawes Act, also known as the Allotment Act, broke up many reservations

into parcels for private sale to both Native and non-native Americans. This process was meant to encourage social integration by imposing Western definitions of ownership, property, and industry on Native Americans (Deloria 1978). The Act intended to make private landowners and farmers out of Native American individuals, but in reality, the majority of the land went to Euro-American settlers (Stuart 1977).

In the 1926, Lewis Meriam was appointed by the Secretary of the Interior to lead an investigation into the effectiveness of the Office of Indian Affairs and its assimilation efforts (Stuart 1977). Lewis Meriam was a graduate of Harvard University with law degrees from both the National Law School and George Washington University, as well as a Ph.D. from the Brookings Institution (Meriam et al. 1928). Meriam worked for several government bureaus, such as the bureaus of Census and Children's Welfare (Stuart 1977). His project became known as the "Meriam Report", though its official title was "The Problem of Indian Administration" (Meriam et al. 1928). The report criticized the Dawes Act and found that the U.S. government failed to protect the land, resources, health, and cultures of American Indians (Meriam et al. 1928; Stuart 1977). The report also criticized the government for suppressing Native American religious practices.

Despite the findings of the Meriam Report, the U.S. government did not change its policy toward Native American religions until much later when the American Indian Religious Freedom Act (AIRFA) of 1978 was enacted (Fine-Dare 2002:83). This Act prohibits governmental intrusion on the right of Native Americans to believe and exercise traditional religions. AIRFA also requires federal agencies to evaluate their policies and procedures to better protect Native American religious freedom by ensuring access to sacred spaces and objects for practicing religious ceremonies (Straus and Low 2004:728).

The Meriam Report became the basis for the Indian New Deal of 1934. The Indian New Deal of 1934 was some of the first Indian legislation to be created through consultation with tribal members (Stuart 1977). John Collier, who held the post of Commissioner of Indian Affairs, helped create the Indian New Deal of 1934, which was an extension of President Roosevelt's New Deal beginning in 1933 (Philp 1983). The Indian New Deal also consisted of the Indian Reorganization Act (IRA). The IRA intended to remedy injustices in federal policies involving Native Americans since the Dawes Act (Dominguez 2004:704). The IRA ended the practice of allotting reservations and returned the land to tribes as communal property. The IRA also gave tribes the right to control their own assets and internal affairs (Dominguez 2004:704). From the Indian New Deal, tribes also gained the right to negotiate with federal, state, and local governments as sovereign entities (Wirth and Wickstrom 2002). However, tribes only gained sovereignty to a certain extent as they were regarded as state-like governments, not completely free from federal involvement (Philp 1983).

Collier's Indian New Deal fell out of favor after WWII, when his policies began to be suspected of affording special freedoms to Native Americans through tribal autonomy (Stuart 1997). Another criticism of the Indian New Deal was that, despite some level of sovereignty, tribes remained wards of the U.S. government, subject to federal supervision (Stuart 1997). These criticisms sparked new policies and legislation in the late 1940s and early 1950s that sought to terminate reservations and eliminate tribal statuses (Philp 1983).

The Indian Claims Commission, formed in 1946, was allegedly set up to hear claims from tribes for land taken from them by the U.S. government since the 18th century (Stuart 1977). The Commission, however, was seen by some politicians as a way to "get the government out of the Indian business" (Straus and Low 2004:729). To achieve this, the Office of Indian

Affairs (later renamed the Bureau of Indian Affairs) began a relocation program that moved Native Americans from reservations into cities, where they were expected to find employment and integrate into mainstream society (Dominguez 2004:704). In 1953, House Concurrent Resolution 108 called for the federal government to terminate many tribal statuses and eliminate their reservations (Wilkinson and Biggs 1977).

Native Americans organized in response to these termination actions. The National Congress of American Indians (NCAI) formed in 1944 in response to termination and assimilation policies. The NCAI organized many federally recognized tribes to present a united front in dealings with the U.S. government (National Congress of American Indians 2014). In the beginning, the NCAI fought against the government's failure to uphold treaties, to end assimilation policies, and to win complete sovereignty (National Congress of American Indians 2014). Tribal activism was ultimately unsuccessful in achieving total tribal autonomy, and efforts shifted in the 1960s toward gaining civil rights and other protections of the U.S. Constitution (Fine-Dare 2002:68).

1.3 The Civil Rights Movement

Taking cues from African American and feminist activism in the late 1960s, Native American groups also fought for legal and social equality. Native Americans living both on and off reservations faced poverty, poor housing, education, and medical services, as well as discrimination and harassment from non-Native Americans (Churchill 2004:710). Prior to the Indian Civil Rights Act of 1968, neither the U.S. Constitution nor the Bill of Rights applied to tribal governments and their members (Straus and Low 2004:728). Until this Act, the U.S. Federal government had no jurisdiction over how tribal governments treated their tribal members (Straus and Low 2004:729).

The American Indian Movement (AIM) organized in 1968 to draw public attention to the problems faced by many Native American communities. Red Power was a more aggressive branch of AIM that used confrontational demonstrations and occupations to state their grievances with the federal government (Fine-Dare 2002:74; Churchill 2004:715; Straus and Low 2004:730). This offshoot group staged highly visible protests and demonstrations to gain the attention of non-Native peoples.

Several examples illustrate how Red Power gained notoriety in their efforts to educate U.S. citizens about Native American grievances. The group first gained attention with the occupation of Alcatraz Island in 1969 by a group of activists who claimed the island belonged to the Sioux through an 1868 treaty with the U.S. government (Straus and Low 2004:725). In 1970, Dennis Banks, one of the founders of AIM, lead an occupation of Mt. Rushmore in protest of the seizure of the Sioux Nation's sacred Black Hills lands by the U.S. government in violation of the 1868 Treaty of Fort Laramie (Churchill 2004:720). Many years later, in 1981, the U.S. Supreme Court ruled that the government had indeed illegally seized the Black Hills, and ordered the government to provide financial restitution (Churchill 2004:720). In 1971 Banks organized Indian activists from multiple tribes across America to launch the Trail of Broken Treaties protest march on Washington D.C. Demonstrators seized the Bureau of Indian Affairs headquarters to call attention to their long list of demands of the federal government (Churchill 2004:722).

The most prominent occupation was the siege of Wounded Knee in 1973. Demonstrators protested corruption within the Bureau of Indian Affairs and the lack of federal protection in instances of persecution by residents of communities bordering the Pine Ridge reservation in South Dakota (Churchill:723). The FBI, U.S. Marshals, and the Department of Justice ended the occupation after a 71-day siege during which several people were wounded and two were killed

(Churchill 2004:724).

Through these social demonstrations, activists garnered public awareness of the need for reparative measures from the U.S. government to Native American communities. Such measures had partly been taken through advances in Native American civil rights, but the issues of cultural self-representation and grave robbing in the 19th century had not been properly addressed. In the 1980s, activism turned toward the repatriation of Native American human remains and cultural materials as means of returning cultural control to Native American communities (Fine-Dare 2002:86).

1.4 The Repatriation Movement

The legal and social actions taken against Native Americans during the civilizing though the civil rights movements culminated in the repatriation movement. The repatriation movement began with indigenous communities seeking cultural self-determination and self-representation. The movement had many aims, starting with the extension of legal protection that had been historically denied to Native American graves. The repatriation movement sought recognition of looting practices during the 19th century that supplied museums with misappropriated Native American human remains and cultural materials. The repatriation movement presented the history of looting practices as a series of human rights violations. The main human rights issue highlighted included a lack of consent. Consent had been denied in the taking of ancestral remains and sacred objects from graves, as well as in the study, display, and interpretation of Native American cultures and cultural materials in museums (Trope and Echo-Hawk 1992).

The movement also called for more Native American involvement in museum and academic settings to ensure Native American materials were curated, interpreted, and exhibited in culturally appropriate ways (Fine-Dare 2002:93; Straus and Low 2004:730). Repatriation

legislation that mandated the return of these remains and materials to the appropriate tribe was the ultimate goal of this movement.

In former colonial nations such as the United States, Australia, and New Zealand, the repatriation movement achieved changes in legislation that supported cultural self-determination for indigenous populations (Keeler 2012). In the U.S., the movement achieved federal legislation, such as the National Museum of the American Indian Act and the Native American Graves Protection and Repatriation Act. In Australia, repatriation activism accomplished the Aboriginal and Torres Strait Islander Heritage Protection Act as well as multiple state level policies. The Province of Alberta, Canada, enacted the First Nations Sacred Ceremonial Repatriation Act. In New Zealand, the national government assists international repatriation cases for indigenous communities through funding and nation-state negotiations power. The repatriation legislation of the U.S. as well as other former colonial nations will be discussed further in Chapters 2 and 3.

Chapter 2—A Legislative History of NAGPRA

2.1 Introduction

The legislative precursor to NAGPRA first appeared during a hearing held by the Select Committee on Indian Affairs in 1987. This hearing concerned the immense collection of Native American human remains and cultural materials housed in the Smithsonian Institute. Petitions from repatriation advocates for the removal of these items from the Smithsonian lead to the National Museum of the American Indian Act of 1989. As this Act only pertained to the Smithsonian's collections, legislators worked to draft a comprehensive bill that would apply to all federally associated repositories. After several drafts, NAGPRA was passed in 1990. The Act is controversial, as repatriating human remains can prevent further scientific study. Most negative reactions to the Act focus on this aspect, fearing significant loss of data available for scientific inquiry.

This chapter begins with a description of the legislative precursors to NAGPRA. Documents from the Library of Congress were used to trace these earlier bills as well as NAGPRA through the United States House of Representatives and the Senate. This chapter ends with a short discussion of problems with the Act's implementation and controversies sparked by recent amendments.

2.2 The First Repatriation Act in the United States

The first serious mention of repatriation legislation appeared in 1987 during a hearing held by the Select Committee on Indian Affairs (Yasaitis 2005). This hearing had been called to address the vast collection of Native American human remains and cultural materials curated by the Smithsonian Institute. The hearing prompted Senators McCain from Arizona and Inouye from Hawaii to sponsor Senate Resolution 3217/House Resolution 2668, titled *the National*

Museum of the American Indian Act (NMAIA) (Yasaitis 2005). The Act passed as public law 101-185, 20 U.S.C. §80 1-15 on November 13, 1989.

The Act created the National Museum of the American Indian, to honor Native American peoples by providing respectful representation through the culturally sensitive research and exhibition (20 U.S.C. 80(2)(a-e)). The Act required the Smithsonian to identify and inventory Native American human remains and funerary objects in its possession. After the inventory process, the institution was required to identify the cultural or ancestral origins of the Native American remains and objects using the best available scientific techniques and all evidence and documentation in its possession (20 U.S.C. 80(11)(a)(1-2)). If such identification could be made, the tribe or people of origin were notified (20 U.S.C. 80(11)(b)). Upon the request of descendants or an Indian tribe, the human remains and funerary objects were to be returned as soon as possible (20 U.S.C. 80(c)).

2.3 Precursors to NAGPRA

The foundations of NAGPRA were the *Native American Grave and Burial Protection Act* introduced by Senator John McCain and the *Native American Repatriation of Cultural Patrimony Act* introduced by Senator Inouye to facilitate the repatriation of Native American and Native Hawaiian human remains and cultural objects (Trope and Echo-Hawk 1992). Together, the Acts would mandate the inventory, identification and repatriation of these remains and objects housed in any federal agency or institution receiving federal funds. The Acts would also dictate the return of indigenous human remains and associated funerary objects newly discovered on federal land, require permits to excavate such remains and objects, and make illegal the trade of Native American human remains or funerary objects (Trope and Echo-Hawk 1992). These bills were eventually merged to create House Resolution 5237, The Native American Graves

Protection and Repatriation Act. A timeline of the occurrence of these precursors as well as NAGPRA moving through the House and Senate is provided below in Figure 3.

Date	Action
7/10/90	Introduced in House by Sen Udall (AZ)
7/10/90	Referred to the House Committee on Interior and Insular Affairs
10/15/90	Amended by Committee on Interior and Insular Affairs
10/22/90	Passed/agreed to in House. On motion to suspend the rules and pass the bill, as amended, agreed to by voice vote.
10/22/90	Received in the Senate
10/25/90	Passed/agreed to in Senate. Passed Senate with amendments by voice vote.
10/25/90	S. Amdt. 3171: Proposed by Sen Exon for Sen Ford to amend certain definitions.
10/25/90	Amendment SP 3171 agreed to in Senate by voice vote.
10/25/90	Amendment SP 3172 proposed by Sen Garn for Sen McCain
10/25/90	S. Amdt. 3172 proposed by Sen Garn for Sen McCain to make amendments to bill.
10/25/90	Amendment SP 3172 agreed to in Senate by voice vote.
10/26/90	Passed/agreed to in Senate. Passed Senate with amendments by voice vote.
10/27/90	Cleared for White House
11/9/90	Presented to President
11/16/90	Signed by President

Figure 3. Timeline of NAGPRA moving through the House and Senate during the 101st Congress, 1990.

2.4 NAGPRA in the House and Senate

NAGPRA was introduced by Rep. Morris Udall (AZ) and sponsored by Representatives Ben Nighthorse Campbell (CO), James H. Scheuer (NY), and Pat Williams (MT) in the 101st Congress, 1990 (H.R. 5237). Major supporters of the bill were Senators McCain (AZ), and Inouye (HI) (Trope and Echo-Hawk 1992). On October 25, 1990, two amendments were proposed and passed in the Senate by of Senators Ford and McCain. Sen. Ford (KY) proposed to remove references to the Smithsonian Institute from the bill as the Smithsonian was addressed by the National Museum of the American Indian Act (Senate Amendment 1990). Sen. McCain’s amendment proposed to clarify the definition of “Indian tribe” to mean “any tribe, band, nation, or any other organized group or community of American Indians, including Alaska Natives which is Federal recognized (Senate Amendment 1990). NAGPRA was passed as amended and signed into law on November 9, 1990, as Public Law 101-601, U.S.C. 3001-3013.

During debate in the Senate, Sen. McCain stated that this Act would effectively balance the interest of Native Americans regarding the just and respectful return of their ancestors with the educational interest of museums in maintaining an American cultural heritage for future generations (Senate Debate 1990). Sen. Inouye stated that the Act was not about the *value of scientific inquiry* but about *human rights*, returning to Native Americans the power to control the representation of their cultures (Senate Debate 1990). Sen. Moynihan (NY) stated that the often unjust treatment of Native Americans and Native American human remains is one of The United States' greatest failures, making repatriation legislation necessary (Senate Debate 1990).

2.5 Reactions to NAGPRA

NAGPRA is a piece of federal legislation pertaining to Native American human remains and associated cultural objects held in federally funded institutions or removed from federal and tribal lands. NAGPRA was created to return wrongfully obtained Native American human remains and cultural objects to federally recognized Indian tribes and Native Hawaiian organizations. The scope of NAGPRA, however, has further implications than those outlined above. Fine-Dare (2002:119) describes NAGPRA not as a set of federal regulations, but as a reparation gesture for the centuries-long persecution of Native American individuals and cultures. Troupe and Echo-Hawk (2000) describe NAGPRA as one piece of legislation trying to resolve a tangle of issues including race, science, religion, education, law, and history.

Initially, some scholars were hesitant to adopt an attitude of cooperation between scientific and descendant communities in a power struggle for the control of cultural information (McGowan and LaRoche 1996). As repatriation sometimes means the reinternment of human remains and cultural objects, claims of scientific necessity have been made by research institutions seeking to retain control of human remains (Meighan 1992; Hibbert 1999; Weiss

2001). These claims are based on a common misconception of NAGPRA in that the Act eliminates scientific inquiry and mandates the immediate return of remains and objects for destruction or reburial (Hibbert 1999).

Museums and scientific repositories often view themselves as the most appropriate wards for archaeological human remains and mortuary objects, citing the analytical value of human remains, which can provide tangible evidence of a shared human history (McGowan and LaRoche 1996; Hibbert 1999). The study of human skeletal remains can be used to support or refute ethnographic and historical accounts of past events. The reconstruction of daily activities of ancient peoples can provide important indications of activities that were necessary for the adaptation and survival of human ancestors (Landau and Steele 1996).

However, this viewpoint may be confined only to scientists themselves. Control over narrating and interpreting the past is an important part of the power struggles between interested parties in the repatriation process. Repatriation requests stem from the representational battle fought by indigenous peoples. The power to narrate their truth is essential for Native American cultural sovereignty (Echo-Hawk Quade 1990). The remains of ancestors having been removed from their graves are powerful manifestations of the representational and political struggle of Native Americans (Kakaliouras 2004).

The control of cultural history and material resources requires a delicate balance between the concerns of many stakeholders. Bruning (2006) outlines repatriation as a method by which researchers, repositories, and tribes are expected to coexist as they pursue various interests in managing the material record of the past. The contentious struggle between cultural and scientific values for the right to narrate the past makes implementing NAGPRA all the more difficult.

2.6 Problems with Implementation

Many problems have plagued the implementation of NAGPRA since its enactment. Firstly, the Act only applies to repositories that receive federal funds, and to human remains or cultural materials that were discovered on federal or tribal lands. According to section 10 of NAGPRA, Native American human remains and cultural objects must have been discovered on federal land or held in a federal agency or federal funded repository for NAGPRA regulations to apply (43 C.F.R. §10.1(b)). As the Act was originally passed, only federal recognized tribes could make repatriation requests (43 C.F.R. §10.2(b)(2-3)). This original regulation prevented non-recognized tribes from placing repatriation requests. Also, Native American human remains and cultural objects held in private collections or found on private land are not eligible for repatriation.

Besides the requirement of federal jurisdiction, the most prominent problem in implementing NAGPRA is the issue of non-compliance (Fine-Dare 2002:115). More than 20 years after NAGPRA's enactment, there are still many repositories that have not completed inventories to comply with its statues (Fine-Dare 2002:116; Cryne 2010). Compliance with NAGPRA's regulations since its enactment has been low for many reasons. Funding is the foremost reason. Many repositories lack the necessary funds to hire and train additional staff to conduct a thorough inventory per NAGPRA's regulations (Cryne 2010). NAGPRA is an unfunded Act, meaning that the U.S. government does not provide funds explicitly for its implementation (Fine-Dare 2002:116). Every federal repository must find its own funding to conduct inventories and facilitate repatriation (Cryne 2010). Some federal grants are available for tribes and small repositories to facilitate repatriation, but a large resource shortage remains for conducting NAGPRA work (Fine-Dare2002:116).

Per section 9 of NAGPRA, the Department of the Interior may assess civil penalties to repositories for non-compliance (25 U.S.C 3007(a-d)). 78 FR 27083 addresses the specific regulations concerning non-compliance and the civil penalties that may be applied. A museum or repository can be found as failing to comply with NAGPRA's regulations if they have not met the deadlines set in the Act for the completion of summaries and inventories, which was originally November 16th, 1993 and November 16th, 1995, respectively (43 C.F.R. §10.12(b)(ii-iii)). Extensions of the deadlines may be granted under 78 FR 27083. If a repository does not notify the appropriate culturally affiliated Indian tribe and Native Hawaiian organization of the intent to repatriate within 6 months after the date specified for completion of an inventory, they are also non-compliant (43 C.F.R. §10.12(b)(iv)).

Other forms of non-compliance include refusing to repatriate human remains or cultural patrimony to the descendants or culturally affiliated Indian tribe or Native Hawaiian organization, repatriating such items without publishing a notice in the Federal Register, failing to consult with the appropriate lineal descendants, tribe officials, or religious leaders, and failing to inform the recipients of repatriated remains and materials if they have undergone any treatment with substances that may be hazardous to the persons receiving the objects (43 C.F.R. §10.12(b)(v-viii)). Refusing to relinquish control of remains and objects of cultural patrimony, if the repository cannot prove right of possession, upon receiving a valid repatriation claim is also a form of non-compliance (43 C.F.R. §10.12(b)(ix)).

A repository can be reported as non-compliant. In such cases, the Secretary of the Interior is notified, as well as the NAGPRA Civil Penalties Coordinator (43 C.F.R. §10.12(c)). If the Secretary finds that a repository has failed to comply in any of the manners mentioned above, the Secretary will notify the repository in writing. A copy of notice will also be sent to lineal

descendants or culturally associated Indian tribes or Native Hawaiian organizations (43 C.F.R. §10.12(e)). If required, a repository can request a hearing.

The Secretary of the Interior determines the extent of the Civil Penalty if a repository is found non-compliant. The penalty can be up to \$5,000 (43 C.F.R. §10.12(g)). The Secretary may also assess an additional penalty of up to \$1,000 per day for every day a repository remains non-compliant after the date of the administrative decision (43 C.F.R. §10.12(g)(3)). The amount of the penalty may be reduced at the discretion of the Secretary if it felt that the non-compliance was not willful, an agreement to mitigate the problem is reached, or if the repository is unable to pay the entire amount (43 C.F.R. §10.12(g)(4)(i-iii)). These fines can be a serious burden to repositories. In many cases, compliance violations are caused by lack of funding and staff, not by willful negligence on the part of the repositories (Fine-Dare 2002:118). Assessing civil penalties and fines to already financially struggling repositories could further impeded NAGPRA inventory work, creating a cycle of non-compliance. It is perhaps for this reason why the Secretary of the Interior and NAGPRA review committee try to avoid assessing financial penalties, allowing repositories to make a good faith effort to complete inventories and comply with NAGPRA's regulations (Fine-Dare 2002:122).

2.6.1 Cultural Affiliation and Culturally Unidentifiable Human Remains

If federal funding or jurisdiction applies to a repository, the next obstacle of compliance is assigning lineal descent or cultural affiliation to human remains or cultural materials. With culturally ambiguous materials or very ancient human remains, there are often multiple interested tribes, as was the case with Kennewick Man's remains, which will be discussed in the next chapter. There is often no right answer in custody disputes. The decision often comes down to the extent of affiliation (Kakaliouras 2004). There is much contention as to what type of

evidence is most valid in establishing affiliation—scientific or traditional and historical (Owsley and Jantz 2001; Kakaliouras 2004; Afrasiabi 2007; Cryne 2010; Weiss 2010; Riding In 2012).

Cultural affiliation is the foundation NAGPRA, determining the validity of repatriation claims. NAGPRA’s definition of cultural affiliation is “a relationship of shared group identity which can be reasonably traced between a present day Indian tribe or Native Hawaiian organization and the remains or cultural materials in question” (43 CFR §10.2(e)).

Determining affiliation is a tangle of legal, religious, scientific, and cultural ideologies. Under NAGPRA, archaeological, anthropological, biological, geographical, linguistic, genealogical, and oral tradition evidence can be used to establish cultural affiliation (43 CFR §10.14(c)). Weiss (2010) faults NAGPRA in that the Act does not require claimants to establish a definitive biological connection, giving more credence to non-scientific evidence. Others argue that NAGPRA puts the burden of proof put on Native American claimants, requiring them to create a cultural identity that coincides with evidence provided by scientists, anthropologists and historians (Kakaliouras 2004; Riding In 2012).

Perhaps more contentious than burden of proof assignment are those remains that have no clear cultural identification. These remains are referred to as culturally unaffiliated remains. NAGPRA does not provide clear procedures for dealing with skeletal remains that lack clear cultural markers because they are very ancient or lack culturally associated grave goods. There is no set age at which skeletons are deemed too old for cultural affiliation to be established. However, as the court decisions in the cases of Kennewick Man and Spirit Cave Man demonstrate, skeletons over 9,000 years old appear to be too ancient to clearly assign cultural affiliation (Yasaitis 2003).

Regarding ancient human remains, Owsley and Jantz (2001) argue that current Native Americans groups cannot possibly claim shared identities with ancient populations, as human populations and cultures can change rapidly through migration and interactions with other populations. Afrasiabi (1997) argues against assigning exclusionary property rights to ancient or culturally unaffiliated skeletal remains, because no one group can make a more valid claim than another. Exclusionary rights in this case would arbitrarily favor one cultural group over another. To prevent this, Afrasiabi (1997) argues that ancient skeletal remains should be held in repositories for open-access research. The question then becomes, how do we address culturally unaffiliated remains in the context of NAGPRA?

2.6.1.2 NAGPRA Amendments—Deaccessioning Culturally Unaffiliated Remains

In October of 2007, a proposed amendment to NAGPRA was published in the Federal Register concerning new rules for the disposition of culturally unidentifiable human remains. The rules were finalized in 2010. As it was originally enacted, NAGPRA limited repatriation to tribes with federal recognition. The amended regulations regarding culturally unidentifiable remains allows non-federally recognized indigenous groups to make repatriation claims (Birkhold 2011; Kakaliouras 2012). The amendment lays out guidelines for how to repatriate unaffiliated remains. In the event that no federal tribe claims culturally unidentifiable human remains, a repository can transfer the remains to a non-federally recognized tribe (Federal Register 2007b).

Within this amendment, a new rule was proposed that stressed temporal and geographic evidence when attempting to identify or return unaffiliated human remains. Without a repatriation request, an institution would be allowed to consult with indigenous groups in the immediate area in which the remains were found. Consultation can also take place with a group

that historically occupied the land from which the human remains were taken (Federal Register 2007b). A cultural relationship with the land can also be used when determining the repatriation of human remains. If cultural affiliation cannot be assigned through these means, remains can be repatriated to an indigenous group with a cultural association to the region in which the repository is located (Federal Register 2007b). Control of the remains should be given to the indigenous group showing the strongest affiliation through these geographical means. If no federally recognized group can make a case for association, repositories can consult with non-federally recognized indigenous groups (Federal Register 2007b).

As for using the location of the institution for determining possession of unidentified remains and materials, Birkhold (2011) argues that the geographic location of an institution may have absolutely no bearing on the cultural affiliation of its collections. Van Horn (2008) criticizes the new rule for allowing geographic affiliation to serve as a proxy for cultural affiliation. While aboriginal occupation of the land on which remains were discovered can help establish affiliation, “geographic proximity is not tantamount to cultural or biological affiliation” (Van Horn 2008).

Birkhold (2011) argues that this amendment concerning culturally unidentifiable human remains skews power in favor of Native Americans over scientific interests. As the Act was originally passed, repositories could keep human remains for which no cultural affiliation could be found (Cryne 2010; Birkhold 2011). Cryne (2010) saw this as a loophole that repositories could use to retain human remains for study by claiming that no cultural affiliation could be conclusively determined. The new amendment requires that repositories must deaccession all human remains that are found to be Native American, even if they cannot be culturally identified (43 CFR §10.11(c)(2)). By mandating the deaccession of all unidentifiable human remains, Van

Horn (2008) argues that the new rule disregards public interest in the educational, historical and scientific information such remains can yield.

A foremost concern among scientists about the new rule was that the new rule eliminates a repository's ability to retain culturally unidentifiable remains for future study. The Department of the Interior's response was that the wording of NAGPRA states that the Act should not be interpreted as an authorization for new scientific studies beyond determining cultural affiliation (Federal Register 2010).

Several concerns were raised among researchers about the constitutionality of the new rule. One common argument was that the new rule violates the Establishment Clause of the First Amendment (Federal Register 2010). This comment focused on a sentence in the amendment, which suggests that repatriation of funerary objects in acknowledgment of Native American spiritual beliefs demonstrates special treatment for the religions of Native American peoples (Federal Register 2010). The response of the Department of the Interior was that returning such items does not constitute federal support of any particular religion to the point of violating the Establishment Clause (Federal Register 2010).

Another argument that surfaced after the new rule was that it violated freedom of expression under the First Amendment (Birkhold 2011). This argument claimed that freedom of expression includes freedom of scientific inquiry. No court in the United States, however, has explicitly ruled that complete scientific freedom exists (Hibbert 1999). The National Bioethics Advisory Commission stated that even if scientific inquiry was in fact constitutionally protected, the government could still regulate research that could cause severe physical, psychological, or social harm to the individual participants involved (Hibbert 1999).

Another claim was made that the new rule constituted an unconstitutional “taking” of a repository’s property in violation of the Fifth Amendment (Birkhold 2011). The Department of the Interior’s response was that, under common law, human remains are quasi-property, and cannot carry full property rights. Because of this, a repository does not have a property claim to human remains unless it has received clear title from the next of kin or the governing body of the associated Indian tribe or Native Hawaiian organization (Federal Register 2010).

Although NAGPRA is only applicable in the United States, other countries with colonial pasts and indigenous populations, such as Australia, New Zealand, and Canada, have struggled with similar repatriation issues. The repatriation movement and subsequent legislation in the United States sparked related policies abroad. The next chapter will discuss these countries’ repatriation policies. Case studies from the United States, Australia, and New Zealand will also be presented to highlight these nations’ repatriation policies in practice.

Chapter 3—Repatriation Policies and Practices in the United States and Abroad

3.1 Introduction

The repatriation movement that led to the passage of NAGPRA in the United States garnered attention abroad, as misdeeds toward indigenous peoples and the misappropriation of indigenous cultural materials and human remains were not limited to the United States. Such practices occurred in Australia and New Zealand as well. Acquisition records from the National Museum of Australia revealed collection policies similar to those of 19th and early 20th century America, with grave robbing openly encouraged by Edward Ramsay, a Victorian era curator of the Australian Museum (Siedemann 2004). Hallgren (2010) outlines the history of European research in Australia, including expeditions consciously undertaken by zoologist Eric Mjöberg to gather indigenous human remains through grave looting. The first historical report of *mokomokai*, the elaborately tattooed and preserved heads of high-ranking Maori individuals, comes from the Cook voyages to New Zealand in 1770 (Stumpe 2005). The heads fetched high prices in Europe and America as curios and scientific specimens (Stumpe 2005).

As a result of this troubled collection history, the most prominent repatriation efforts come from the former colonial nations of the United States, Canada, Australia, and New Zealand. Repatriation practices in these countries are varied, ranging from formal legislation to stewardship arrangements negotiated on a case-by-case basis.

This chapter begins with a short review of repatriation laws in the United States prior to NAGPRA before providing a general summary and critique of repatriation practices in Canada, Australia, and New Zealand. These laws will be further illustrated by case studies as well as an overview of the international response to indigenous repatriation efforts. A table listing the many repatriation Acts and programs in these countries is provided below in Figure 4 with a brief

description of their importance.

Law or Act	Year	Nation	Brief Summary
Aboriginal and Torres Islander Strait Act	1984	Australia	Legislation enabled the government to preserve and protect areas and objects significant to Aboriginal and Torres Strait Island peoples.
The Return of Indigenous Property Program	2006	Australia	Effort to return indigenous cultural property to traditional custodians and places of rest.
Aboriginal Cultural Heritage Act	2003	Australia (Queensland)	Recognize and conserve Aboriginal cultural heritage. Created legal responsibility to citizens in Queensland to protect indigenous heritage or pay a fine and/or prosecution.
Torres Strait Islander Cultural Heritage Act	2003	Australia (Queensland)	Similar in nature to Aboriginal Cultural Heritage Act.
Aboriginal Historic Relics Protection Act	1965	Australia (South)	Created a register of burials, remains, artifacts, and archaeological sites.
Aboriginal Heritage Act	2006	Australia (Victoria)	Provided for state-wide voice to Aboriginal people to advise on affairs relative to cultural heritage. Established the Aboriginal Heritage Council.
Aboriginal Land Rights Act	1976	Australia (Northern Territory)	Allows Aboriginal people of the Northern Territory to claim land rights based on evidence of traditional occupation. Also requires aboriginal consultation when human remains are found of traditional aboriginal land.
Protected Objects Act	1975	New Zealand	Provides protection of Maori remains and objects by regulating the Maori cultural artifact market and making private collection registry compulsory. Applicable at both federal and private level.
Historic Places Act	1993	New Zealand	Established Maori Heritage Council. Provides protection to places of cultural interest or importance to New Zealanders and Maori.
Ontario Heritage Act	1975	Canada	Allowed provincial and municipal governments to designate sites, properties, and districts of cultural interest. Included both indigenous and non-indigenous cultures.
First Nations Sacred Ceremonial Objects Repatriation Act	2000	Canada (Alberta)	First repatriation policy in Canada. Returned objects held by the Royal Alberta Museum in Edmonton and the Glenbow Museum in Calgary to the Blackfoot Confederacy.
First Peoples' Heritage, Language and Culture Act	1996	Canada (BC)	Provided funding for First Nations cultural and language programs.
Funeral, Burial and Cremation Services Act	2012	Canada (Ontario)	Protected marked burials and cemeteries from disturbance. Does not provide for repatriation of grave goods and human remains disturbed historically.
Dawes Act (Allotment Act)	1887	USA	Eliminated social, religious, and economic practices through forced assimilation, broke up reservation land for private sale. Addressed archaeological looting and grave robbing. Allowed institutions to collect remains and artifacts in order to manage them.
Antiquities Act	1906	USA	Created the Indian Reorganization Act.
Indian New Deal	1934	USA	Applied to Native American tribes some, but not all, rights guaranteed under the US Bill of Rights.
Indian Civil Rights Act	1968	USA	First piece of repatriation legislation in the US. Specifically addressed collections held by the Smithsonian. Created the National Museum of the American Indian.
National Museum of the American Indian Act	1989	USA	Requires federal agencies and federally funded institutions to repatriate Native American materials to descendants or culturally affiliated tribes.
Native American Graves Protection and Repatriation Act	1990	USA	

Figure 4. Table listing the name of each repatriation Act or policy discussed in Chapter 3. A brief summary of the policy's importance is included.

3.2 Repatriation Policies and Practices

3.2.1 The United States

The Antiquities Act of 1906 enabled U.S. repositories to amass Native American cultural materials and human remains by labeling them property to be managed by federal repositories. The repatriation movement called for the return of these materials to their tribes and cultures of origin. In response to that call, The National Museum of the American Indian Act (NMAIA) was passed in 1989, becoming the first unequivocal piece of repatriation legislation in the world (Keeler 2012). The Act limited repatriation requests to the collections of the Smithsonian Institute. Under the Act, Native American remains and cultural materials were transferred to a new museum, the National Museum of the American Indian, with the goal of providing culturally sensitive curation and public education. The NMAIA was followed by NAGPRA in 1990.

3.2.2 Australia

Australia passed an indigenous heritage protection law in 1984, the Aboriginal and Torres Strait Islander Heritage Protection Act (ATSICHPA). Beside the ATSICHPA, the Australian government created other repatriation programs. The Return of Indigenous Cultural Property Program formed in 2006 to focus on repatriating the collections of Australia's federally-funded institutions (Feikert 2009). The National Museum of Australia has its own repatriation unit, funded first by the Aboriginal and Torres Strait Islander Commission (1990-2005), and then by the Return of Indigenous Cultural Property Program (Feikert 2009).

In addition to the actions of the Australian government, Australian states have implemented their own repatriation programs to address indigenous finds on state land and aboriginal materials in state repositories. The state of Queensland enacted the Aboriginal

Cultural Heritage Act and the Torres Strait Islander Cultural Heritage Act in 2003 (Feikert 2009). The government of Victoria passed the Aboriginal Heritage Act of 2006, which is monitored by the Aboriginal Heritage Council (Feikert 2009). Victoria's legislation provides the greatest support for reburial, allowing Aboriginal groups to acquire state land for re-interment (Meara 2007). Communities are also allowed to specify sites of traditional significance and that will be protected for future burials.

South Australia adopted the Aboriginal Historic Relics Protection Act (AHRPA) in 1965 to protect Aboriginal sites with historic, social and religious significance (Meara 2007). This early legislation focused on protecting historic Aboriginal archaeological sites and artifacts. Aboriginal human remains were categorized as "relics", or artifacts, and were afforded protection under AHRPA. The state government also started a register of Aboriginal burials, artifacts, and archaeological sites. To create this register, the Act allowed academic institutions and museums to actively seek out burials and artifacts to add to collections as means of protection (Meara 2007). Social and political backlash against mass collecting practices under AHRPA put pressure on South Australia to repeal the Act in favor of the ATSIHPA in 1984. Labeling ancestral remains as "relics" was offensive to Aboriginal groups. This was addressed by South Australia's Aboriginal Heritage Act of 1988, which removed the relic label from human remains. The new Act gave legal control to Aboriginal people over their ancestors' remains, sacred sites, and cultural property (Meara 2007).

The Aboriginal Land Rights Act, pertaining to the Aboriginal peoples in the Northern Territory of Australia, was passed in 1976. The Act allows Aboriginal people of the Northern Territory to claim land rights based on evidence of traditional occupation (Thorley 2002). The Act also created new regulations for the collection and preservation of aboriginal cultural

materials and human remains. Excavating cultural materials and human remains would require consultation with and approval from the traditional owners of the land (Bowler 2014). After this Act, archaeological work at the Mungo site was stopped. Scientists agreed to share research agendas and hire local Aboriginal people as cultural consultants (Thorley 2002).

3.2.3 New Zealand

Encouraged by repatriation legislation in the United States, Maori communities in New Zealand began their own repatriation efforts for the return the mokomokai held in foreign repositories (Siedemann 2004). On behalf of Maori communities, the New Zealand government pursued the repatriation of human remains and cultural objects held in foreign institutions (Clarke 2009). In this way, New Zealand is one of the most proactive and supportive nations, putting the might and capital of the state behind its indigenous people in international repatriation efforts.

New Zealand signed both the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Clarke 2009). To implement these programs domestically, the New Zealand government passed the Protected Objects Act in 1975 and the Historic Places Act (HPA) in 1993, which are applicable both at the federal and private level (Clarke 2009). These Acts provide protection of Maori remains and objects by regulating the Maori cultural artifact market and making private collection registry compulsory (Clarke 2009).

3.2.4 Canada

There is no federal law mandating repatriation in Canada. Instead repatriation efforts take place through negotiation and cooperation between indigenous First Nations and institutions

housing their cultural property (Siedemann 2004). The Canadian government and federal institutions negotiate repatriations on a case-to-case basis, guided by the joint task force created by the Canadian Museums Association and the Assembly of First Nations (Bell 1992; Keeler 2012).

The Royal Commission on Aboriginal Peoples (RCAP) and the Assembly of First Nations/Canadian Museum Association both formed in 1990 to issue guidelines for repatriation (Bell 1992). This task force promotes indigenous management of cultural heritage and identity through direct involvement in museums. The task force is comprised of more than twenty-five museum professionals as well as members of Native communities from across Canada (Bell 1992). The general repatriation rule sponsored by this organization is to repatriate first to lineal descendants or culturally associated communities. If no descendants for culturally associated groups currently exist, they recommend that repositories work out a solution with First Nations consultants (Bell 1992).

In lieu of a federal law, Canadian provinces develop and enforce their own repatriation legislation. Alberta enacted its own repatriation law, The First Nations Sacred Ceremonial Objects Repatriation Act to facilitate repatriation with the Blackfoot Confederacy. Enacted in 2000, the Act was the first repatriation enactment in Canada (Eden 2006). The Act applies to Blackfoot sacred objects in the collections of the Royal Alberta Museum and the Glenbow Museum (Eden 2006). The Act confers title of cultural materials to the tribe, but is limited to sacred ceremonial objects with no provisions for human remains.

British Columbia enacted the First Peoples' Heritage, Language and Culture Act in 1996. The Act provides financial support for First Nation community cultural centers, but does not pertain to human skeletal remains (Eden 2006). The Act provides funding for cultural and

language programs to revitalize the cultural heritage of First Nations peoples in British Columbia (Eden 2006). In Ontario, the Heritage Act protects indigenous archaeological artifacts, but does not specifically cover human remains (Keeler 2012). Ontario's revised Funeral, Burial and Cremation Services Act of 2012, however, does afford protection for indigenous human remains by designating burial sites as indigenous cemeteries to be protected (Keeler 2012).

3.2.5 International Law

Repatriation of human remains to their families and places of origin is an established practice in international law, but it only pertains to non-indigenous people (Keeler 2012). Indigenous repatriation rights were first tackled by domestic legislation but have garnered international attention (Keeler 2012). The repatriation movement met new obstacles at the international level. The most notable obstacles were conflicting heritage laws and museum policies in these different countries. Repatriation efforts also encountered trouble with the United Nations "where indigenous communities remain nonvoting third parties in international matters directly pertaining to their communities" (Keeler 2012). The UN addressed this by drafting the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. UNDRIP declares that indigenous peoples have self-determination and privacy rights over their cultural and religious traditions, sacred sites, as well as property and repatriation rights over their cultural materials and human remains (Keeler 2012).

Under colonial occupation, Indigenous peoples lost control over the ways in which their cultural heritage was appropriated and represented, and are still struggling to assert complete cultural sovereignty (Turnbull 2010). Long denied civil rights in their own countries and lacking power of the nation-state in the international arena, indigenous peoples are gaining recognition of their fundamental human rights through the UN Forum on Indigenous Issues (Keeler 2012).

Human remains and cultural property are handled at the international level by UNESCO's Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the Convention Concerning the Protection of the World Cultural and National Heritage (Keeler 2012). Siedemann (2004) sees the World Archaeological Congress (WAC)'s Vermillion Accord on Human Remains as a more suitable model for international legal standardization than UNESCO's conventions, as the Vermillion Accord reflects real change at the ground level through the codes of ethics of professional organizations involved in heritage management.

Keeler (2012) argues that handling repatriation on a case-by-case basis is better than enacting strict laws. Keeler (2012) encourages the use of different repatriation approaches, such as government initiated and funded claims and museum-initiated repatriation efforts on an international scale. Nation-states can aid their indigenous peoples by putting governmental power and funding behind negotiations. The State is a stronger negotiator in international law, being able to put pressure on other governments in a way that that indigenous groups alone cannot. So far, only Australia and New Zealand practice State-lead international repatriation efforts. Such programs would be a boon to Native American communities inhibited by lack of funding and international negotiating power. Museums worldwide can aid repatriation for all indigenous peoples by creating a centralized, international inventory to inform indigenous communities about cultural materials and human remains held in institutions of which they might not be aware.

3.3 Repatriation Case Studies

The repatriation policies and practices in the countries discussed in the previous section can be illustrated with case studies. The most notable cases come from the United States,

Australia, and New Zealand.

3.3.1 Significant Repatriation Cases in the United States

3.3.1.1 Kennewick Man

In 1996, the discovery of skeletal remains along the banks of the Columbia River in central Washington State sparked a very public and controversial legal battle between local Native American tribes and the scientific community. Nicknamed for his proximity to the town of Kennewick, Washington, Kennewick Man was the first significant challenge to NAGPRA. Carbon dating revealed an age of over 9,000 years, and the discovery site lacked grave goods that could associate the remains with a particular culture.

Jim Chatters, acting as a consulting archaeologist for the government, conducted an early analysis on the remains and concluded that they belonged to a Caucasian male adult (Slayman 1997). “Caucasian”, as used in osteology, refers to the ancestral peoples of Europe, North Africa, and Western and Central Asia. A facial reconstruction of Kennewick Man’s skull created by Chatters and sculptor Thomas McClelland revealed a face that was popularly thought to bear resemblance to actor Sir Patrick Stewart (Thomas 2000). The “Caucasian” label and the facial reconstruction garnered media attention and increased public awareness of the Kennewick Man case. Later osteological analysis of Kennewick Man using measurements the cranium, teeth, and skeleton found no close relation between Kennewick Man and any contemporary Native American population. Kennewick Man was then categorized as an early ancestor of Pacific Island populations, including the indigenous Ainu of Japan (Jantz and Owsley 1997; Brace et al. 2001; Chatters 2002; Owsley and Jantz 2002).

The US Corps of Engineers (COE), on whose land Kennewick Man was found, took possession of the remains while attempting to assign cultural affiliation in accordance with

NAGPRA. Radiocarbon dating of a bone sample yielded an age of between 9300 and 9600 years old (Chatters 2000). The extreme age of Kennewick Man and lack of associated cultural materials isolated him from contemporary Indian populations in the area. The COE maintained the intention of repatriating Kennewick Man's remains, despite inconclusive cultural identification. The scientific community criticized the COE, arguing that Kennewick Man had no cultural affiliation, allowing continued study of the bones under the "culturally unidentifiable human remains" clause in NAGPRA (Thomas 2000). These claims sparked a legal battle between scientists, the COE, and the Umatilla, Colville, Yakama, and Nez Perce nations who maintained that Kennewick Man was their ancestor.

A suit was brought against the COE for the right to conduct scientific research on Kennewick Man. In August of 2002, Oregon U.S. District Judge John Jelderks ruled that since Kennewick Man had no clear cultural or genealogical associations due to his extreme age, he was not a Native American individual (Jelderks 2002). The tribes and the COE appealed this decision in 2003 and the case was moved to the 9th District Court of Appeals (Bruning 2006). In February of 2004, the Court of Appeals rejected the appeal, supporting Judge Jelderks decision that there was no obvious evidence of kinship or cultural affiliation to any of the local tribes (Bruning 2006; Cryne 2010). Scientific study of Kennewick Man's remains was allowed to proceed. Kennewick Man's remains are currently housed in the Burke Museum at the University of Washington (Burke Museum 2014).

3.3.1.2 Buhl Woman

In 1989, skeletal remains of a prehistoric woman were uncovered in a quarry near Buhl, Idaho. Thomas J. Green of the Arkansas Archeological Survey led the investigation of the Buhl Woman in cooperation with the nearby Shoshone-Bannock Tribe of Fort Hall, Idaho (Slayman

1998). Buhl Woman's skeleton was estimated to be nearly 11,000 years old (Green et al. 1998; Slayman 1998). She was estimated to have been between 17 and 21 years old at the time of her death, but no exact cause of death could be determined (Green et al. 1998). Without sparking much controversy, Buhl Woman was reburied in 1993 (Slayman 1998). Bone measurements, casts, and soil samples were retained with permission of the tribes for radiocarbon dating and isotopic analysis (Green et al. 1998). As Buhl Woman was discovered on State land, NAGPRA did not directly apply. Instead, she was repatriated under an Idaho State statute mandating that remains determined to be Native American are to be returned to the nearest federally recognized tribe (Slayman 1998).

3.3.1.3 Spirit Cave Man

Spirit Cave Man is a mummy excavated in 1940 by S.M. and Georgia Wheeler as part of a salvage archaeology project in the caves around Grimes Point, Nevada (Wheeler 1997; Edgar 2007). The Bureau of Land Management (BLM) was the federal agency in control of the land where the remains were discovered. Four burials were removed from Spirit Cave with the earliest being the Spirit Cave Man (Wheeler 1997; Edgar 2007). Spirit Cave Man was put in storage at the Nevada State Museum. Little work done on his remains until initial carbon dating in 1994 revealed his age to be over 9,000 years (Touhy and Dansie 1997). Further dating done by Kirner et al. (1997) put Spirit Man's age at approximately 9,400 years.

Heather Edgar completed the first bioanthropological analysis of the remains in early 1996 (Edgar 1997). According to her study, the Spirit Cave Mummy lived to be 45 years old, was not particularly robust, and had many spinal abnormalities (Edgar 1997). There is evidence of a healed skull fracture that took place well before the time of death. Steele and Powell (2002) and Owsley and Jantz (1997) focused attention on the biological affinity of Spirit Cave Man by

conducting craniometrics analyses. Steele and Powell (2002) suggested that Spirit Cave Man was most similar to Polynesians and Native Americans, while Owsley and Jantz concluded that he had the closest affinity with archaic Ainu of Japan, bearing little affiliation with modern Native American groups.

The study of Spirit Cave man brought the remains to public attention and fueled controversy in the same way as Kennewick Man because of his extreme age and ambiguous cultural affiliation. In 1997, the Paiute-Shoshone Tribe made a repatriation claim under NAGPRA for the human remains and associated artifacts, as Spirit Cave is in territory belonging to the Paiute as of 1978 (Edgar et al. 2007). This claim sparked a legal case over the cultural affiliation assessment. Artifacts associated with Spirit Cave Man were found to share some cultural attributes with materials historically created by the Paiute (Edgar et al. 2007). This similarity helped to bolster the tribe's claim in the absence of morphological resemblance.

However, the BLM, which was responsible for determining whether the Spirit Cave Man was an ancestor of the Tribe, found no evidence of shared group identity between them and Spirit Cave Man. The BLM ruled that Spirit Cave Man fell into the category of culturally unidentifiable remains, allowing the agency to retain control of Spirit Cave Man indefinitely with no obligation to repatriate (Rose 2000). The BLM stated that there was no material evidence from the burial that could be reasonably affiliated with modern tribes in the area (Rose 2000). Emphasizing Spirit Cave Man's extreme age, the BLM argued that there was no proof of direct lineal descent that would justify repatriation. Testimony from tribal elders asserting that the Paiute have been in the area for more than the 10,000 years, suggesting a relationship between them and Spirit Cave Man, was dismissed by the BLM. The agency argued that oral accounts

were insufficient proof of a relationship stretching from the present day to the early Holocene (Rose 2000).

The Paiute-Shoshone Tribe appealed the BLM's ruling to the NAGPRA review committee, who in turn advised the BLM to re-weigh the oral evidence of the tribe (Cryne 2010). The review committee, however, is only advisory, and cannot mandate or offer a definitive ruling (25 U.S.C. 3006(c)). The suit moved to the United States District Court for the District of Nevada in 2006 (Cryne 2010). The court ruled that the BLM was erroneous in dismissing the tribe's evidence, and remanded the case back to the BLM for reconsideration (Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management 2006; Cryne 2010). As of 2014, there has not been a final decision whether Spirit Cave Man will be repatriated.

3.3.2 Significant Repatriation Cases in Australia

3.3.2.1 Lake Mungo Remains

Lake Mungo is part of the now-dry Willandra Lakes system of New South Wales, Australia. In 1968, University of Melbourne geomorphologist Jim Bowler discovered bone fragments eroding from the dry bed of Lake Mungo (Bowler et al. 1970). The fragments were identified as human by physical anthropologist Alan Thorne at the Australian National University. Thorne further identified the remains as belonging to an anatomically modern human female, and subsequently labeled her "Lady Mungo" (Bowler et al. 1970; Bowler and Thorne 1976). An additional set of prehistoric human remains were found at Lake Mungo in 1974 that were subsequently named "Mungo Man" (Bowler and Thorne 1976).

The sets of Mungo remains represent the oldest anatomically modern human inhabitants of Australia (Bowler and Thorne 1976). Lady Mungo has undergone several carbon dating tests, estimating her remains to be approximately 26,250 years old (Bowler and Magee 1999). Mungo

Man was believed to be between 40,000 and 68,000 years old, though his actual age is disputed because of problems with sample availability and preservation (Oyston 1996; Bowler and Magee 1999; Thorne et al. 1999; Brown 2000; Gillespie and Roberts 2000; Olley et al. 2006).

Thermoluminescence dating of the Mungo Man burial site indicated an age older than 24,600 but younger than 43,300 years ago (Oyston 1996). Thorne et al. (1999) came up with a different estimate of $62,000 \pm 6,000$ years using a combination of data from uranium-thorium, electron spin resonance, and optically stimulated luminescence dating. Additional tests suggest that Mungo Man could not be older than 50,000 years (Brown 2000; Gillespie 2000). Without a sample of the original soil that once lay above the burial, a minimum age for Mungo Man cannot be established, yielding only a possible maximum age (Brown 2000).

Lady Mungo's remains are one of the oldest known ritualized cremations in Australia (Bowler et al. 1970; Bowler and Magee 1999). After Lady Mungo died, her remains were cremated, then crushed and burned again before being covered in ochre powder and buried in a shallow pit (Bowler et al. 1970). Mungo Man had been dusted with ochre around the time of his burial, but he was not cremated. Mungo Man was buried on his back, with hands clasped at the waist. The use of ochre in these contexts is the earliest known example of this particular burial practice in Australia (Bowler and Thorne 1976).

While Mungo Man's remains are available for further study, Lady Mungo was repatriated in 1991 to a coalition of three New South Wales tribes: the Paakantji, the Mathi-Mathi, and the Ngiyampaa (Smith and Burke 2003). Lady Mungo is now locked in a vault in the newly formed Mungo National Park that can only be opened with two keys—one controlled by archaeologists, the other by the tribes (Smith and Burke 2003). Despite the Mungo remains being taken without tribal consent, the coalition recognized that study on the Mungo couple helped to enforce the

depth of Aboriginal history and culture. For the return of the Mungo remains, the Australian Foundation for National Parks & Wildlife worked with the tribes to prepare an Australian Indigenous Knowledge and Research Centre at Mungo National Park. This center will serve as a cultural center and as a “keeping place” for the Lake Mungo skeletal remains and associated artifacts (Foundation for National Parks and Wildlife N.D.).

3.3.2.2 Lake Mungo Repatriation Controversies

While Lady Mungo was repatriated, the remains of Mungo Man stayed at the Australian National University for on-going research. Repatriation requests for his remains did not cease, however. In early 2014, a group of scientists lead by the original discover of the remains, Jim Bowler, currently a Professor Emeritus at the Australian National University, responded to the repatriation call (Bowler 2014; Westaway 2014).

Bowler (2014) stated that significant scientific research has been finished for some time on Mungo Man, meaning that the remains should be returned to his descendants. Michael Westaway (2014) of Griffith University, Queensland, Australia, took a different stance on the repatriation of Mungo Man. Westaway (2014) contested Bowler’s statements, claiming that during the first few decades Mungo Man spent at the Australian National University, his remains were not accessible to scientists other than the original research team. Westaway (2014) argued that few papers were published and little data was released during this time concerning the Mungo remains. Westaway (2014) claims that the late Dr. Thorne of the original discovery team was very protective of his research, and also cited sensitivity to the cultural and spiritual concerns of Willandra Elders as the reason for not allowing exhaustive research.

Westaway (2014) took issue with the claim, stating that he and his colleagues at Griffith University have met with Willandra Elders to explain new research methods and propose new

studies. Over the last 10 years, the Elders have granted Westaway and his colleagues access to the Mungo Man remains (Westaway 2014). The latest research proposal involved the recovery of ancient DNA for use in next generation sequencing (Westaway 2014). This work was to be funded by the Australian Research Council. Despite this on-going access, there have been plans made by both Elders and scientists to repatriate the last of the Lake Mungo remains. Further, repatriation plans have hastened in the last year by Emeritus Professor Bowler (Bowler 2014).

3.3.2.3 Ngarrindjeri Old People

The Ngarrindjeri are the aboriginal people of the lower Murray River region in South Australia. The Ngarrindjeri people consisted as separate tribes before the time of British occupation (Fforde 2009). The tribes of the Ngarrindjeri had varying funerary customs. Some smoke-dried bodies before placing them on platforms in trees or in rock shelters, later gathering the bones for burial, while others buried the intact bodies (Fforde 2009). For the Ngarrindjeri and other Aborigine communities, ancestors are the ‘Old People’ whose physical remains must be kept complete and buried accordingly to prevent spiritual unrest (Fforde 2009; Hemming and Wilson 2010). With the onset of British colonization in the 19th century, Ngarrindjeri burials were routinely looted for human remains to be sent back to the UK for scientific study. The non-consensual disturbance of the graves of the Old People came to symbolize the sum of the historical injustices toward Australian Aborigines (Wilson 2009). Repatriation of the Old People was the critical first step in reparation.

Repatriation efforts in Australia were initially focused abroad, demanding the return of the Old People to their descendants from museums in the U.K. The Tasmanian Aboriginal Community presented the first formal repatriation requests for their Old People to the University of Edinburgh in the late 1980’s (Wilson 2009). The University of Edinburgh had returned the

bulk of its Aboriginal human remains collection by 1991, spurring the National Museum of Australia to do likewise (Wilson 2009). In 2003, Ngarrindjeri officials collected the last of their Old People's remains from the Edinburgh Collection and the National Museum of Australia (Wilson 2009). The remains of nearly 300 individuals were repatriated, making this event the largest single repatriation case in Australia (Fforde 2009; Wilson 2009; Hemming and Wilson 2010).

The act of repatriation established constructive cooperation between institutions, the aboriginal community, and the Australian government. The repatriation of the Old People, however, was only the first challenge for the Ngarrindjeri (Wilson 2009). Once the remains were returned, the Ngarrindjeri community still faced the difficult issues of providing the proper care and reburial of their Old People. Funding had to be found, appropriate storage had to be arranged, locations and rituals agreed upon, and the State and Federal governments had to be consulted for final approval of burial sites (Wilson 2009). The Repatriation Unit at the National Museum of Australia has assisted the Ngarrindjeri, but the complex reburial process is still ongoing.

3.3.3 Significant Repatriation Cases in New Zealand

3.3.3.1 Mokomokai Heads

Mokomokai, also known as *toi moki*, are the elaborately tattooed, preserved heads of New Zealand's indigenous Maori peoples. The *moko* facial tattoos were a traditional part of Maori culture and symbolized social stratification. *Moko* tattoos signified a high rank in society, and were mostly worn by chiefs and renowned warriors. *Toi moki* were originally intended to serve as sacred memorials when a warrior's entire body could not be brought back from battle (Stumpe 2005). The art form of *moko* tattoos and its practitioners were traditionally hidden by

social taboos that protected the sacred protocol from outside influence and theft (Stumpe 2005).

Europeans made contact with the Maori in the early 19th century, opening doors to trade and settlement in New Zealand. The first historical report of *toi moko* comes from the Cook voyages in 1770 (Stumpe 2005). Trade gave Maori warriors access to firearms that could give them military advantage over neighboring bands. European opportunists used this social disruption to create a lucrative market for *mokomokai*, which were bartered for firearms (Stumpe 2005). The New South Wales government issued a ban in 1831 on trading *mokomokai* heads outside of New Zealand, which served to end warring between Maori communities (Stumpe 2005).

In 1988, the purported sale of a Maori tattooed head at Bonham's auction house in London alerted the public to the sale of human remains (Stumpe 2005). Overwhelmed by public concern and Maori objections, the auction house withdrew the head from sale and returned it to the Maori (Stumpe 2005). This precedent prompted the identification and return of other Maori heads and human remains in U.K. and European repositories. By November 2000, all *mokomokai moki* and other Maori human remains held by foreign and domestic repositories had been repatriated (Stumpe 2005).

3.4 Comparing Repatriation Policies, Practices, and Significant Cases

Prominent cases from the United States, Australia, and New Zealand highlight the varying ideologies of repatriation. In Australia and New Zealand, the concept of indigenous control of cultural heritage and property was first propagated socially and professionally whereas in the United States such control was mandated by law. Australia and New Zealand work on behalf of aboriginal communities for the repatriation of ancestral remains and secret sacred objects from abroad.

The United States lacks an international reparation policy and does not offer governmental support to Native Americans seeking repatriation of cultural materials and human remains housed in foreign repositories. This is due to the complicated sovereignty relationship Native American tribes have with the United States government. Native Americans are given U.S. citizenship individually while tribes are given nation status. For this reason, the United States government is not formally involved in tribal repatriation claims concerning foreign repositories.

Despite the absence of a national repatriation law in Canada, The Royal Commission on Aboriginal Peoples (RCAP) and the Assembly of First Nations/Canadian Museum Association (AFN-CMA) formed to assist repatriation. The programs encourage cooperation between First Nations, scientists, and museums, as does the Vermillion Accord. The National Museum of Australia formed its own repatriation unit to assist aboriginal communities without the prompting of a national repatriation law. Programs like these reflect changes in discourse at the ground level through the codes of ethics of professional organizations involved in heritage management. The programs also illustrate how effective repatriation can take place without formal legislation.

Repatriation has sparked the most public and academic contention in the United States, as it came about through legislation and is compulsory for federally funded institutions. Weiss (2001) sums up anti-repatriation arguments in the United States, stating that the reburial of ancient skeletons is a serious impediment to scientific study. Weiss (2001) takes issue with the repatriation of the 10,000 year old Buhl Woman in Idaho, stating that valuable information about peopling of North America has been lost by repatriating the remains to the Shoshone-Bannock tribe.

The discovery of Kennewick Man kindled a decade long legal battle while proactive

cooperation between interested parties achieved repatriation for Lady Mungo (Smith and Burke 2003). Scientists argued that Kennewick Man was a novel discovery and a rare specimen with much scientific promise, which is why they were hesitant to let the remains be returned. The presence of an additional Lake Mungo specimen helped Lady Mungo's repatriation case.

Like New Zealand, the Australian government works on behalf of aboriginal communities for the repatriation of ancestral remains and secret sacred objects from abroad. The Ngarrindjeri case illustrates the constructive cooperation between institutions, the indigenous community, and the Australian government that facilitated the return of over 300 skeletons from overseas (Wilson 2009).

Keeler (2012) encourages the use of different repatriation approaches, such as government initiated and funded claims and museum initiated repatriation offers on an international scale. States can aid their indigenous peoples by putting governmental power and funding behind negotiations. The nation-state is a stronger negotiator in international law by being able to assert pressure on other governments in a way that that indigenous peoples cannot. So far, only Australia and New Zealand use state lead international repatriation claims. Such programs would be a boon to Native American communities inhibited by lack of funding and international negotiating power. Museums can help by creating a centralized, international inventory to inform indigenous communities on cultural material and remains held in institutions of which they might not be aware.

3.4.1 Kennewick Man and Spirit Cave Man

Kennewick Man and Spirit Cave Man court rulings that ancient remains do not qualify as Native American under NAGPRA raises the question of what is the temporal threshold at which ancient remains became Native American (Edgar et al. 2007). As cultural evidence concerning

Kennewick Man's affiliation was absent, the repatriation decision depended on the legal acceptance of oral traditions of the Columbia Plateau tribes. The Umatilla tribe argued that their traditions went back more than 10,000 years in the area where Kennewick was discovered, proving their people to be the heirs of Kennewick Man. By ruling in *Bonnichsen v. United States* that Kennewick Man had no cultural or genealogical links to contemporary American Indians and could not be defined as Native American, the court rejected the legitimacy of oral histories.

Kennewick Man's age is the main argument against repatriation; he is too old to be affiliated with any current human population. Siedemann (2004) suggests that indigenous cultural claims to remains that stretch into the domain of paleoanthropology are akin to modern Europeans requesting the repatriation of Neandertals. Media sensationalism also influenced the Kennewick Man case by fixating on misinterpreted notions of race, chiefly that Kennewick Man was "Caucasian", bearing more relation to Europeans colonists than Native Americans. Accusations of racism and inflamed discussions of ethnicity created strong oppositions and spoiled opportunities for amicable cooperation.

The repatriation controversy surrounding Spirit Cave Man evokes parallel arguments regarding Kennewick Man. Both cases involve a long legal battle between scientists and tribes that sought to balance the ethical and scientific implications of reburial of ancient human remains (Cryne 2010). These two cases embodied the various interests in the repatriation controversy. On one side of the debate is the right of descendants to handle their ancestors' bodies in accordance with their own traditions. On the other side is the desire for materials to stay available for the current and future study of human history, as ancient human remains sufficiently intact for scientific research are extremely rare. The lawsuits in both of these cases hinged on whether, under the definitions in NAGPRA, Kennewick and Spirit Cave men were Native American and

whether they were culturally affiliated with any contemporary, federally recognized tribe (Edgar et al 2007).

There is no cultural context for Kennewick Man. In contrast, there is obvious evidence that Spirit Cave Man was intentionally buried, and that the associated cultural materials were representative of his cultural identity. The style of the clothing and other grave goods found with Spirit Cave Man offer insights into his material culture and human culture which could be used when establishing cultural affiliation for repatriation.

Judge Jelderks ruled that Kennewick Man is not Native American under NAGPRA, which set a legal precedent for the Spirit Cave Man case. Edgar et al. (2007) argued against the use of precedents in cases of ancient remains, instead favoring a case-by-case consideration. This technique is used in Canada, as no federal repatriation law along the lines of NAGPRA has been passed. Keeler (2012) argues that handling repatriation on a case-by-case basis is better than enacting laws with strict protocols that may not take into account the unique and personal nature of repatriation for each community.

Chapter 4—Legal Analysis of NAGPRA

4.1 Introduction

NAGPRA is a complex law that draws upon many aspects of the American legal system to regulate the control of Native American human remains and cultural materials. The law has equally complex regulations, some of which have sparked controversy and animosity between repatriation activists and opponents. This chapter will conduct a brief legal examination of NAGPRA to resolve misunderstandings of the Act's provisions and regulations.

Interpreting NAGPRA as a property law, concerns have been raised that the Act constitutes unconstitutional taking of private property. On the other hand, interpreting the Act as a civil rights mandate, there have been concerns that NAGPRA violates the First Amendment's freedom of expression and separation of church and state provisions. Citing these violations, opponents to the Act have argued that repatriation is not constitutionally legal. However, repatriation has been supported by the U.S. constitution.

NAGPRA is a multifaceted law that strives to address the thorny issue of possession of indigenous human remains and cultural objects. This chapter will examine the different legal aspects of NAGPRA through property, constitutional, and tribal sovereignty law to address common misconceptions of the Act's provisions and contentions in its implementation. As part of the property law discussion, this chapter will address cultural property and expound on the cultural affiliation section of NAGPRA.

4.2 Property Law

The social construct of property is a system to control the appropriation and use of resources. The traditional definition of property used in the American legal system is anything tangible or intangible that falls into one of three categories: real, private, and intellectual (Aoki

1996; Carruthers and Ariovich 2004; Carpenter, Katyal, and Riley 2009). Real property is immovable, such as land or permanent structures. Personal (private) property consists of moveable and tangible objects. An article of private property, however, can contain intangible features, as objects are often imbued with unique cultural values. Intellectually property, while still considered private property, consists of novel inventions and unique expressions of human intellect. Cultural constructs such as symbols, rituals, and traditional knowledge are considered forms of intellectual property, falling into the subcategory of cultural property.

Property rights determine power relationships between members of a society, as they involve a transfer of institutional power to private individuals they they can wield against others (Carruthers and Ariovich 2004). Property rights are integral to social and institutional interactions, as they give owners authority to make decisions about the manufacture, use, distribution, sale, and destruction of an object or resource (Carruthers and Ariovich 2004).

4.3 Cultural Property

The legal construct of cultural property was created during the Hague Convention on the Protection of Cultural Property in 1954 (Mezey 2007). In 1970, UNESCO put forth the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was amended in 2003 to expand the concept of cultural property to include the concepts of heritage, and intangible cultural heritage. Under this convention, these additional concepts refer to the customs, demonstrations, language, and knowledge of a people as well as the tools and objects used to express intangible culture (Mezey 2007). Intangible cultural heritage is transmitted from generation to generation, constantly recreated in response to interactions with the environment and other people (Mezey 2007).

Tangible and intangible aspects of heritage provide people with a sense of social and cultural identity as well as historical continuity.

The concepts of title, alienation, and heritage are integral to a study of cultural property. Title is often represented by physical documents providing evidence of ownership. Transfer of title is a way of reassigning ownership and its associated rights. Title is different from possession, which itself is not enough to prove rightful ownership. In Western property cases, the current owner of an object is rarely the original owner but has acquired title through gift, contract, exchange, or sale (Carruthers and Ariovich 2004). Title can be forfeited through abandonment (alienation). Alienation can take place by the donation or gift of an object, but can also happen through misplacement or purposeful desertion (Gold 1996). Repositories claim ownership to such materials by using the right of first possession theory of property law (Gold 1996). This theory holds that ownership is justified simply by someone claiming an object before someone else.

Arguments against repatriation often focus on right of first possession and alienation, claiming that most objects sought for repatriation have at some time been abandoned by their original cultures, which forfeits title (Mezey 2007). However, these arguments overlook the concept of communal and inalienable property. Communal property includes tangible or intangible materials produced by a community without independent actions of creation (Mezey 2007). Inalienable property cannot be owned or disposed of by any one individual member of a culture (Mezey 2007; Burns Colman 2010:87).

Since inalienable property lacks title, Burns Colman (2010:88) argues that such property belongs solely to the originating culture or community and cannot legally be possessed by any institution or outside group by any means. Arguments for repatriation focus on inalienable

communal property. Inalienable property in regards to repatriation refers to a material with such enduring traditional and cultural significance to a people that it cannot be abandoned without the destruction of their collective identity (Mezey 2007).

4.4 Common Law

Common law, also known as case or precedent law, is a legal system developed through court decisions. Common law gives great weight to precedents on the principle that it is unjust to rule differently in similar cases (Johnson and Haensly 1992). Under common law, ownership of buried objects goes to the landowner. Unearthed human remains, however, are generally treated as a form of quasi-property of which survivors or descendants act as stewards for the purpose of conducting a funeral (Johnson and Haensly 1992). Grave goods are the property of the individuals who supplied them or of the deceased's descendants, though ownership in this case is also limited to re-internment (Johnson and Haensly 1992).

4.5 Constitutional Law

As mentioned in Chapter 2 in reference to culturally unaffiliated remains, there have been arguments that repatriation is unconstitutional. Weiss (2008) argues that repatriation claimants are allowed to breach the separation of Church and State and to impinge on scientific freedom by requesting the return of human remains and cultural materials for appropriate religious burial. Despite this, the Supreme Court has held that incidental infringement on the freedom of scientific study is acceptable when the government recognizes compelling interests, such as returning misappropriated Native American human remains to their descendants (Hibbert 1999). Meighan (1992) argues that NAGPRA violates the First Amendment by favoring Native American religion over scientific evidence. Meighan (1992) also claims that repatriation is a

taking of private property in violation of the Fifth Amendment, in that NAGPRA mandates the destruction of legally acquired museum collections.

Common law as well as the First, Fifth, and Fourteenth Amendments of the U.S. Constitution reinforce the legality of repatriation. Native Americans' First Amendment freedom of religious practice right is infringed when ancestral dead are withheld from reburial by repositories. The Fifth and Fourteenth Amendments mandate equal protection for citizens. As common law protects the graves of the deceased, the history of Indian grave desecration in the U.S. violates the provisions in these amendments.

The manner in which the U.S. legal system historically dealt with Native American burials conflicts with the common law protection of human remains and graves, such as the surgeon general's mandate for skeletal collection through looting (Trope and Echo-Hawk 1992). This is one of the reasons that repatriation claims are supported by multiple areas of U.S. law. Common law, as well as the First, Fifth, and Fourteenth Amendments offer legal reinforcement for repatriation. Common law does not recognize property rights over human remains or grave goods for landowners or individuals who make a discovery of such materials (Johnson and Haensly 1992). Possession is allowed only by the next of kin for reburial. The Antiquities Act broke from common law by treating Indian dead as archaeological resources and Federal property. Native Americans' First Amendment freedom of religious practice right is infringed when ancestral dead are withheld from reburial by repositories (Trope and Echo-Hawk 1992). The Fifth and Fourteenth Amendments mandate equal protection for citizens, which is violated by the history of grave desecration and misappropriation of Native American remains (Trope and Echo-Hawk 1992).

4.6 Sovereignty

As the Meriam Report found, the U.S. government was misguided in its policies and practices regarding Native Americans. Assimilation policies such as the Dawes Act and mandatory boarding school attendance did not achieve the goal of seamlessly incorporating Native Americans into the dominant Euro-American culture. The Indian New Deal sought to address problems between the U.S. government and Native American tribes through consultation and cooperation, but it did not go as far as to afford complete sovereignty to tribes. The termination policies of the 1940s and 50s threatened to eliminate tribal sovereignty altogether by doing away with Native American status.

Since tribal termination has been abandoned, state-like sovereignty has been used by the United States government to carry out Indian policy. United States Indian policy is a mix of federalism and trust (Frederickson 1998). Federalism is a form of government in which a centralized governing body shares state sovereignty with smaller political units, such as states and provinces (Frederickson 1998). In the U.S. common law system, a “trust” involves property being held and managed by one party for another (Minzner 2006). Federal agencies such as the Bureaus of Indian Affairs and Land Management have acted as the trustee of lands reserved for Native American tribes (Smith 1995; Minzner 2006).

American Indian tribes are not considered minorities, but sovereign peoples, even though they lack the political power and voting privileges of nation-states (Keeler 2012). This front of nation-state sovereignty breaks down in the international context. International sovereignty constitutes power relations between separate and independently governed nations. Native American tribes, while having some degree self-determination and governance within their reservation borders, are ultimately subject to the jurisdiction of the United States (Frederickson

1998; Minzner 2006). This complicated sovereignty hinders Native Americans when making repatriation claims at foreign repositories.

The New Zealand government negotiates international repatriation requests on behalf of its Maori peoples. Australia promotes repatriation as cooperating with fellowman for a stronger nation. The United States government does not put its weight behind repatriation requests from Native Americans to foreign countries, as does New Zealand. In these cases, the U.S. government cites American Indian tribal sovereignty, regardless of Native Americans' status as American citizens (Keeler 2012).

Critics of repatriation, such as Weiss (2008) and Meighan (1992), argue that it is not the responsibility of repositories to make reparative efforts to sovereign peoples. In the international arena, American Indian tribes are afforded little recognition as sovereign states and lack negotiating power (Hanna 2005; Keeler 2012). It is important for international repatriation policies to acknowledge the sovereignty of federally recognized tribes in the United States by allowing them international negotiating privileges.

Chapter 5—Summary, Discussion, and Concluding Remarks

5.1 Summary

The need for repatriation legislation resulted from the colonial histories of the United States, Canada, Australia, and New Zealand. The push for medical and scientific advancement in the 19th century called for readily available human skeletal material, which encouraged grave robbing. Indigenous graves were singled out during this era; as such graves lacked the protection of common law.

As a result of this troubled collection history, the most prominent repatriation efforts come from the former colonial nations of the United States, Canada, Australia, and New Zealand. In the United States, repatriation legislation such as the NMAIA and NAGPRA resulted from a series of social movements, starting with the civilizing movement in the 1800s, the civil rights movement in the 1960s, and the repatriation movement in the 1980s. The repatriation movement gained international attention and sparked similar repatriation policies in Australia and New Zealand.

In the United States, petitions from repatriation advocates for the removal of Native American human remains and cultural materials housed in the Smithsonian Institution led to the National Museum of the American Indian Act of 1989. This Act only pertained to the Smithsonian's collections. Legislators then worked to pass a law that would apply to all federally associated repositories. After several drafts, the Native American Graves Protection and Repatriation Act was passed in 1990.

In Australia, repatriation started with cooperation between repositories, professional organizations, and indigenous communities. In 1984, Australia passed an indigenous heritage protection law with the Aboriginal and Torres Strait Islander Heritage Protection Act

(ATSIHPA). Beside the ATSIHPA, the Australian government has created other repatriation programs, such as the Return of Indigenous Cultural Property Program, formed in 2006. Australian states have also implemented repatriation programs to address indigenous finds on state land and aboriginal materials in state repositories.

The New Zealand government passed the Protected Objects Act in 1975 and the Historic Places Act (HPA) in 1993. The Act covers indigenous human remains as well as cultural materials, and is applicable both at the governmental and private level. The New Zealand government also pursues the repatriation of human remains and cultural objects held in foreign institutions on behalf of Maori communities. In this way, New Zealand is one of the most proactive and supportive governments, putting the might and capital of the state behind its indigenous communities.

The Canadian government and federally associated repositories negotiate repatriation on a case-by-case basis, guided by a task force created in 1989 by the Canadian Museums Association and the Assembly of First Nations. As do the Australian states, Canadian provinces develop and enforce their own repatriation legislation. In the international arena, UNDRIP declared that indigenous peoples have self-determination and property rights over their cultural materials and human remains.

Repatriation has sparked significant controversy in the United States, as it was mandated through legislation and is compulsory for federally funded institutions. Repatriation has also been controversial because it attempts to reconcile opposing views regarding ownership of human skeletal remains. Human remains are imbued with aspects of personhood as well as individual and cultural identity. Beyond their social properties, human remains have scientific value as evidence of past lifeways and human evolution. Repatriation has been contentious

because it questions which aspect of human remains is more important, social or scientific values. The Kennewick Man and Spirit Cave Man cases involve a long legal battle between scientists and tribes seeking to balance the scientific implications of reburial of ancient human remains with tribes' right to have ancestors reburied in the manner they wish. Media sensationalism influenced the Kennewick Man case by fixating on misinterpreted notions of race. Accusations of racism and inflamed debates over ethnicity created strong oppositions and spoiled opportunities for amicable cooperation between scientists and Native American groups. Despite conspicuous, polarizing arguments over the importance of religious versus scientific evidence, Zimmerman (2005) stressed that there has been great strides in collaboration between Native American communities and archaeologists.

NAGPRA draws upon many areas of the American legal system, such as property, constitutional, and tribal sovereignty law. Concerns have been raised that repatriation is an unconstitutional taking of property from repositories, and that it violates the First Amendment's freedom of expression and separation of church and state provisions. However, common law, the First, Fifth, and Fourteenth Amendments offer legal reinforcement to repatriation.

The property law concepts of title, alienation, and heritage are integral to a study of repatriation. Arguments against repatriation often focus on first possession and alienation, claiming that most objects sought for repatriation have at some time been abandoned by their original culture, which forfeits ownership rights. Burns Colman (2010:87) argues that title and alienation do not apply to the human remains and cultural materials sought for repatriation, as they are part of a people's inalienable cultural heritage. This means that human remains and cultural materials belong solely to the originating culture and cannot legally be possessed by any outside institution or group.

Native American tribes have some degree self-determination and governance, though they are ultimately subject to the jurisdiction of the United States government. In the international arena, Native American tribes have little recognition as sovereign states and lack negotiating power. This complicated quasi-sovereignty impedes Native Americans when making repatriation claims at foreign repositories. The theater of international law is ideal for creating a set of minimum repatriation standards which nations could implement in the absence of domestic repatriation laws. As many repatriation cases—most noticeably in Australia and New Zealand—take place on the international level, global standards would facilitate indigenous repatriation between nations.

5.2 Discussion

5.2.1 Repatriation as a Power Struggle

Power is the ability to influence. It depends on authority and legitimacy. Power relationships also depend on the existence of ‘the Other’, which is determined by a society’s law, traditions, class structure, and distribution of privilege (Sarukkai 1997). While ‘the Other’ is often the party over which power is wielded, social groups can also present themselves as ‘the Other’ in an attempt to gain power (Sarukkai 1997). Property rights are intrinsically linked to power, as they confer the ability to control the use, preservation, or destruction of the materials owned. By emphasizing its cultural uniqueness, a people or ethnic group can claim ownership rights to its cultural materials, allowing the group to control the representation of these materials. Groups must maintain this cultural distinctiveness, as it is tied to their legitimacy and authority of representation.

Authority and legitimacy are also bound to sovereignty. Indigenous groups seek sovereignty by struggling against political, ethnic, social, and religious domination (Keeler

2012). The State is often the opponent. The *sovereign state* is the principal embodiment of power (Reus-Smit 2001). A sovereign state is characterized by a central government with authority over a clearly defined and defended geographical area (Reus-Smit 2001). Sovereign states exist within the international legal system and have the capacity to negotiate with other sovereign states (Keeler 2012). Such states are neither dependent nor subject to to any other state. A state claims and legitimizes jurisdictional authority over its territory through recognition as a sovereign entity by other sovereign entities (Reus-Smit 2001). For a state to declare sovereignty and have negotiation clout, it must be recognized as such by other sovereign states.

Terra nullius is a term used in international law to describe territory that has never been subject to an internationally recognized sovereign state (Keeler 2012). Colonizing terra nullius put the area under state jurisdiction. This term was used to justify the colonization of Australia, New Zealand, and North America (Keeler 2012). Indigenous peoples already occupied these lands and governed their own communities, but they were not recognized as sovereign states or afforded state privileges in international law (Hanna 2005).

Riding In (2012) described the repatriation movement as the Indigenous struggle against cultural and political oppression under European colonization. The repatriation movement sought to overthrow the legal and social ambivalence that made those practices possible (Riding In 2012). The movement spread worldwide in the later half of the 20th century, where the dominant, state-based system was challenged by demands for sovereignty by indigenous peoples (Keeler 2012). Initially, some anthropologists and scientists were hesitant to adopt an attitude of cooperation between scientific and indigenous communities in a struggle over the control of cultural information (McGowan and LaRoche 1996).

The control of cultural history and material resources requires a delicate balance between

the concerns of many stakeholders. Bruning (2006) outlines repatriation as a method by which researchers, repositories, and tribes are expected to balance differing interests in managing the material record of the past. During debate in the Senate, Sen. McCain stated that NAGPRA would effectively balance the interest of Native Americans regarding the just and respectful return of their ancestors with the educational interest of museums in maintaining American cultural heritage (Senate Debate 1990). Sen. Inouye stated that the Act was not about the *value of scientific inquiry* but about *human rights*, returning to Native Americans the power to control the representation of their cultures and the fate of their ancestors remains.

In museum or scientific settings, human skeletal remains are “decontextualized to remove social and religious taboos” (McGowan and LaRoche 1996). Once a human skeleton is devoid of taboos, it can be perceived as property, making the scientific value of the remains superior to spiritual integrity (McGowan and LaRoche 1996). Koehler (2007) states that the manner in which human remains and cultural objects are treated through collection and interpretation reflect the social attitude toward the cultures the materials represent. Removing human remains from their original context for outside interpretation is an exercise of control, as appropriate cultural context is important to identity construction (McGowan and LaRoche 1996; Koehler 2007).

5.2.2 Culture and Identity

As cultural distinctions and values are fundamental aspects of the power struggle in repatriation, it is important to discuss the concepts of culture and identity. Culture is difficult to define. It can refer to a collection of human actions that cannot be attributed to biological inheritance. Culture can contain both physical and intangible manifestations of human intellect that are regarded by a group to have been achieved collectively (Cerulo 1997). These

manifestations can take the form of language, religion, customs, means of subsistence, and creative expressions such as folklore, art, and music. The complicating factor is that culture does not necessarily exist in discrete groups (Gupta and Ferguson 1992). Culture can be shared by people who do not share a collective identity. Culture can transcend national borders.

Identity can be defined as the set of distinctive characteristics which an individual attributes himself. Identity can also refer to the shared characteristics claimed by the members of group to distinguish themselves from other groups. At this level, identifying characteristics form the collective identity. Identity construction is a social process that occurs through interactions with other individuals and groups (Cerulo 1997). The same structures that influence agency also play into individual and group identity construction. Identity constructions are self-reflexive displays of the collective agency of a group (Cerulo 1997). Of interest are the mechanisms by which individual and group distinctions are established, maintained, and altered in an increasingly interconnected world (Calhoun 1993).

Nations and peoples do not necessarily embody their own distinctive cultures and cultural identities. The terms “people” and “culture”, however, are commonly used as if interchangeable (Gupta and Ferguson 1992). These terms are attached to the name of the country or people in which they exist, such as “Native American people”, or “Native American culture” (Nagel 1995). Cultures and peoples are not fixed. Human populations are mobile and cultural boundaries are fluid.

Modern multiculturalism shapes repatriation discourse. Multiculturalism attempts to preserve cultural distinctions while acknowledging and attempting to balance power relations between subordinate cultures and a dominant one (Gupta and Ferguson 1992). Control over Native American human remains cannot be understood apart from the broader processes of

Native American self-representation viewed against multiculturalism (Johnson 2005).

Repatriation battles over unidentifiable human remains might indicate that purposefully propagating cultural differences are means of acquiring greater sovereignty and power to oppose the dominate culture.

Repatriation claims must include narratives that convincingly link the claimants to the objects or human remains in question, even if they are ancient, as with Kennewick Man. Johnson (2005) points out that these narratives are often oppositional, highlighting cultural differences or animosities. To prove cultural affiliation under NAGPRA, claimants must present themselves as members of a unique culture which has existed continually in a fixed territory for thousands of years (Trope and Echo-Hawk 1992). While repatriation efforts try to fight the 19th century colonial notion that American Indian tribes were discrete cultures to be collected and preserved, cultural affiliation requirements force tribes to represent themselves as such. This is particularly the case with repatriation claims for ancient human remains. In such cases, tribes must present themselves as sharing a unique, unchanged culture that has existed in a finite territory for millennia.

The human remains of Native Americans held in repositories exist in different realms where they represent both spiritual and scientific value. Like the remains sought for repatriation, contemporary American Indians occupy a hybrid space. They live at multiple levels of culture, law, sovereignty, and citizenship (Deloria 1978). As NAGPRA was born of the modern American legal system, claimants must represent their cultures as both pre-colonial and modern (Johnson 2005). Tribes must show cultural and geographical continuity with the materials in question that pre-date colonial events while also associating that culture with a contemporary, recognized tribe.

In the United States, there are many federally recognized American Indian tribes that vie for cultural affiliation to human remains and cultural materials. In cases of unidentifiable remains, there are often disputes between multiple tribes who all have equally valid claims. Because of this, disputes between scientific, academic, and tribal organizations in highly volatile cases such as Kennewick Man and Spirit Cave Man are decided in court, which can be construed as a tip in the power balance toward the U.S. government.

Zimmerman (2005) cites the *Bonnichsen v. United States* decision in the Kennewick Man case when stating that scientific values have at times been given greater weight than cultural values in court. In this decision, the court endorsed the idea that remains and materials from the extreme past are part of a common heritage shared by all peoples. This undermines the intent of NAGPRA, which seeks to give Native American tribes sole proprietary rights of ancestral remains and cultural resources, as well as control of their own cultural representations.

5.2.3 Problems with a Property Discourse

In the 1980s, Native American activism shifted away from the tumultuous demonstrations of the 1960s with a new focus on gaining control over cultural materials and ancestral remains (Hutt and McKeown 1999). Public attention was brought to the extensive museum collections of Native American remains and cultural materials, as well as to the grave looting practices that initially brought these materials into repositories (Fine-Dare 2002). Grave desecration and the misappropriation of cultural materials can be seen as human rights violations, denying Native Americans consent, self-determination, and burial protection under common law (Trope and Echo-Hawk 1992). Hutt and McKeown (1999) argue that cultural property rights are essential to human rights for indigenous peoples.

Legislation was sought that would address these violations through the property law

system (Hutt and McKeown 1999). NAGPRA is intended not to grant advantages to any specific party, but to “equalize the legal landscape” (Hutt and McKeown 1999). The Act extends common law protections to Native American graves, remains and cultural materials, as well as conferring property rights to these materials. One way in which property rights readily adapt to repatriation is through the common law protection of graves and human remains. As discussed in the common law section of the previous chapter, human remains are not articles of property and cannot carry full property rights beyond the right of descendants to dispose of the dead as they wish.

Beyond this, the property law system of the United States does not readily accept the communal, inalienable property sought in repatriation cases. Private property and private ownership form the basis of American property law. The traditional and deeply embedded definition of property in this legal system is tangible or intangible materials over which the owner has the right to consume, alter, destroy, share, sell, transfer, gift or abandon as they chose. The concepts of alienation and right of first possession are integral components of the American property law system. Alienation means that when materials are abandoned purposfully, lost, or misplaced by the owner, property rights to the materials are forfeit. First possession holds that ownership of property that has been alienated is justified by finding or seizing it before someone else.

Repatriation of communally owned cultural materials challenge this traditional system of property law, as it is claimed that such materials are inalienable. They cannot be considered to have been abandoned by the culture of origin. This means that the right of first possession cannot legally be claimed for repositories to house such materials. Despite this, repatriation as it exists in the United States is grounded in the language of property law. It is essentially a proprietary

struggle between interested parties for the right to control access, use, and interpretation of materials. A particular sticking point in the struggle is the question of whether any group has ownership rights to materials which a culture defines as belonging to its own heritage, given that cultures share many practices and materials and have done so throughout human history (Zimmerman 2005).

Carpenter, Katyal, and Riley (2009) call for the concepts of communal ownership and cultural heritage to be included more readily in the Western property paradigm, which has long focused on individual, exclusionary rights. This requires thinking of *people*-hood instead of *person*-hood (Carpenter, Katyal, and Riley 2009). But as discussed in the last section, there is a problem with defining a *people*, as they do not necessarily share the same culture. Common ancestry, geography, language, religion, or politics do not inevitably point to a collective cultural identity. The act of defining a people by these criteria creates a fictitious homogeneity that does not exist in real human populations.

In Australia and New Zealand, repatriation laws are not framed in terms of property rights. Australia and New Zealand use repatriation as means to mend social and political fences. For those countries and their indigenous populations, repatriation is about human rights and social reconciliation (Short 2003). In the U.S., repatriation is framed in polarizing terms of property and ownership. In the United States, repatriation might have been more agreeable in the spirit of human and civil rights over the exclusionary language of property.

5.3 Concluding Remarks

While some scholars lamented the potential loss to science from repatriation, the long history of political and social oppression of Native Americans and their cultures have created an environment where strong actions had to be taken toward reconciliation through repatriation.

Repatriation in the United States is not solely about the legitimacy of science versus cultural beliefs, or restitution for past rights violations. Repatriation is an issue of power. NAGPRA provides a procedural framework with which to negotiate the power relationships between scholars, tribes, and the federal government. NAGPRA uses the language of property law as the result of sovereignty and power struggles between Native American communities, the dominant Euro-American culture, and the U.S. government. Property rights are integral to power, as the holders control the use of and access to resources.

Property rights over Native American human remains and cultural materials cannot be appreciated apart from the issue of cultural self-representation. Ancestral remains held in non-Native repositories are manifestations of the social and political struggle of Native American tribes. The ability to rebury their ancestors and interpret their own cultural histories are the foundation of this struggle. Property rights over human remains and cultural materials are an essential component of Native American communities' struggle for political and cultural sovereignty.

NAGPRA has been described as a property law, a procedural law, and as human or civil rights legislation. NAGPRA, however, is fundamentally constructed as a property law, as it relies on the language of property rights. Although born of a property law paradigm, NAGPRA does not fit well within it. Traditionally, the American property law system does not allow for inalienable cultural property. These concepts were created for repatriation legislation before the property law system had been adapted to account for them. Individualistic definitions of property are deeply ingrained in Euro-American society and permeate the American legal system. This is responsible for many of the controversial disputes and case studies that have resulted from NAGPRA's enactment.

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Appendix A

A Section-by-Section Summary of The Native American Graves Protection and Repatriation Act

House Resolution 5237, The Native American Graves Protection and Repatriation Act, became law on November 16, 1990 (Public Law 101-601; 25 U.S.C. 3001-3006; see Appendix B). The Act applies to both purposeful and inadvertent discoveries of human remains and cultural materials on federal lands as well as such materials already held in federal repositories. This Act, however, does not apply to discoveries on private or state lands or to cultural materials in private repositories. The Act requires federal agencies and institutions that receive federal funding to return Native American human remains and cultural objects to the lineal descendants and/or the culturally affiliated Indian tribe or Native Hawaiian organizations. The Act sets up a priority of ownership for indigenous human remains and cultural objects. Tribes and federal institutions can apply for federal grants to assist the inventory and repatriation process.

The Secretary of the Interior has authority to create regulations to carry out this Act as well as the power to levy civil penalties on institutions that fail with these regulations. The Secretary also has authority to create a committee to review inventory and repatriation actions and mediate disputes between tribes and institutions.

Section 1: Title of The Act

This section defines the title of the Act as The Native American Graves Protection and Repatriation Act.

Section 2: Terminology and Definitions

Section 2 of 25 U.S.C. 3001 provides definitions for terminology used throughout the Act. These definitions are important because they guide the understanding and applicability of

the law.

Under NAGPRA, “**burial site**” means any natural or man-made location below, on, or above the earth’s surface into which human remains are deposited as a part of a cultural the death rite or funeral ceremony.

“**Cultural affiliation**” refers to a shared group identity between a current Indian tribe or Native Hawaiian organization and the remains of a group, individual, or cultural items in question.

In the text of NAGPRA, “**cultural items**” refers to both human remains and “associated funerary objects” which are part of the death rite a culture and are believed to have been purposefully placed with individual at or near the time of death. For the purposes of the Act, both the human remains and associated funerary objects that are currently under the control of a Federal agency or repository can be considered cultural items.

Items made exclusively for burial purposes or for containing human remains that are found without human remains are not considered associated funerary objects. These objects are treated as “**unassociated funerary objects**”. These objects can be repatriated by preponderance of evidence associating them with a particular Indian or Native Hawaiian organization.

“**Sacred objects**” are have their own category within cultural items. Sacred objects have specific ceremonial purposes and are needed by traditional Native American religious leaders for the practice of traditional religions by their modern adherents.

“**Cultural patrimony**” is another branch of cultural items. Cultural patrimony means that an object has strong and obvious ongoing historical, spiritual, traditional, and cultural importance to an indigenous group or culture. This is not property owned by an individual Native American, but by the entire group or culture communally. Objects of cultural patrimony cannot

be sold or purchased by any individual regardless of Native American or Native Hawaiian group membership.

“**Federal agency**” within the context of NAGPRA refers to any department, office, agency, or institution of the United States government. For the purposes of this Act, institutions that receive any amount of federal funds are also under the purview of NAGPRA. “**Federal lands**” refers to any land beside tribal lands controlled, managed, or owned by the United States. “**Secretary**” when used in NAGPRA refers to the Secretary of the Interior.

“**Museum**” refers to any institution, State, or local government agency, including institutions of higher learning that receives Federal funding and has possession of Native American cultural items.

“**Indian tribe**” describes any tribe, band, nation, or any other organized community of Indians, including Alaska Native villages, which is eligible for programs and services provided by the United States because of their Native status. “**Tribal land**” encompasses all lands within the boundaries of any Indian reservation as well as all dependent Indian communities and any lands administered for the benefit of Native Americans and Hawaiians.

“**Native American**” refers to a tribe, people, community, or culture that is indigenous to the United States. “**Native Hawaiian**” is any individual who is a descendant of the aboriginal people who occupied and exercised sovereignty in the area that now constitutes the State of Hawaii prior to 1778.

“**Native Hawaiian organization**” means any organization that serves or represents the interests of Native Hawaiians and has expertise in Native Hawaiian Affairs. “**Office of Hawaiian Affairs**” means the Office of Hawaiian Affairs established by the State constitution of Hawaii.

Regarding ownership under NAGPRA, “**right of possession**” is obtained through the voluntary consent of an individual or group that has legal authority of alienation. Repatriation under the Act is based on the common lack of voluntary consent in the collection of Native American cultural items. Right of possession is provided under the appropriate property law of the United States. If the original acquisition of Native American human remains and other cultural items were excavated, exhumed, or otherwise obtained with the full knowledge and consent of the next of kin or the official tribal governing body, right of possession is deemed the controlling repository.

Section 3, 25 U.S.C. 3002a-d: Priority of Custody, Purposeful and Inadvertent Discovery

25 U.S.C. 3002ab: Priority of Custody

This section establishes a chain of priority for the custody of indigenous remains and cultural items. Ownership of such items is given first to the lineal descendants of the deceased Native American individual. In the case that lineal descendants cannot be identified, and also in the case of unassociated funerary objects, ownership goes to the tribe or Native Hawaiian organization on whose tribal land the objects or remains were discovered. After this, custody goes to the Indian tribe or Native Hawaiian organization which can demonstrate the closest cultural affiliation to the remains or objects or objects.

If the cultural affiliation cannot be established and the objects were discovered on Federal land that is recognized by the Indian Claims Commission or the United States Court of Claims to be the aboriginal land of some tribe, custody is given to the tribe that is recognized as aboriginally occupying the area in which the objects or remains were discovered.

If it can be shown by a preponderance of evidence that a different tribe has a stronger cultural affiliation with the remains or objects than the tribe or organization specified above, the

tribe with the strongest demonstrated relationship can claim custody. Native American human remains and cultural items not claimed through the examples above can be disposed of in accordance with regulations put forth by the Secretary in consultation with the review committee under section 8 of NAGPRA.

25 U.S.C. 3002(c): Intentional Excavation and Removal of Native American Human Remains and Objects

The intentional removal or excavation of Native American human remains and cultural items from Federal or tribal lands is allowed only with a permit issued under the Archaeological Resources Protection Act of 1979. Such items can only be excavated or removed after consultation with the appropriate Indian tribe or Native Hawaiian organization. The control over such items is determined by the provisions earlier in this section.

25 U.S.C. 3002(d): Inadvertent Discovery of Native American Human Remains and Objects

In case of inadvertent discovery, the discoverer must notify in writing the Secretary of the Department of the Interior, the head of any other federal agency which has primary authority with respect to the lands, and the appropriate Indian tribe or Native Hawaiian organization. If the discovery occurred through any activity, such as construction, mining, logging, or agriculture, activity must cease in the area of the discovery and effort must be taken to protect the items. Activity may resume after thirty days of proper notification of the entities above.

Section 4, 18 U.S.C. 1170: Illegal Trafficking In Native American Human Remains And Cultural Items

Section 4 deals with the “Illegal Trafficking in Native American Human Remains and Cultural Items” by laying out the penalties for such actions. Whoever knowingly sells,

purchases, uses for profit, or transports for sale or profit Native American human remains or cultural objects without the right of possession can be fined and/or imprisoned up to twelve months for the first offense. Subsequent violations can result in fines and/or imprisoned of up to five years. This section edits chapter 53, title 18 of the United States Code by adding the new category “Native American Human Remains and Cultural Items”.

Section 5, 25 U.S.C. 3003a-e: Inventory For Human Remains And Associated Funerary Objects

U.S.C. 3003ab: General Requirements

This section discusses the general inventory processes of NAGPRA. Each Federal agency or federally funded repository with possession of Native American human remains and other cultural items must compile an inventory of such items and to the fullest extent possible based on the information currently possessed by the repository or agency. The inventory must make an effort to identify the geographical and cultural affiliation of each cultural item. The inventory process and the Act must not be construed as an authorization for initiating new scientific studies of remains and associated objects other than for determining cultural or geographic affiliation. The inventories and identifications must be completed in consultation with tribal governments, Native Hawaiian organization officials and traditional indigenous religious leaders. The inventory process cannot take more than five years after November 16th, 1990 date of enactment.

Upon request by an Indian tribe or Native Hawaiian organization, a museum or Federal agency must supply them with additional, existing documentation including inventories, catalogues, relevant studies, or other data determining the geographical and cultural affiliation. Basic facts must also be supplied concerning the original acquisition and accession of Native American human remains and associated objects.

U.S.C. 3003c: Extension Of Time For Inventory

This section allows an extension of the inventory deadline. Any museum or agency which is judged by the review committee and the Secretary to have made a good faith effort to carry out the inventory and identification process but which has been unable to complete the process within the time limit may appeal for an extension of the deadline. In this case, as an indication of good faith, the museum or agency must include a plan to carry out the inventory and identification process within new time constraints.

U.S.C. 3003d: Notification

This section defines how museums must notify tribes of cultural affiliation. After cultural affiliation is determined pursuant to this section, the Federal agency or museum must notify the proper Indian tribes or Native Hawaiian organizations no later than six months after the completion of the inventory. The notice must include information which identifies the Native American human remains or associated funerary objects, the circumstances of its acquisition, which human remains or objects are clearly identifiable as to tribal origin, and which human remains and objects that are not clearly culturally identifiable. A copy of each notice must be sent to the Secretary who will publish each notice in the Federal Register.

25 U.S.C. 3003e: Definition Of Inventory

This subsection defines “**inventory**” as an itemized list summarizing the information called for earlier in the section.

Section 6, 25 U.S.C. 3004ab: Summary For Unassociated Funerary Objects, Sacred Objects, And Cultural Patrimony

Section 6 addressed summary creation. Each Federal agency or museum with possession of Native American remains or cultural objects must create a written summary of such

collections with available information currently held by the agency or museum. The summary must describe the scope of the collection, the kinds of objects included, and the means and period of acquisition and cultural affiliation if readily ascertainable. The summary can be in lieu of an object-by-object inventory if followed by consultation with a tribal government, Native Hawaiian organization officials or traditional religious leaders. A summary must be completed no later than three years after November 16th, 1990 date of enactment. Upon request, Indian Tribes and Native Hawaiian organizations must be given access to collection records, catalogues, relevant studies or other pertinent data for determining geographic and cultural affiliation.

Section 7, 25 U.S.C. 3005a-f: Repatriation

25 U.S.C. 3005a: Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums

If the cultural affiliation of Native American human remains and cultural items established through section 5 of the Act, a repository must expedite the return of such items upon request from a known lineal descendant or affiliated tribe or organization. If cultural affiliation is shown for unassociated objects, sacred objects, or objects of cultural patrimony through section 6 of the Act, a repository must return such objects at the request of the affiliated tribe or organization. The return and manner of delivery of these remains and items must be done through consultation with the requesting descendant, tribe, or organization.

25 U.S.C. 3005b: Scientific Study

If cultural affiliation of Native American human remains or cultural objects has not been established through scientific study during the inventory or summary processes, such items must be returned when a requesting tribe or organization can demonstrate cultural affiliation with a preponderance of evidence of geographical, kinship, biological, archaeological, anthropological,

linguistic, folkloric, oral traditional, or historical nature.

If a lineal descendant, culturally affiliated Indian tribe or Native Hawaiian organization requests the return of Native American human remains or cultural items, a repository must return such items they are indispensable for completing a current, specific scientific study in which the outcome is of major importance or benefit to the United States. In this case, such items must be returned by no later than ninety days after the completion date of the study.

25 U.S.C. 3005c: Standard For Repatriation

If a known descendant or culturally affiliated Indian tribe or Native Hawaiian organization requests the return of Native American cultural objects of a repository cannot prove right of possession, the repository must return such objects.

25 U.S.C. 3005d: Sharing Of Information By Federal Agencies And Museums

A repository must share the information it possesses regarding the human remains or objects in question with known descendants, and affiliated tribes and organizations to assist them in making a repatriation claim.

25 U.S.C. 3005e: Competing Claims

If multiple requests for repatriation of a cultural item occur and a repository cannot determine which party is the most appropriate claimant, they may retain such an item until the parties agree upon the disposition or the dispute is resolved a court with appropriate jurisdiction.

25 U.S.C. 3005f: Museum Obligation

A repository which repatriates such items cannot be liable for claims by another party of breach of fiduciary duty, public trust, or any violations of state law that are not consistent with this Act.

Section 8, 25 U.S.C. 3006a-i: Review Committee

25 U.S.C. 3006a: Establishment

Section 8 outlines the establishment and duties of the NAGPRA Review Committee. The Secretary must establish a committee to monitor inventory and identification processes and repatriation activities required under sections 5, 6 and 7 of this Act. The Secretary is responsible for appointing members of the committee.

25 U.S.C. 3006b: Committee Membership

The Committee must be composed of seven members. Three members must be appointed from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders, with at least two of these members being traditional Indian religious leaders. Three additional members must be appointed through nominations submitted by national museum scientific organizations. The final member must be appointed from a list developed and consented to by all of the members appointed from the prior categories. Federal officers or employees cannot be members of the Committee. In the event of vacancies, the positions must be filled in the same manner as the original appointment within 90 days of the occurrence. Members will serve without pay, though they will be reimbursed equal at the rate for GS-18 of the General Schedule, for the time, including travel, that they the are engaged in committee business.

25 U.S.C. 3006c: Committee Responsibilities

The Committee must designate one member as chairman. The Committee must also monitor the inventory and identification process to ensure fair and objective consideration of all available information and evidence. Upon request from affected parties, the Committee must review and making findings regarding the identity an cultural affiliation of human remains and cultural items and the return of such items. The Committee must facilitate the resolution of

disputes among tribes, organizations, descendants, and Federal repositories regarding the repatriation of such items. The Committee must compile an inventory of culturally unidentifiable human remains that are in the possession of all Federal agency and museums and recommend specific actions to repatriate such remains. The Committee must consult with Indian tribes, Native Hawaiian organizations, Federal agencies, and museums on matters affecting such tribes or organizations regarding the scope of this Act. The committee must consult with the Secretary in developing regulations to carry out this Act. The Committee can make recommendations regarding future care of human remains and cultural items that are to be repatriated.

25 U.S.C. 3006d: Admissibility Of Records

All records and findings of the Review Committee relating to the identity an cultural affiliation of human remains and cultural items and the return of such items are admissible for action under section 15 of this Act.

25 U.S.C. 3006e: Recommendations And Report

The Committee must make all recommendations under consultation with Indian tribes, Native Hawaiian organizations, and appropriate scientific and museum officials.

25 U.S.C. 3006f: Committee Access

The Secretary must ensure that the Committee members have access to the Native American cultural items under review as well as to associated scientific and historical documents.

25 U.S.C. 3006g: Duties Of The Secretary, Regulations, And Administrative Support

The Secretary must establish operational rules and regulations for the Committee and provide administrative support staff as necessary for the deliberations of the Committee.

25 U.S.C. 3006: Annual Report To Congress

The Committee must submit an annual progress report to the Congress including barriers encountered in implementing this section of the Act.

25 U.S.C. 3006i: Committee Termination

The Committee must terminate at the end of a 120-day period beginning on the day the Secretary reports to Congress that the work of the Committee has been completed.

Section 9, 25 U.S.C. 3007a-d, Penalty Assessment for Museums

Any museum that fails to comply with this Act will be assessed a civil penalty by the Secretary of the Interior. A penalty will be assessed after opportunity for a hearing. Each violation will result in a separate offense.

25 U.S.C. 3007b: Amount Of Penalty

The amount of a penalty will be determined taking into account addition factors, such as the archaeological, historical, or commercial value of the items involved, the economic and noneconomic damages suffered by the aggrieved party, and the number of violations that have occurred.

25 U.S.C. 3007c: Legal Actions To Recover Penalties

If a museum fails to pay a penalty and does not appealed or after a final judgment has been passed, the Attorney General can institute a civil action in the appropriate court to collect the penalty.

25 U.S.C. 3007d: Authority To Issue Subpoenas

In penalty hearings, subpoenas can be issued for the testimony of witnesses as well as for relevant documents.

Section 10, 25 U.S.C. 3008ab: Grants

The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations to assist in the repatriation of Native American human remains and other cultural items. The Secretary is authorized to make grants to museums to assist in conducting inventories and identification processes.

Section 11, 25 U.S.C. 3009: Limitations on Applying the Act

No section of this Act shall be construed as limiting the authority of any Federal agency or museum to repatriate Native American human remains and other cultural items to Indian tribes, Native Hawaiian organizations, individuals, or lineal descendants, or to enter into any agreement with the culturally affiliated tribe or organization regarding the disposition of and control over such items. Nothing in this Act can be construed to delay repatriation requests or limit procedural and substantive rights of Indian tribes and Native Hawaiian organizations. Nothing in this Acts can be construed as limiting any State or Federal law pertaining to theft and stolen property.

Section 12, 25 U.S.C. 3010: Special Relationship between the Federal Government and Indian tribes and Native Hawaiian organizations

This Act reflects the special sovereignty relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and does not set a precedent for any other individual, organization, or foreign government.

Section 13, 25 U.S.C. 3011: Regulations

The Secretary must issue regulations to carry out this Act within 12 months of the November 16, 1990 commencement date.

Section 14, 25 U.S.C. 3012: Authorization of Appropriations

The Secretary is authorized to appropriate funds necessary to carry out this Act.

Section 15, 25 U.S.C. 3013: Judicial Jurisdiction And Enforcement

The United States district courts will have jurisdiction over actions brought by any organization or person for alleged violations of this Act. These courts have the authority to issue orders to enforce the provisions of this Act.

NAGPRA Regulations and Amendments

As outlined in section 13 of NAGPRA, the Secretary of the Interior is responsible for enacting regulations to apply the tenets of the Act. The Office of the Secretary does so by first publishing proposed rules in the Federal Register under Notice of Proposed Rulemaking. These proposed rules are open for a length of time to comment from tribal officials, federal agencies, museums, and academic professionals and professional organizations. After the comment time is over, the Office of the Secretary publishes a Final Rule in the Federal Register along with a summary of comments and the Office's responses. Regulations are listed under volume number of the Federal Register and the page on which the regulation is found.

The Office of the Secretary of the Interior published the first final set of NAGPRA regulations in 1995, codified as 43 CFR 10 (title 43 of the Code of Federal Regulations, part 10). Minor technical errors in the regulations were corrected in 1997 and 2005. To address larger contentions, further amendments were made to address civil penalties in 2003, and the controversial disposition of culturally unidentifiable human remains in 2010. In 2012, issues with factual accuracy and uniformity of terminology were addressed. The corrections were made final by the Office of the Secretary of the Interior in May of 2013.

58 FR 31123-31134, May 1993: Notice Of Proposed Rulemaking

In May of 1993, the Department of the Interior published proposed regulations for implementing NAGPRA. These provisional regulations were listed in the Federal Register as 58

FR 31123, Notice Of Proposed Rulemaking. The Department of the Interior released these proposed rules to solicit comments from Indian tribes, Federal agencies, federal funded museums and universities, professionals and members of the general public to help shape the final regulations. The requirements and deadlines specified in the Act were still applicable during the interim process while final regulations were being negotiated.

60 FR 62158, December 1995: Final Rule

Taking into account comments on the proposed rules, the Department of the Interior published the final rules to implement NAGPRA in December of 1995, listed as 60 FR 62158, Final Rule. This rule translates the statutes of NAGPRA into a set of federal regulations, 43 CFR Part 10.

62 FR 1820, January 1997: Civil Penalties Interim Rule

In January of 1997, the Department of the Interior published 62 FR 1820, the Civil Penalties Interim Rule. The interim rule allowed the Secretary of the Interior to assess a civil penalty against any Federal agency or federal funded repository that failed to comply with NAGPRA regulations. The administrative procedures for addressing failure to comply are providing notice to an institution of failure to comply and issuing a final administrative decision. The penalty is either .25% of an institution's annual budget or \$5000, whichever is less. A \$1000 per day penalty would be assessed if a repository still failed to comply after being given notice and Final administrative decision of the Office of The Secretary of the Interior (Federal Register 1997a).

The Office of the Secretary announced it did intend to issue penalties if it judged that a repository has made a good faith effort to comply within the deadlines set in NAGPRA. The original deadlines for compliance were November 16th, 1993 for completing summaries,

November 16th, 1995, for completing inventories, and May 16th, 1996 (or six months after completing an inventory) for notifying culturally affiliated Indian tribes and Native Hawaiian organizations of the intent to repatriate (Federal Register 1997a). Failing to repatriate human remains, funerary, sacred, or objects of cultural patrimony to the appropriate lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization or repatriating these materials without publishing a notice in the Federal Register are also violations of NAGPRA (Federal Register 1997a).

62 FR 41292 August 1, 1997: Correcting Amendments To Final Regulations

Later in 1997, the Department of the Interior issued 62 FR 41292, correcting technical errors from previous proposed and final regulations (Federal Register 1997b).

68 FR 16354, April 2003: Civil Penalties Final Rule

In April of 2003, after reviewing comments on the interim rule for civil penalties, the Department of the Interior finalized the rule as well as two additional changes with 68 FR 16354. Firstly, the text had been revised to indicate that a notice of failure to comply must be followed by a period during which a repository can request a hearing (Federal Register 2003). If this time elapses without a hearing request, a second notice can be issued, granting a second possibility for a hearing. The second change in the final civil penalties rule pertains to the per-day fine that can be leveled if a repository fails to comply after the final notice of assessment (Federal Register 2003). The amount was changed from \$100 per day as set by the interim rule to a range not in excess of \$1,000 per day that the repository fails to comply with NAGPRA regulations (Federal Register 2003).

70 FR 57177, September 2005: Final Rule/Technical Amendment

In September of 2005, under Secretarial Order 3261, the Department of the Interior reassigned responsibilities within the Department and National Park Service to improve efficient implementation of NAGPRA (Federal Register 2005). This amendment was made through 70 FR 57177. This new set of regulations reassigned responsibility to the Assistant Secretary for Fish and Wildlife and Parks. This agency was made responsible for issuing regulations in consultation with the Assistant Secretary for Indian Affairs, granting extensions for inventories, and awarding monetary grants to assist to Indian tribes, Native Hawaiian organizations, and museums in the repatriation process (Federal Register 2005). In consultation with the Office of the Solicitor, the Assistant Secretary for Fish and Wildlife and Parks is also responsible for executing civil penalties for failure to comply with NAGPRA. The National NAGPRA Program under the National Park Service Director is responsible for running the National NAGPRA Program and providing staff to the Assistant Secretary for Fish and Wildlife and Parks. These duties include preparing regulations, reviewing requests for deadline extensions, publishing repatriation and inventory notices in the Federal Register, and acting as the Designated Federal Official for the NAGPRA Review Committee (Federal Register 2005).

72 FR 13189, March 2007: Proposed Rules and Regulations, Future Applicability

In March of 2007, the Office of the Secretary issued 72 FR 13189, a final rule that applied to Federal agencies and federally funded repositories that still possessed human remains after the expiration of the original summary and inventory deadlines. Within 6 months of the issuance of the new rule, these repositories must provide a summary of collections to “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs” (Federal Register 2007a). Within 2 years of a new post on this list, an inventory must have been prepared in consultation with the newly recognized and culturally affiliated Indian

tribe. If the repository has made a good faith effort to complete the summary and inventory, they may apply for an extension to complete the process. Within 3 years of the receipt of Federal funds or within 3 years of the effective date of this final rule, a repository is required to provide a summary of their collections to any Indian tribe or Native Hawaiian organization that is or is thought to be culturally affiliated with the collections (Federal Register 2007a). Within 5 years of the date of receipt of Federal funds, or within 5 years of the effective date of the final rule, an inventory must be made in consultation with any affiliated Indian tribe or Native Hawaiian organization (Federal Register 2007a).

72 FR 58582, October 2007: Proposed Rule for the Disposition Of Culturally

Unidentifiable Human Remains

In October of 2007, 72 FR 58582 was published in the Federal Register, proposing rules for the disposition of culturally unidentifiable human remains in the possession of federal funded institutions and Federal agencies. In the proposed rules, The NAGPRA Review Committee specified three categories of culturally unidentifiable human remains: those for which cultural affiliation can be established, but the appropriate tribe is not federally recognized, those that represent an identifiable past group for which no present-day tribe can be identified, and those for which the repository believes there is insufficient evidence to identify a culturally affiliated group (Federal Register 2007b).

To address these types of human remains, The Review Committee proposed two models for action. The first model says that return of culturally unidentifiable human remains can take proceed in cases where claimants, repositories, and Federal agencies have agreed in writing that all inventory requirements have been met and alternatives to continued curation have been identified. The second model suggests using regional solutions that account for local historical

and cultural factors. The Review Committee recommended that, within each region, Federal agencies, repositories, Indian tribes, and Native Hawaiian organizations consult and develop a framework for repatriation of culturally unidentified human remains.

Amendments were proposed to NAGPRA that stress temporal and geographic evidence when attempting to identify or return these human remains. A repository must consult with a tribe or Hawaiian organization within 90 days of a request for remains. Without a request, an institution must consult with an indigenous group in the area in which the remains were found before transferring control of culturally unidentifiable human remains and associated funerary objects. Consultation can also take place with a group aboriginally occupied the land from which the human remains and associated funerary objects were taken.

A cultural relationship with the land can also be used when determining repatriation of human remains. If not cultural affiliation cannot be found through prior means, a cultural association to the region in which the repository or Federal agency is located can determine to whom the remains are returned. Control of the remains should be returned to the indigenous group showing the strongest cultural affiliation through these geographical means. If no federally recognized group can make a case for association, repositories can consult with non-federally recognized indigenous groups. Any associated funerary objects with the culturally unidentifiable human remains must be transferred with the remains.

75 FR 12378 March 15, 2010: Final Rule, Disposition Of Culturally Unidentifiable

Human Remains

Taking into account extensive public comments and agency reviews, the Department of Interior published 75 FR 12378, the Final Rule on the Disposition Of Culturally Unidentifiable Human Remains. The new rule pertains to the human remains deemed Native

American but without obvious markings of cultural affiliation. This rule eliminates a repository's ability to retain culturally unidentifiable remains for future study. Under the new rule, all such remains must be repatriated through consultation with the groups outlined in the earlier proposed rule.

A foremost comment about the new rule was that Congress had originally intended to allow the study of ancient and culturally unaffiliated human remains. The Department of the Interior's response was that the statute states it should not be interpreted as an authorization for new scientific studies of Native American human remains and associated funerary objects beyond determining cultural affiliation under 25 U.S.C. 3003(b).

Concerns were raised with the constitutionality of the new rule. One comment stated that compliance with the rule might place a repository or agency in violation of state statutes. The response was that, as a Federal law, the Supremacy Clause of the Constitution preempts state law. The Department of the Interior emphasized that the Supremacy Clause is exceptionally clear in Federal Indian law, where the United States has exclusive power (Federal Register 2010). The Department also points out that section 7(f) of the NAGPRA explicitly states that a repository which repatriates an item is not liable for claims of breaching state laws that inconsistent with the provisions of the Act.

Another constitutionality comment stated that the proposed rule violates the Establishment Clause of the First Amendment. This comment focused on a sentence which suggests that repatriation of funerary objects in acknowledgment of Native American spiritual beliefs demonstrates special treatment for the religion of Indian peoples (Federal Register 2010). The respond of the Department is that such a comment misconstrues items used for death rites as

inherently religious. Returning such items does not constitute Federal support of any particular religion to the point of violating the Establishment Clause.

An argument that surfaced after the new rule is that it violates freedom of expression under the First Amendment. This argument claims that freedom of expression includes freedom of scientific inquiry (Hibbert 1999; Weiss 1999). No court in the US, however, has explicitly ruled that such scientific freedom exists (Hibbert 1999). The National Bioethics Advisory Commission stated that even if scientific inquiry was in fact constitutionally protected, the government could still regulate such research in the case of compelling harms (Hibbert 1999). This means that the US government has the authority to prohibit scientific research that could cause severe physical, psychological, or social harm to the individuals involved.

A claim was made that the new rule pertaining to human remains constituted an unconstitutional “taking” of a repository’s property in violation of the Fifth Amendment. The Department’s response was that, under Common Law, human remains are quasi-property as they do not carry full property rights. Because of this, a repository does not have a property claim to culturally unidentifiable human remains unless it has received clear title to the remains from the next of kin or the governing body of the associated Indian tribe or Native Hawaiian organization (Federal Register 2010).

A final comment argued that the new rule would conflict with the opinion in *United States v. Bonnichsen*, the case in which Kennewick Man was ruled to not be Native American under the definition put forth by NAGPRA. The Department of the Interior’s response was that the Bonnichsen opinion only addressed whether Kennewick Man fit NAGPRA’s definition of “Native American”. The new rule does not change the Act’s definition, and is only applicable after such a determination is made.

77 FR 23196, April 2012: Proposed Rules To Provide For Factual Accuracy And Consistency

In April of 2012, The Department of the Interior published 77 FR 23196. The set of proposed rules sought to correct technical, factual or terminology usage errors in the previous sets of NAGPRA regulations.

77 FR 50157, August 2012: Notices, Agency Information Collection Activities 30-Day

Notice of Intention To Request Clearance of Collection Information; Opportunity for Public Comment

Later in 2012, Notice 77 FR 50157 was published by the National Park Service, requesting comments from professionals on NAGPRA collecting inventory completion records, asking if the collection of such data was necessary and if the information would have practical utility (Federal Register 2012b).

78 FR 27078, May 2013: Rules and Regulations, Final Rule

In May of 2013, 78 FR 27078 was issued, correcting technical errors from previous rules. This Final Rule is the most current set of NAGPRA regulations. A proposed amendment that would shorten the terms “human remains”, “cultural sacred, and funerary objects” and “objects of cultural patrimony” to simply “remains” and “objects” was declined to ensure specificity and accordance with the definitions of the terms in the NAGPRA statute. Text was clarified pertaining to priority of ownership. The Final Rule requires the notification of known lineal descendants cases of inadvertent discovery. Ownership priority is given to lineal descendants only in cases of human remains and associated funerary objects. Peoples with cultural affiliation are given priority in cases of sacred and patrimonial objects. Ownership of remains is assigned to a culturally affiliated Indian tribe or Native Hawaiian organization if no living descendants can be identified. It was also clarified that ownership rights go to geographically associated

Native America tribes or Native Hawaiian organization only when lineal descendants and culturally affiliated groups cannot be ascertained.

APPENDIX B

Native American Graves Protection and Repatriation Act AS AMENDED

This Act became law on November 16, 1990 (Public Law 101-601; 25 U.S.C. 3001 et seq.) and has been amended twice. This description of the Act, as amended, tracks the language of the United States Code except that (following common usage) we refer to the "Act" (meaning the Act, as amended) rather than to the "subchapter" or the "title" of the Code.

25 U.S.C. 3001,
Definitions

Section 2

For purposes of this Act, the term—

(1) "**burial site**" means any natural or prepared physical location, whether originally 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.

(2) "**cultural affiliation**" means that there is 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.

(3) "**cultural items**" means human remains and—

(A) "**associated funerary objects**" which shall mean objects that, as a 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, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "**unassociated funerary objects**" which shall mean objects that, as a 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, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

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(C) “**sacred objects**” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) “**cultural patrimony**” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) “**Federal agency**” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) “**Federal lands**” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.].

(6) “**Hui Malama I Na Kupuna O Hawai’i Nei**” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) “**Indian tribe**” means 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) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

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(8) “**museum**” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) “**Native American**” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) “**Native Hawaiian**” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) “**Native Hawaiian organization**” means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) “**Office of Hawaiian Affairs**” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) “**right of possession**” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c) of this Act [25 U.S.C. 3005(c)], result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to

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28 U.S.C. 1491 in which event the “right of possession” shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were 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 is deemed to give right of possession to those remains.

(14) “Secretary” means the Secretary of the Interior.

(15) “tribal land” means—

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920 [42 Stat. 108], and section 4 of Public Law 86-3 [note preceding 48 U.S.C. 491].

25 U.S.C. 3002,
Ownership

25 U.S.C. 3002(a),
Native American
human remains and
objects

Section 3

(a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

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(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) [sic] in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) [sic] if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

25 U.S.C. 3002(b),
Unclaimed Native
American remains and
objects

(b) Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act [25 U.S.C. 3006], Native American groups, representatives of museums and the scientific community.

25 U.S.C. 3002(c),
Intentional excavation
and removal of Native
American human
remains and objects

(c) The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979, as amended, [16 U.S.C. 470cc] which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.

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25 U.S.C. 3002(d),
Inadvertent discovery
of Native American
remains and objects

(d)(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

25 U.S.C. 3002(e),
Relinquishment

(e) Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

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18 U.S.C. 1170,
Illegal trafficking
in Native American
human remains and
cultural items

Section 4

(a) Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

Section 1170

“(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.”

“(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.”

(b) The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

“1170, Illegal Trafficking in Native American Human Remains and Cultural Items.”

25 U.S.C. 3003,
Inventory for human
remains and associ-
ated funerary objects

25 U.S.C. 3003(a),
In general

25 U.S.C. 3003(b),
Requirements

Section 5

(a) Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b)(1) The inventories and identifications required under subsection (a) of this section shall be—

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(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after November 16, 1990, [the date of enactment of this Act], and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8 of this Act [25 U.S.C. 3006].

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term “**documentation**” means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not 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.

25 U.S.C. 3003(c),
Extension of time for
inventory

(c) Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B) of this section. The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

25 U.S.C. 3003(d),
Notification

(d)(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

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(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

25 U.S.C. 3003(e),
Definition of
inventory

(e) For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

25 U.S.C. 3004,
Summary for unassociated
funerary objects,
sacred objects, and
cultural patrimony

Section 6

25 U.S.C. 3004(a),
In general

(a) Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall 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.

25 U.S.C. 3004(b),
Requirements for the
summary

(b)(1) The summary required under subsection (a) of this section shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

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(C) completed by not later than the date that is 3 years after November 16, 1990, [the date of enactment of this Act].

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

25 U.S.C. 3005,
Repatriation

25 U.S.C. 3005(a),
Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums

Section 7

(a)(1) If, pursuant to section 5 of this Act [25 U.S.C. 3003], the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6 of this Act [25 U.S.C. 3004], the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

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(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 of this Act [25 U.S.C. 3003], or the summary pursuant to section 6 of this Act [25 U.S.C. 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) of this section and, in the case of unassociated funerary objects, subsection (c) of this section, such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e) of this section, sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

25 U.S.C. 3005(b),
Scientific study

(b) If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

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25 U.S.C. 3005(c),
Standard for
repatriation

(c) If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents 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, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

25 U.S.C. 3005(d),
Sharing of information by Federal agencies and museums

(d) Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

25 U.S.C. 3005(e),
Competing claims

(e) Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

25 U.S.C. 3005(f),
Museum obligation

(f) Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

25 U.S.C. 3006,
Review committee

Section 8

25 U.S.C. 3006(a),
Establishment

(a) Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7 of this Act [25 U.S.C. 3003, 3004, and 3005].

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25 U.S.C. 3006(b),
Committee
membership

(b)(1) The Committee established under subsection (a) of this section shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) of this section shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5 [United States Code].

25 U.S.C. 3006(c),
Committee
responsibilities

(c) The committee established under subsection a) of this section shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004] to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—

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AS AMENDED

This Act became law on November 16, 1990 (Public Law 101-601; 25 U.S.C. 3001 et seq.) and has been amended twice. This description of the Act, as amended, tracks the language of the United States Code except that (following common usage) we refer to the "Act" (meaning the Act, as amended) rather than to the "subchapter" or the "title" of the Code.

25 U.S.C. 3001,
Definitions

Section 2

For purposes of this Act, the term—

(1) "**burial site**" means any natural or prepared physical location, whether originally 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.

(2) "**cultural affiliation**" means that there is 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.

(3) "**cultural items**" means human remains and—

(A) "**associated funerary objects**" which shall mean objects that, as a 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, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "**unassociated funerary objects**" which shall mean objects that, as a 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, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

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25 U.S.C. 3006(g),
Duties of the
Secretary, regulations,
and administrative
support

(g) The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

25 U.S.C. 3006(h),
Annual report to
Congress

(h) The committee established under subsection (a) of this section shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

25 U.S.C. 3006(i),
Committee
termination

(i) The committee established under subsection (a) of this section shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

25 U.S.C. 3007,
Penalty assessment,
museums

Section 9

(a) Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

25 U.S.C. 3007(a),
Penalty

25 U.S.C. 3007(b),
Amount of penalty

(b) The amount of a penalty assessed under subsection (a) of this section shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

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25 U.S.C. 3007(c),
Legal actions to
recover penalties

(c) If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) of this section and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

25 U.S.C. 3007(d),
Authority to issue
subpoenas

(d) In hearings held pursuant to subsection (a) of this section, subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

25 U.S.C. 3008,
Grants

Section 10

25 U.S.C. 3008(a),
Grants to Indian tribes
and Native Hawaiian
organizations

(a) The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

25 U.S.C. 3008(b),
Grants to museums

(b) The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004].

25 U.S.C. 3009,
Limitations on apply-
ing the Act

Section 11

Nothing in this Act shall be construed to—

(1) limit the authority of any Federal agency or museum to—

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on November 16, 1990;

(3) deny or otherwise affect access to any court;

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(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

25 U.S.C. 3010,
Special relationship
between the Federal
Government and
Indian tribes and
Native Hawaiian
organizations

Section 12

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

25 U.S.C. 3011,
Regulations

Section 13

The Secretary shall promulgate regulations to carry out this Act within 12 months of November 16, 1990.

25 U.S.C. 3012,
Authorization of
appropriations

Section 14

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

25 U.S.C. 3013,
Judicial jurisdiction
and enforcement

Section 15

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

National NAGPRA

ND Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq., NAGPRA Full Text. National Park Service, U.S. Department of the Interior. (Online): <http://www.nps.gov/nagpra/MANDATES/INDEX.HTM> Accessed: 09/15/2013.