

UCLA

UCLA Journal of Environmental Law and Policy

Title

In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After

Permalink

<https://escholarship.org/uc/item/1rk888gw>

Journal

UCLA Journal of Environmental Law and Policy, 21(2)

Authors

McKeown, C. Timothy
Hunt, Sherry

Publication Date

2003

DOI

10.5070/L5212019398

Copyright Information

Copyright 2003 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

IN THE SMALLER SCOPE OF CONSCIENCE: THE NATIVE AMERICAN GRAVES PROTECTION & REPATRIATION ACT TWELVE YEARS AFTER

C. Timothy McKeown and Sherry Hutt***

I.

THE TRUE COMPROMISE

Standing before the United States Senate on October 26, 1990, Senator John McCain asked the approval of his colleagues to consider H.R. 5237, the Native American Graves Protection and Repatriation Act¹ (NAGPRA). “The passage of legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation,” stressed McCain, “is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise.”² H.R. 5237 had originally been introduced by McCain’s fellow Arizonan, Representative Morris Udall. With McCain’s urging, the Senate passed the bill by a voice vote. The House of Representatives passed the amended version by unanimous consent the next day.

* Ph.D., Northwestern University, 1988. C. Timothy McKeown is an applied ethnographer with the National NAGPRA Program, National Park Service, 1849 C Street NW, Washington, DC 20240. This article represents the personal opinions of the authors. Some passages have previously appeared in Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363 (1999), and *THE DEAD AND THEIR POSSESSIONS: REPATRIATION IN PRINCIPLE, POLICY AND PRACTICE* (Cressida Fforde et al. eds., 2002).

** J.D., Arizona State University, 1975; Ph.D., Northern Arizona University, 2001. Sherry Hutt is a former judge of the Superior Court, Maricopa County, Arizona, and co-author of *HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT* (1999).

1. 18 U.S.C. § 1170 (2000); 25 U.S.C. §§ 3001–3013 (2000).

2. 136 CONG. REC. S17,173 (1990).

Congress was not acting unilaterally in supporting NAGPRA. A May 11, 1990 letter to House and Senate members urging passage of repatriation legislation was signed by representatives of the American Baptist Churches, American Ethical Union, Church of the Brethren, Church Women United, Evangelical Lutheran Church in America, Friends Committee on National Legislation, Episcopal Church, Jesuit Social Ministries, Mennonite Central Committee, Presbyterian Church, Unitarian Universalist Association of Congregations, United Church of Christ, and the United Methodist Church.³ An October 12, 1990 letter from the American Association of Museums also indicated its support of H.R. 5237.⁴ An October 17, 1990 letter to members of Congress further broadened support for H.R. 5237 to include representatives of the American Civil Liberties Union, American Jewish Committee, American Jewish Congress, Central Conference of American Rabbis, National Council of Jewish Women, and Union of American Hebrew Congregations.⁵ A November 2, 1990 letter urging President George Bush to sign the bill into law further added and diversified parties to this compromise.⁶ The letter was signed by the heads of the Society for American Archaeology, American Anthropological Association, American Association of Physical Anthropologists, Archaeological Institute of America, Association on American Indian Affairs, Native American Rights Fund, National Conference of State Historic Preservation Officers, National Congress of American Indians, National Trust for Historic Preservation, Preservation Action, Society for Historical Archaeology, and Society of Professional Archaeologists.

The long process of which McCain spoke began in 1986, as Congress sought to reconcile four major areas of federal law. As civil rights legislation, Congress wished to acknowledge that throughout U.S. history, Native American human remains and funerary objects suffered from disparate treatment as compared

3. Letter from the Friends Committee on National Legislation to Members of the Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs (May 11, 1990) (on file with authors).

4. Letter from Edward H. Able, Jr., Executive Director, American Association of Museums, to whom it may concern. (October 12, 1990) (on file with authors).

5. Letter from the American Civil Liberties Union to Members of Congress (October 17, 1990) (on file with authors).

6. Letter from the Society for American Archaeology to President George H.W. Bush (November 2, 1990) (on file with authors).

with the human remains and funerary objects of other groups.⁷ Congress also wanted to recognize that the loss of sacred objects by Indian tribes and Native Hawaiian organizations to unscrupulous collectors negatively impacted Native American religious practices.⁸ In making this Indian law, Congress founded its efforts on an explicit Constitutional recognition of tribal sovereignty and the government-to-government relationship between the United States and Indian tribes.⁹ Regarding property law, Congress wanted to clarify the unique status of the dead as well as highlight the failure of American law to adequately recognize traditional concepts of communal property in use by some Indian tribes.¹⁰ Lastly, in terms of administrative law, Congress would direct the Department of the Interior to implement Congress' mandate, including the promulgation of regulations to ensure due process, awarding of grants, and assessment of civil penalties.¹¹ In all, 26 separate bills were proposed or introduced, and two public laws were enacted over a four-year period as a compromise on these multiple issues was negotiated.¹²

7. See House Hearing 101-952, at 4 (1990) ("Protection of Native American burial grounds is not just a matter of safeguarding archeological resources, nor is it just against grave robbing for profit. Most importantly, it is a matter of civil rights for the Indians and for protecting the rights of religious freedom.") (comments of Rep. Bennett); H.R. REP. NO. 101-877, at 13 (1990) ("There was testimony that non-Indian remains which are unearthed are treated much different than those of Indians. The non-Indian remains tend to be quickly studied and then reburied while so many Indian remains are sent to museums and curated.").

8. See 136 CONG. REC. H10,990 (1990) (statement of Rep. Collins) ("H.R. 5237 is necessary to ensure the repatriation of hundreds of sacred objects to Native American communities to reverse several hundreds [sic] years of abuses of a people, their lands, and their very roots.").

9. 25 U.S.C. § 3010 (2003) ("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.").

10. The Act states:

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), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court.

Id. § 3001(13).

11. See *id.* §§ 3001(14), 3002(b), 3002(d)(3), 3003(d)(3), 3006(a)-(b), 3006(f)-(g), 3006(i), 3007-3008(b), 3011 (2003).

12. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-60, 104 Stat. 3048 (1990); National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989); Native American Grave Protection and Repatriation Act, H.R. 5237, 101st Cong. (1990, three versions); Native American Repatriation

NAGPRA reconciled these various concerns by establishing three sets of provisions. Following an introductory section and definitions, Section 3 establishes procedures in the United States Code upon the discovery and, if necessary, excavation or removal of Native American human remains and "cultural items" (including funerary objects, sacred objects, or objects of cultural patrimony) on federal or tribal lands after November 16, 1990.¹³ Section 4 makes it a crime to traffic in Native American human remains or cultural items under certain conditions.¹⁴ Sections 5 through 10 establish procedures to allow lineal descendants, Indian tribes, and Native Hawaiian organizations to repatriate Native American human remains and cultural items from museum and federal agency collections.¹⁵

McCain's "true compromise" went into effect on November 16, 1990. However, interpretation of this or any other law is guided not by continued efforts at compromise but rather by established canons of interpretation. The legal effect of a statute must be determined by either the internal definitions, where supplied, or by the ordinary meaning of the words used in the text.¹⁶ For example:

- Every word must be given legal effect.¹⁷

and Cultural Patrimony Act/Native American Grave Protection and Repatriation Act, S. 1980, 101st Cong. (1989-1990, four versions); Bill to Amend the National Historic Preservation Act, Historic Sites Act, Archaeological Resources Protection Act, and Abandoned Shipwrecks Act, S. 1579, 101st Cong. (1990, two versions); Native American Grave and Burial Protection Act, S. 1021, 101st Cong. (1990); Amendment to the National Defense Authorization Act for Fiscal Year 1991, H.R. 4739, 101st Cong. (1990); Indian Remains Reburial Act, H.R. 1124, 101st Cong. (1990); National American Indian Museum Act, S. 978, 101st Cong. (1989); Native American Burial Site Preservation Act of 1989, H.R. 1381, 101st Cong. (1989); Native American Grave and Burial Protection Act, H.R. 1646, 101st Cong. (1989); National American Indian Museum Act, H.R. 2668, 101st Cong. (1990); Bill to amend the National Historic Preservation Act, Historic Sites Act, Archaeological Resources Protection Act, and Abandoned Shipwrecks Act, H.R. 3412, 101st Cong. (1989); Comprehensive Preservation Act, S. 2912, 100th Cong. (1988); National Museum of the American Indian Act, S. 1722, 100th Cong. (1987, two versions); Native American Cultural Preservation Act/Native American Museum Claims Commission Act, S. 187, 100th Cong. (1987-1988); Indian Remains Reburial Act, H.R. 5411, 100th Cong. (1987); National Museum of the American Indian Act, H.R. 3480, 100th Cong. (1987); Native American Cultural Preservation Act, S. 2952, 99th Cong. (1986).

13. 25 U.S.C. § 3002.

14. 18 U.S.C. § 1170 (2003).

15. 25 U.S.C. §§ 3003-3008.

16. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

17. See *Montclair v. Ramsdell*, 107 U.S. 147 (1882).

- A word used several times in a statute must be interpreted identically in each place.¹⁸
- In contrast, different words used in a statute may not be interpreted to have the same meaning.¹⁹
- Where an ambiguity is identified in the statutory language, the legislative history may be used to resolve the ambiguity.²⁰
- The sequence of changes in a statute prior to enactment provides strong evidence of the meaning of the enacted statute.²¹
- Newer or more specific usage of a word prevails over older or more general usage.²²
- Ambiguous words may not be interpreted in a way that would bring the constitutionality of the statute into question.²³
- Statutes passed for the benefit of Indian tribes must be construed in favor of Indian interests.²⁴

Responsibility for implementing NAGPRA was assigned to the Secretary of the Interior.²⁵ The following overview of NAGPRA's provisions is based on the final rule promulgated by the Department of the Interior and published in the Code of Federal Regulations,²⁶ as well as other administrative and judicial opinions over the 12 years since NAGPRA became law.²⁷

II.

WHO MUST COMPLY WITH THE STATUTE?

Questions of jurisdiction are usually the first asked of any legislation. Congress has limited jurisdiction to place the responsibility for compliance with the statute upon two broad categories of institutions: 1) federal agencies and 2) institutions that receive

18. *Id.* at 152.

19. See *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Atl. Cleaners, Inc. v. United States*, 286 U.S. 427, 433 (1932).

20. See *United States v. Great N. Ry. Co.*, 287 U.S. 144 (1932).

21. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

22. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

23. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).

24. See *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). For further context on some issues discussed herein, see the September/October 2000 *Museum News* article, "NAGPRA at 10: Examining a Decade of the Native American Graves Protection and Repatriation Act."

25. See Colloquium, *The Native American Graves Protection and Repatriation Act*, *FED. ARCHEOLOGY*, Fall/Winter 1995, at 1.

26. See *Native American Graves Protection and Repatriation Regulations*, 43 C.F.R. § 10 (2003).

27. *NAGPRA at 10: Examining a Decade of the Native American Graves Protection and Repatriation Act*, *MUSEUM NEWS*, Sept./Oct. 2000, at 42.

federal funds. In NAGPRA, Congress has chosen to extend responsibility for compliance to the full extent of its domain.

The statute defines a federal agency as "any department, agency, or instrumentality of the United States."²⁸ This definition includes all components of the executive, legislative, and judicial branches of the United States government that either manage land or hold collections of Native American human remains or cultural items, with only one exception: the Smithsonian Institution. The National Museum of the American Indian Act established basic repatriation provisions for the Smithsonian Institution in 1989.²⁹ The more elaborate repatriation provisions established under NAGPRA were also intended to apply to the Smithsonian Institution until just prior to the bill's passage when procedural concerns were raised by the Senate Committee on Rules and Administration.³⁰ Separate legislation to apply some NAGPRA terms and procedures to the Smithsonian was introduced immediately prior to NAGPRA's passage in 1990 but was not voted on by Congress.³¹ Some of these provisions eventually became law in 1996.³²

All federal agencies, except the Smithsonian Institution, must complete summaries and inventories of Native American collections in their control³³ and ensure compliance regarding inadvertent discoveries and intentional excavations conducted on federal or tribal lands.³⁴ Federal agencies are responsible for the appropriate treatment and care of all collections from federal lands being held by non-governmental repositories.³⁵

A museum is defined in the statute as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or

28. 25 U.S.C. § 3001(4) (2000). "Such term does not include the Smithsonian Institution." *Id.*

29. 20 U.S.C. § 80q (2000).

30. See 136 CONG. REC. S17,173 (1990).

31. See National Museum of the American Indian Amendments Act, S. 3217, 101st Cong. (1990).

32. See 20 U.S.C. § 80q.

33. See 25 U.S.C. § 3003-3005. The Internal Revenue Service has determined that it does not have sufficient control of cultural items that are seized and sold under authority of the Internal Revenue Code. Letter from Joyce E. Bauchner, Assistant Chief Counsel for General Litigation, Internal Revenue Service, to Francis P. McManamon, Departmental Consulting Archeologist, National Park Service (August 16, 1996) (on file with authors).

34. See 25 U.S.C. § 3002.

35. See Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10 (2003).

control over, Native American cultural items.”³⁶ As used in this definition, “possession” means having physical custody of such objects with sufficient legal interest to lawfully treat them as part of the museum’s collection.³⁷ “Generally, a museum would not be considered to have possession of human remains [or cultural items] on loan from another individual, museum, or Federal agency.”³⁸ “Control” means “having a legal interest in human remains [or cultural items] sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection,” whether or not the objects are in the physical custody of the museum.³⁹ “Generally, a museum that has loaned human remains [or cultural items] to another individual, museum, or Federal agency is considered to retain control of [those objects].”⁴⁰ “Receives Federal funds” means “the receipt of funds by a museum after November 16, 1990 from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a federal agency makes or made available to a museum aid in the form of funds.”⁴¹ Procurement contracts are not considered a form of federal-based assistance but are provided to a contractor in exchange for a specific service or product. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered federal funds for purposes of these regulations. “For example, if a museum is a part of a State or local government or private university and [that entity] receives Federal funds for any purpose, the museum is considered to receive federal funds.”⁴² The application of federal laws to institutions that receive federal funds is common, being used with such recent legislation as the Americans with Disabilities Act of 1990.⁴³ NAGPRA applies to certified local governments. The statute covers tribal museums if the Indian tribe of which the museum is a part receives federal funds through any grant, loan, or contract (other than a procure-

36. See 25 U.S.C. § 3001(8). The statute continues: “[s]uch term does not include the Smithsonian Institution or any other Federal agency.” *Id.*

37. Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10.2 (a)(3)(i) (2003).

38. *Id.*

39. *Id.* § 10.2 (a)(3)(ii).

40. *Id.*

41. *Id.* § 10.2 (a)(3)(iii).

42. *Id.*

43. 42 U.S.C. §§ 12101–12213 (2000).

ment contract).⁴⁴ The Secretary of the Interior is authorized to assess civil penalties on museums that fail to comply with provisions of the statute.⁴⁵

While an earlier bill would have required private individuals that receive federal funds to comply with the repatriation provisions,⁴⁶ the final statute and regulations do not apply to private individuals, nor to institutions that do not receive federal funds or are not part of a larger entity that receives federal funds.

III.

WHO HAS STANDING TO MAKE A REQUEST?

The regulations provide certain individuals and organizations the opportunity to request Native American human remains and cultural items. Lineal descendants, Indian tribes, and Native Hawaiian organizations may request Native American human remains, funerary objects, and sacred objects. Only Indian tribes and Native Hawaiian organizations may request objects of cultural patrimony. The criteria needed to identify who has standing to make a request are outlined below.

“Lineal descendant” is not defined in the statute. The statute does make clear, however, that lineal descendants have priority over Indian tribes or Native Hawaiian organizations in making requests for human remains, funerary objects, and sacred objects.⁴⁷ “Lineal descendant” is defined by regulation as an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the American common law system of descentance to a known Native American individual whose remains, funerary objects, or sacred objects are being requested.⁴⁸ The necessity for a direct and unbroken line of ancestry between the individual making the request and a known individual is a high standard, but one that is consistent with the preference for disposition or repatriation to lineal descendants required by the statute. Reference to traditional kinship systems in the definition is designed to accommo-

44. See Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10 (2003).

45. See 25 U.S.C. § 3007 (2000); 43 C.F.R. § 10.12.

46. See Native American Repatriation or Cultural Patrimony Act, S. 1980, 101st Cong. (1989).

47. See 25 U.S.C. § 3002(a).

48. See 43 C.F.R. § 10.2 (b)(1).

date the different systems that individual Indian tribes and Native Hawaiian organizations use to reckon kinship.⁴⁹

“Indian tribe” is defined to mean any tribe, band, nation, or other organized Indian group or community of Indians, including any Alaska Native village as defined in or established by the Alaska Native Claims Settlement Act,⁵⁰ which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.⁵¹ This definition was drawn explicitly from the Indian Self Determination and Education Act (ISDEA),⁵² a statute implemented by the Bureau of Indian Affairs since 1976 to apply to a specific list of eligible Indian tribes and Alaska Native villages and corporations. NAGPRA’s use of the definition within the ISDEA precludes extending applicability of NAGPRA to non-federally recognized Indian groups that have been terminated, that are current applicants for federal acknowledgement, or that have only state or local jurisdiction legal status.⁵³ Earlier repatriation bills would have provided standing to both state recognized Indian groups and federally terminated Indian tribes.⁵⁴

A Native Hawaiian organization is defined as “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.”⁵⁵ The statute specifically identifies the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai’i Nei as being Native Hawaiian organizations.⁵⁶ An earlier bill included a provision requiring Native Hawaiian organizations to have a membership of which a majority is Native Hawaiian.⁵⁷ However, this provision was not included in the statute, and the legislative history must be interpreted to mean

49. See 43 C.F.R. § 10.

50. 43 U.S.C. §§ 1601–1629(h) (2000).

51. See 43 C.F.R. § 10.2 (b)(2).

52. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450–458e (2000)).

53. See Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10.2(b)(2).

54. See Native American Cultural Preservation Act, S. 187, 100th Cong., § 3(5) (1990); Native American Cultural Preservation Act, S. 2952, 99th Cong., § 3(5) (1987).

55. 25 U.S.C. § 3001 (11).

56. See *id.*

57. Native American Graves Protection and Repatriation Act, S. 1980, 101st Cong., § (3)(6)(C) (1990).

that Congress considered the additional criterion and decided it should not be included. The Congressional rejection of the Native Hawaiian membership criterion seems prescient in light of the U.S. Supreme Court's recent decision that a state law restricting non-Native Hawaiians from voting for trustees of the Office of Hawaiian affairs was unconstitutional.⁵⁸ Legislation to establish a single Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship was recently introduced in Congress.⁵⁹

Non-federally recognized Indian groups do not have standing to make a direct disposition or repatriation request under the statute. Although they may be comprised of individuals of Native American descent, these groups are not recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Human remains in federal agency or museum collections for which a relationship of shared group identity can be shown with a particular non-federally recognized Indian group are considered "culturally unidentifiable." Federal agencies and museums must retain possession of culturally unidentifiable human remains pending promulgation of regulations, unless legally required to do otherwise, or recommended to do otherwise by the Secretary of the Interior.⁶⁰ Federal agencies and museums that hold culturally unidentifiable human remains may request the Native American Graves Protection and Repatriation Review Committee to recommend disposition of such remains to the appropriate non-fed-

58. *Rice v. Cayetano*, 528 U.S. 495 (2000).

59. *See, e.g.*, A Bill Expressing the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes, S. 1783, 107th Cong. (2001); A Bill to Express the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes, S. 746, 107th Cong. (2001); A Bill to Express the Policy of the United States Regarding the United States Relationship with Native Hawaiians, to Provide a Process for the Reorganization of a Native Hawaiian Government and the Recognition by the United States of the Native Hawaiian Government, H.R. 617, 107th Cong. (2001); S. REP. NO. 107-66 (2001).

60. *See* 43 C.F.R. § 10.9(e)(6).

erally recognized Indian group.⁶¹ The administration of this process is handled by the U.S. National Park Service.⁶²

IV.

WHAT OBJECTS ARE COVERED?

The regulations apply to four types of Native American cultural items: 1) human remains; 2) funerary objects; 3) sacred objects; and 4) objects of cultural patrimony.⁶³ A particular item may fit more than one category.

The term "Native American" means "of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii."⁶⁴ The Department of the Interior subsequently clarified the term to apply to all tribes, peoples, and cultures that occupied the United States prior to historically documented European exploration.⁶⁵ The term is used only to refer to human remains and cultural items. It is not used in the regulations to reference any individual or group with standing to make a request. This usage was first introduced by Representative Udall in H.R. 5237.⁶⁶ Earlier bills had used the term to identify present day Indians, Eskimo, Aleut, and Native Hawaiians.⁶⁷ Some have argued that the term only applies to cultural items for

61. See 25 U.S.C. § 3006(c)(5) (2000). The Review Committee is charged with compiling an inventory of culturally unidentifiable human remains and for recommending specific actions for developing a process for disposition of such remains. *Id.* Since only federally recognized Indian tribes are recognized by the law as having standing to make a claim, "culturally unidentifiable" includes human remains of Native Americans of unknown cultural affiliation, as well as those for whom cultural affiliation is known, but the individual is culturally affiliated to a non-federally recognized Indian group.

62. The law requires the Secretary of the Interior to provide reasonable administrative and staff support necessary for the deliberations of the review committee. § 3006(g)(2). The Departmental Manual delegates administrative responsibilities for the review committee to the Departmental Consulting Archeologist. 519 D.M. 1 (4)(C)(5). The review committee's charter delegates administrative responsibilities for the review committee to the manager, NATIONAL NAGPRA PROGRAM. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE CHARTER (May 5, 2003).

63. § 3001(3). "Cultural items," and four of the five subcategories are defined. The term human remains is not defined in the law.

64. 43 C.F.R. § 10.2(d).

65. See Letter from Francis P. McManamon, Departmental Consulting Archeologist, National Park Service, to Lieutenant Colonel Donald Curtis, Jr., U.S. Army Corps of Engineers-Walla Walla District (December 23, 1997) (on file with authors).

66. Native American Grave Protection and Repatriation Act, H.R. 5237, 101st Cong., § (2)(11) (1990).

67. Native American Grave Protection and Repatriation Act, S. 1980, 101st Cong., § 3(1) (1990).

which there is proof of a relationship with present-day Native people.⁶⁸ This interpretation would appear to be counter to the specific intent of Congress since the statute calls for the identification and development of a process for the disposition of human remains or cultural items for which a relationship with present-day lineal descendant, Indian tribe, or Native Hawaiian organization cannot be shown.⁶⁹

“‘Human remains’ means the physical remains of a body of a person of Native American ancestry.”⁷⁰ The term has been interpreted broadly to include bones, teeth, hair, ashes, and mummified or otherwise preserved soft tissues.⁷¹ The regulations make no distinction between fully articulated burials and isolated bones and teeth.⁷² The term applies equally to recent and ancient Native American human remains.⁷³ The term does not include remains, or portions of remains, freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets.⁷⁴ Purposefully disposed human remains should not be considered either freely given or naturally shed.⁷⁵ For the purposes of determining cultural affiliation, human remains incorporated into funerary objects, sacred objects, or objects of cultural patrimony are considered as part of that object.⁷⁶ This provision is intended to prevent the destruction of a cultural item that is affiliated with one Indian tribe but incorporates human remains affiliated with another Indian tribe.⁷⁷ Human remains that have been repatriated under NAG-

68. See Plaintiffs' Memorandum In Support of Motion to Vacate Second Administrative Action, *Bonnichsen v. U.S.*, No. 96-1481, 217 F.Supp.2d 1116 (D.Or. 2002).

69. See 25 U.S.C. § 3002(b) (2000); *id.* § 3006(c)(5).

70. See 43 C.F.R. § 10.2(d)(1) (2003).

71. See Definition of Human Remains, *id.* § 10.2(d)(1).

72. *Id.*

73. NAGPRA sets no age limit for protection, unlike ARPA, 16 U.S.C. § 470aa (2000), which only applies to items in excess of 100 years of age, *id.* § 470bb(1).

74. See Definition of Human Remains, *id.* § 10.2(d)(1). For example, small scalplocks were commonly placed with the deceased as part of traditional Hawaiian burial custom. See Notice of Inventory Completion for an Associated Funerary Object in the Possession of the Santa Cruz City Museum of Natural History, Santa Cruz, CA, 61 Fed. Reg. 16,264-65 (Apr. 12, 1996). These would not be considered as human remains under NAGPRA since they were given freely. *Id.* They may fit the definition of funerary object since they are exclusively made for burial purposes. *Id.*

75. 43 C.F.R. § 10; Final Rule, Preamble, 60 Fed. Reg. 62,137 (Dec. 4, 1995).

76. See *id.* § 10.2(d)(1).

77. 43 C.F.R. § 10; Final Rule, Preamble, 60 Fed. Reg. 62,137 (Dec. 4, 1995).

PRA to date include complete and partial skeletons, isolated bones, teeth, scalps, and ashes.⁷⁸

“Funerary objects” are defined as “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.”⁷⁹ Items that inadvertently came into contact with human remains are not considered to be funerary objects.⁸⁰ Certain Indian tribes, particularly those from the northern plains, have ceremonies in which objects are placed near, but not with, the human remains at the time of death or later.⁸¹ These items should also be considered funerary objects. Funerary objects that have been repatriated under NAGPRA to date include: beads of various types; pottery jars, bowls, and shards; tools and implements of wood, stone, bone, and metal; trade silver and other goods; weapons of many types, including rifles and revolvers; and articles or fragments of clothing.⁸²

“Sacred objects” are defined as “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.”⁸³ Traditional religious leaders are individuals recognized by members of an Indian tribe or Native Hawaiian organization as being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe’s or organization’s cultural, ceremonial, or religious practices.⁸⁴ Sacred objects that have been repatriated under NAGPRA to date include medicine bundles, prayer sticks, pipes, effigies and fetishes, basketry, rattles, and a

78. This summary of human remains is based on a review of the 661 Notices of Inventory Completion published in the 12 years since NAGPRA became law. All of these notices are *available at*: <http://www.cast.uark.edu/other/nps/nagpra/nic.html> (last visited June 24, 2003).

79. 25 U.S.C. § 3001(2)(3)(A).

80. 43 C.F.R. § 10; Final Rule, Preamble, 60 Fed. Reg. 62,137 (Dec. 4, 1995).

81. 43 C.F.R. § 10; Final Rule, Preamble, 60 Fed. Reg. 62,137 (Dec. 4, 1995).

82. This summary of funerary objects is based on a review of the 661 Notices of Inventory Completion and 237 Notices of Intent to Repatriate published in the 12 years since NAGPRA became law. All of these notices are *available at*: <http://www.cast.uark.edu/other/nps/nagpra/nic.htm> (last visited June 24, 2003); <http://www.cast.uark.edu/other/nps/nagpra/nir.html> (last visited June 24, 2003).

83. 25 U.S.C. § 3001(3)(C) (2000).

84. *See* 43 C.F.R. § 10.2(d)(3).

birchbark scroll.⁸⁵ Some earlier bills had included much broader definitions of "sacred object."⁸⁶ Other earlier bills included narrower definitions of the term, such as a requirement that sacred objects not only be needed currently for religious practice, but also were devoted to a ceremony in the past.⁸⁷ The term was amended to its final form shortly before passage.⁸⁸

"Objects of cultural patrimony" are defined as items "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."⁸⁹ These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal member.⁹⁰ Such objects must have been considered inalienable by the affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group.⁹¹ Objects of cultural patrimony that have been repatriated under NAGPRA to date include a wolf-head headdress, a clan hat, several medicine bundles, and ceremonial masks of varying types.⁹²

It should be stressed that the definitions of human remains, funerary objects, sacred objects, and objects of cultural patrimony simply define the applicability of the regulations and do not in any way attempt to restrict other concepts of "sacredness" or "patrimony." Further, the four categories are not mutually exclusive. Items fitting both the sacred object and object of cultural patrimony definitions that have been repatriated under NAGPRA to date include Zuni ahayuda (also known as War

85. This summary of sacred objects is based on a review of the 237 Notices of Intent to Repatriate published in the 12 years since NAGPRA became law. <http://www.cast.uark.edu/other/nps/nagpra/nir.html> (last visited June 24, 2003).

86. Native American Cultural Preservation Act, S. 2952, 99th Cong., § 3(10) (1986).

87. Native American Grave Protection and Repatriation Act, H.R. 5237, 101st Cong., § (2)(14) (1990); *id.* § 2(3)(B). This language was deleted by the House Resources Committee at markup on October 10, 1990, and was not included in the final statute. It reappeared in the final regulations promulgated by the Department of the Interior. Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10.2(d)(3).

88. *See* H.R. 5237, 101st Cong., § (2)(3)(C) (1990).

89. 25 U.S.C. § 3001(2)(3)(D).

90. *See id.*

91. *See* 43 C.F.R. § 10.2(d)(4).

92. This summary of objects of cultural patrimony is based on a review of the 237 Notices of Intent to Repatriate published in the 12 years since NAGPRA became law. All of these notices are available at: <http://www.cast.uark.edu/other/nps/nagpra/nir.html> (last visited June 24, 2003).

Gods), a Sun Dance wheel, ceremonial masks of several types and functions, and a tortoise shell rattle.⁹³

IV.

WHAT ACTIVITIES ARE REQUIRED?

The NAGPRA regulations bring together federal agencies and museums that receive federal funds with lineal descendants, Indian tribes, and Native Hawaiian organizations to resolve the complex issues surrounding custody of Native American human remains and cultural items. The regulations outline two sets of activities to ensure the proper disposition or repatriation of these objects. The first set of activities provides a mechanism for federal land managers to consult with Indian tribes and Native Hawaiian organizations to determine the appropriate disposition of Native American human remains and cultural items that are or might be discovered, removed, or excavated on federal or tribal lands. The second set of activities provides a mechanism for federal agency or museum officials to consult with and, upon request, repatriate Native American human remains and cultural items in their collections to lineal descendants or culturally affiliated Indian tribes or Native Hawaiian organizations. The activities for dealing with excavations or discoveries on federal or tribal lands are different than those for dealing with museum and federal agency collections.

A. *Discovery, removal, or excavation from federal or tribal lands*

Provisions that apply to discovery, removal, or excavation went into effect on November 16, 1990, the date the statute was enacted.⁹⁴ Though earlier bills applied to all lands,⁹⁵ these provisions generally apply only to federal lands and tribal lands.⁹⁶ These provisions do not generally apply to private, municipal, or state lands, but have occasionally been explicitly applied to non-federal lands.⁹⁷ These provisions generally do not apply to un-

93. *Id.*

94. 25 U.S.C. § 3002.

95. *See, e.g.*, Native American Burial Site Preservation Act of 1989, H.R. 1381, 100th Cong., § (3)(b) (1989).

96. *See* 25 U.S.C. § 3002(a) ("The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990.").

97. The Water Resources Act, which transferred land from the Department of Defense, Army Corps of Engineers, to the State of South Dakota, but which re-

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT		
All provisions apply to: 1) lineal descendants, Indian tribes, and Native Hawaiian organizations; and 2) Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.		
Specific provisions for:	Planned excavations and inadvertent discoveries on Federal or tribal land	Collections held by Federal agencies or museums that receive Federal funds.
Term for transference of control:	Disposition	Repatriation
Deadlines:	Effective November 16, 1990	Summaries: November 16, 1993 Inventories: November 16, 1995
Priority of control:	1. lineal descendant 2. Indian tribe land owner 3. culturally affiliated Indian tribe 4. Indian tribe with stronger cultural relationship 5. Indian tribe that aboriginally occupied area 6. unclaimed	1. lineal descendant — 2. culturally affiliated Indian tribe — — 3. culturally unidentifiable
Reference:	local newspaper(s) 25 USC 3002 (§ 3) 43 CFR 10 (B) (\$10.3-10.7)	Federal Register 25 USC 3003-3005 (§§ 5-7) 43 CFR 10 (C) (\$10.8-10.13).

dertakings involving federal funds conducted pursuant to the National Historic Preservation Act.⁹⁸ However, human remains or cultural items obtained through such an undertaking may fall under the summary or inventory provisions once the items come under the control of a federal agency or museum.⁹⁹

tained in the federal government the responsibility for compliance with NHPA, ARPA and NAGPRA on the transferred lands. See 43 U.S.C. §§ 1198-1200e (2000) (enacting rules for transfer of land from tribes to the Corps of Engineers, accepting government responsibility for relocation of burials, and naming the area Lake St. Francis Case).

98. 16 U.S.C. §§ 470-470x-6 (2000). NHPA applies to undertakings on state and private land involving federal funds or requiring a federal permit or license. *Id.* § 470f. As such, applicability of NHPA follows the receipt of federal funds or permission while NAGPRA is land based and restricted, absent an act of congress, to federal or Indian land.

99. 43 C.F.R. § 10.13 (2003) states: "The collection provisions of NAGPRA apply to each federal agency and each museum that has possession or control over holdings or collections of Native American cultural items." 25 U.S.C. §§ 3003 (a) and

Federal regulations contain detailed provisions regarding discovery, removal and excavation. These regulations outline a process for advance planning when human remains or cultural items may be impacted by development, as well as for those incidents when such planning has not occurred and human remains or cultural items are discovered. The two scenarios addressed are “intentional excavation” and “inadvertent discovery.” Inadvertent discovery refers to the unanticipated detection of human remains or cultural items found under or on the surface of federal or tribal lands.¹⁰⁰ Any person who knows, or has reason to know, that he or she has inadvertently discovered human remains or cultural items on federal or tribal lands after November 16, 1990 must provide immediate telephone notification of the inadvertent discovery, as well as written confirmation, to the responsible federal land manager.¹⁰¹ Inadvertent discoveries on tribal lands must be reported immediately to the responsible Indian tribe official. Additionally, if the inadvertent discovery occurred in connection with an on-going activity, the person must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the human remains or cultural items.¹⁰² All federal authorizations to carry out land use activities on federal or tribal lands, including leases and permits, must include this notification requirement.¹⁰³ As soon as possible, but not later than three working days after receipt of the written confirmation of notification, the federal land manager must notify the appropriate Indian tribes or Native Hawaiian organizations and begin consultation about the disposition of human remains or cultural items.¹⁰⁴ The activity that resulted in the inadvertent discovery may resume thirty days after certification by the federal land manager of receipt of the written confirmation of notification.¹⁰⁵ The activity may also resume in less than 30 days if a written, binding agreement is executed between the federal agency and the affiliated Indian tribes or Native Hawaiian organizations that enacts a re-

3004 (a). Many states assume control of human remains and other cultural items recovered as part of ongoing activities on state and private lands. A separate section of the regulations has been reserved to establish procedures regarding newly acquired collections.

100. *Id.* § 10.2(g)(4).

101. *Id.* § 10.4(b).

102. *Id.* § 10.4(c).

103. *Id.* § 10.4(g).

104. *Id.* § 10.4(d)(1).

105. *Id.* § 10.4(d)(2).

covery plan for the excavation or removal of the human remains or cultural items.¹⁰⁶ These items may then be removed or excavated following the provisions for intentional excavation.

Intentional excavation is the “planned archeological removal of human remains [or cultural items] found under or on the surface of Federal or tribal lands.”¹⁰⁷ Federal land managers are required to take reasonable steps to determine whether a planned activity may result in the excavation of human remains or cultural items.¹⁰⁸ The intentional excavation of human remains or cultural items on federal lands can only occur after consultation with the appropriate Indian tribes and Native Hawaiian organizations. Earlier bills had also required the consent of the appropriate Indian tribes and Native Hawaiian organizations prior to excavations of federal lands.¹⁰⁹ In the case of tribal lands, intentional excavation of human remains and cultural items can only proceed with the consent of the appropriate Indian tribe or Native Hawaiian organization.¹¹⁰ Proof of consultation or consent must be shown to the official responsible for the issuance of the required permit.¹¹¹

The excavation or removal of human remains or cultural items must generally comply with the requirements of the Archaeological Resources Protection Act of 1979 (ARPA)¹¹² and its implementing regulations. The land manager may issue a permit or otherwise authorize the excavation or removal of human remains or cultural items only if the individual carrying out the activity: 1) has a graduate degree in anthropology or archeology, or equivalent training and experience; 2) has a demonstrated ability to plan, supervise, and complete similar activities; and 3) outlines the nature and extent of the work proposed, including how it will be conducted, proposed time of performance, and locational maps.¹¹³ Some provisions of the ARPA – such as the notion that

106. *Id.*

107. *Id.* § 10.2(g)(3).

108. *Id.* § 10.3(c).

109. Native American Graves Protection and Repatriation Act, S. 1980, 101st Cong., § 5(a)(2) (1990); Native American Graves Protection and Repatriation Act, H.R. 5237, 101st Cong., § 3(c)(2) (1990).

110. *See* 43 C.F.R. § 10.3(b)(2).

111. *See id.* § 10.3(b)(4).

112. 16 U.S.C. §§ 470aa–470mm (2000).

113. *See* 43 C.F.R. § 7.8 (2003).

all archeological resources obtained from federal lands remain federal property – are superseded by NAGPRA.¹¹⁴

Sixteen civil cases involving NAGPRA's excavation and discovery provisions have been filed in federal court over the last twelve years.¹¹⁵ Briefly, these cases are as follows:

- In *Abenaki Nation v. Hughes*,¹¹⁶ the court affirmed that the excavation and discovery provisions of the statute apply only to federal and tribal lands, and not to federal undertakings conducted on municipal lands.¹¹⁷ Excavations and discoveries on non-federal and non-tribal lands are typically covered by state and local burial laws.
- In *Four Corners Action Coalition v. Bureau of Reclamation*,¹¹⁸ the court enjoined the federal agency from conducting archeological testing on federal land until it conducted the required consultation with affiliated Indian tribes.¹¹⁹ The injunction remained in effect for nearly a decade.
- In *Klamath Tribes v. U.S. Army Corps of Engineers*,¹²⁰ the court dealt with a complicated situation involving the inadvertent destruction of Native American burial sites on federal lands as part of a federally permitted undertaking on adjacent private land.¹²¹ Here, the private landowner removed fill dirt containing human remains for use in an earthen dam. The landowner entered a guilty plea to a violation of the ARPA and entered into an agreement which allowed him to maintain the earthen dam on his property. The court still has not resolved the tribal claims to the human remains here, where the remains are now ensconced in the dam.
- In *Monet v. United States*,¹²² the court dismissed a former land owner's request to disinter, or remove, Native American human remains from land sold by the Internal Revenue Service as part

114. ARPA specifies that items "removed from public lands will remain the property of the United States." 16 U.S.C. § 470cc (b)(3). NAGPRA sets forth a process to determine "ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands." 25 U.S.C. § 3002(a).

115. See Hutt & McKeown, *supra* note 1, for more detailed accounts of most of the pre-1999 cases.

116. 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

117. *Abenaki Nation*, 805 F. Supp. at 252.

118. No. 92-Z-341 (D. Col. Sept. 17, 1992) (order granting preliminary injunction).

119. *Id.* at 10.

120. No. 95-975 (D. Or. July 29, 1997) (order granting motion to dismiss).

121. *Id.* at 2.

122. 114 F. 3d 1195 (9th Cir. 1997).

of a foreclosure sale.¹²³ NAGPRA does not require that discovered human remains be removed or excavated.

- In *Bonnichsen v. United States*¹²⁴ and *Asatru Folk Assembly v. United States*,¹²⁵ the court vacated the U.S. Army Corps of Engineers' decision regarding the disposition of human remains believed to be over 9,000 years old and remanded it to the agency for reconsideration. The Corps subsequently delegated responsibility for the decision to the Department of the Interior, which affirmed the Corps' earlier decisions that the remains are Native American, are culturally affiliated with several Indian tribes, and were found within the aboriginal territory of the Umatilla tribe.¹²⁶ In its final decision, the court found the government's decision to be arbitrary and capricious. The court held that the government erred by failing to associate the human remains with a specific "identifiable earlier group." The court objected to the government's use of oral tradition evidence to establish cultural affiliation. The court reinterpreted the definition of "Native American" to mean only those cultural items that are affiliated with a present-day Indian group. Lastly, having previously found that the five tribes claiming the human remains did not have standing to intervene, the court found that the government's consultation with the tribes compromised its ability to be fair. Rather than remanding the decision to the government pursuant to the Administrative Procedure Act, the court granted a judicial ARPA permit to the plaintiffs with the terms and conditions to be set in the future by the court. The tribes were subsequently granted standing to appeal the decision and both the tribes and the government have filed opening briefs, along with several amicus parties.¹²⁷

123. *Id.* at 1197.

124. 969 F. Supp. 614 (D. Or. 1997).

125. 969 F. Supp. 628 (D. Or. 1997).

126. Letter from Secretary of the Interior Bruce Babbitt to Secretary of the Army Louis Caldera, September 21, 2000.

127. At the time of publication, the United States and the joint tribal claimants of the Yakama Nation, Colville Confederated Tribes, Nez Perce, and Confederated Tribes of the Umatilla Indian Reservation have filed an appeal in the Ninth Circuit on the issue of the court's definition of "indigenous" and application of law. The tribes have also appealed the failure of the court to grant intervention as a party with standing to make a claim. Amicus briefs have been filed by the Haudenosaunee Standing Committee and the Association on American Indian Affairs/Morning Star Institute on behalf of the tribes and by Sherry Hutt on behalf of the tribes and the government. The plaintiffs have filed an answering brief and seven volume excerpt of record and additional testimony by the plaintiffs by affidavit. The Plaintiffs/Appellants argue the importance of the remains and the need to establish an exact date of the find. The Society for American Archaeology, Ohio Archaeological Council, and Texas Historical Commission have each filed an amicus brief. The Society for American Archaeology and Ohio Historical Society stress the im-

- In *Idrogo v. United States Army*,¹²⁸ the court dismissed claims by a non-Native American individual and a non-federally recognized Indian group to disinter the remains of Geronimo from his burial site on federal land, determining that the plaintiffs lacked standing.¹²⁹
- In *Yankton Sioux Tribe v. U.S. Army Corps of Engineers (Yankton I)*,¹³⁰ the court enjoined the agency from raising the level of a reservoir until inadvertently discovered human remains could be removed.¹³¹ Provisions of the ARPA were waived by the court. The court also affirmed that the statute must be considered Indian law with any ambiguities construed in favor of Indian interests.
- In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*,¹³² the tribe requested a temporary restraining order and permanent injunction of continued water releases from a dam operated by the Corps of Engineers on the Missouri River.¹³³ The tribe charged that lowering the water levels constituted an ongoing activity resulting in the exposure of human remains and associated funerary objects at three sites on tribal land. The court issued the restraining order. In a settlement agreement, the Corps of Engineers agreed to conduct an investigative survey at two of the sites and stabilize a third. The Corps of Engineers also agreed to regularly monitor the sites for looting and erosion.
- In *Western Mohegan Tribe & Nation v. State of New York*,¹³⁴ a non-federally recognized Indian group requested a preliminary injunction of development activities on state lands, alleging that the state was in violation of federal laws, including NAGPRA.¹³⁵ The district court denied the request on the grounds that the Western Mohegan Tribe lacked standing to make a claim under NAGPRA. While part of the district opinion was vacated and remanded on appeal, the district court opinion regarding non-applicability of NAGPRA was affirmed.

portance of the discovery. The Texas Historical Society argues that an inability to retain the remains will inhibit their ability to conduct survey work under § 106 of the National Historic Preservation Act. For an update on the progress of the litigation from the perspective of the Plaintiffs/Appellants see <http://www.friendsofamericaspast.org>.

128. 18 F. Supp. 2d 25 (D.D.C. 1998).

129. *Id.* at 27.

130. 83 F. Supp. 2d 1047 (D.S.D. 2000).

131. *Id.* at 1061.

132. No. 00-1023 (D.S.D. Apr. 17, 2001) (order approving settlement agreement).

133. *See id.* for the details of the facts and the settlement agreement discussed in this paragraph.

134. 246 F.3d 230 (2d Cir. 2001).

135. *Id.* at 231.

- In *Kickapoo Traditional Tribe v. Chacon*,¹³⁶ the tribe had taken the body of one of its members from the mortuary and buried it on reservation land. When the coroner ordered an autopsy with the concurrence of the next of kin, the tribe requested a temporary restraining order. The court initially issued a temporary restraining order and the coroner withdrew her order for an autopsy.¹³⁷ The court then vacated its temporary restraining order finding in part that NAGPRA was not intended to apply to a recently buried corpse which was less than 100 years old and of no particular cultural or anthropological interest.¹³⁸ Such tortured logic was not necessary since the statute gives preference to lineal descent claims and explicitly protects the applicability of state and federal law pertaining to theft or stolen property.
- In *Castro Romero v. Becken*,¹³⁹ the plaintiff, a member of a non-federally recognized Indian group, claimed \$100 million in damages for the excavation of Native American human remains during a project conducted on municipal lands.¹⁴⁰ The Texas Historical Commission assumed control of the remains and, with the concurrence of the U.S. Army Corps of Engineers, turned the human remains over to the municipality for reburial. The court dismissed Romero's claim for damages, arguing that NAGPRA applies only to human remains and cultural items recovered from federal lands. The district court's opinion was affirmed on appeal. However, both the Texas Historical Commission, who initially had possession and control of the remains, and the City of Universal City, who eventually acquired the remains, received federal funds and should have been required to prepare an inventory of the human remains in consultation with lineal descendants and culturally affiliated Indian tribes. A state that asserts dominion and control over human remains, funerary objects, sacred objects, or objects of cultural patrimony triggers the collection provisions of NAGPRA.
- In *City of Wetumpka v. Norton*,¹⁴¹ the city argued that the Poarch Band Creek failed to notify affected Indian tribes of human remains allegedly discovered on tribal lands. The city also argued that the Secretary of the Interior had failed to provide adequate oversight of the tribe's historic preservation program.¹⁴² The suit was ultimately withdrawn.

136. 46 F. Supp. 2d 644 (W.D.Tex. 1999).

137. Carmina Danini, *Justice Withdraws Order for Autopsy*, SAN ANTONIO EXPRESS-NEWS, Mar. 18, 1999, at 16A.

138. *Kickapoo Traditional Tribe*, 46 F. Supp. 2d at 649-51.

139. 256 F.3d 349 (5th Cir 2001).

140. *Id.* at 354.

141. No. 01-1146-N (M.D. Ala. Nov 21., 2001) (order granting motion to dismiss).

142. Plaintiffs' Complaint at 10, *id.*

- In *Crow Creek Sioux Tribe v. U.S. Army Corps of Engineers*, the tribe asked for an injunction against the transfer of federal land to the state of South Dakota, arguing that the Corps had not complied with provisions of NAGPRA.¹⁴³ Though the court agreed that the Corps had failed to comply with the statute, it refused to halt the land transfer, leaving the NAGPRA issues to be handled separately.¹⁴⁴ The appeals court dismissed the tribe's challenge for lack of standing.
- In *Oglala Sioux Tribe v. South Dakota*, the tribe argued that burial sites on federal land should not be transferred to the state of South Dakota or the Lower Brule and Cheyenne River Sioux Tribes because, according to the 1868 Treaty of Laramie, they belong to the Oglala Sioux Tribe.¹⁴⁵
- In *Yankton Sioux Tribe v. United States Army Corps of Engineers (Yankton II)*,¹⁴⁶ the court enjoined the state of South Dakota from continuing the excavation or removal of Native American human remains from land recently transferred to the state by the Corps.¹⁴⁷

In summary, review of the sixteen cases reveals that seven of the plaintiffs were Indian tribes, five represented non-federally recognized Indian groups, and four were non-Indian parties. Twelve of the sixteen lead defendants were federal agencies, with the U.S. Army Corps of Engineers being the most commonly sued agency. Eleven of the complaints involved excavations on either federal land or state land for which NAGPRA provisions specifically applied. In over half of these, the federal activity was enjoined or the federal decision was vacated. Two complaints involved excavations on tribal land, both of which were dismissed. The remaining three complaints involved excavations on state, municipal, or private lands, which were each dismissed.

143. See Jim Kent, *Federal Judge Okays South Dakota Land Transfer*, NATIVE-TIMES.COM, Feb. 1, 2002 (discussing case), at <http://www.nativetimes.com>; Jeanne Koster, *SDPJIC Affirms Stand of Crow Creek Sioux*, PEOPLE'S VOICE, Dec. 11, 2001 (same); David Melmer, *Missouri River Land Issue Goes to Appeals Court*, INDIAN COUNTRY TODAY, Mar. 25, 2002 (same); Charmaine White Face, *A Mouse Has Roared*, RAPID CITY J., Jan. 11, 2002 (same).

144. See *id.*

145. Joe Kafka, *Tribe Goes to Court over Land Transfer*, MIDWEST NEWS, Dec. 27, 2001 (discussing case), at http://www.yankton.net/stories/122701/new_1227010007.shtml.

146. 209 F.Supp. 2d 1008 (D.S.D. 2002).

147. *Id.* at 1011.

B. *Museum and federal agency collections*

The statute also requires federal agencies and museums to inform Indian tribes and Native Hawaiian organizations of human remains and cultural items in their collections.¹⁴⁸ Distribution of this information is achieved through two types of documents: 1) summaries and 2) inventories.

Summaries are written descriptions of collections that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony.¹⁴⁹ Unassociated funerary objects are funerary objects for which the associated human remains are not in the possession or control of the federal agency or museum and can be shown by a preponderance of the evidence as: being related to specific individuals or families; being related to known human remains; or, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.¹⁵⁰ The summaries to have been completed by November 16, 1993 amount to a simple notification to each Indian tribe and Native Hawaiian organization of the nature of the collections held by the federal agency or museum.¹⁵¹ The summary is intended as an initial step to bring Indian tribes and Native Hawaiian organizations into consultation with a federal agency or museum,¹⁵² which was not required before completion of the summary.¹⁵³ Identification of specific unassociated funerary objects, sacred objects, or objects of cultural patrimony must be done in consultation with Indian tribe representatives and traditional religious leaders since few, if any, federal agencies or museums have personnel with the expertise necessary to make such identification.¹⁵⁴ Copies of the summaries must also be provided to the National Park Service.¹⁵⁵ To date, summary information has been received from 1,058 federal agencies and museums. These and other requirements for summaries are de-

148. See generally 25 U.S.C. §§ 3003–3004 (2000).

149. *Id.* § 3004(a).

150. *Id.* § 3001(3)(B) (2000). A burial site is defined as “any natural or prepared physical location, whether originally below, on, or above the surface of the earth,” into which human remains were deposited as part of the death rite or ceremony of a culture. *Id.* § 3001(1).

151. *Id.* § 3004 (b)(1)(A) ; (b)(1)(C).

152. *Id.* § 3004 (b)(1)(B).

153. *Id.* § 3004 (b)(1) (“The summary required under subsection (a) of this section shall be (B) followed by consultation”).

154. 43 C.F.R. § 10 (2003); Final Rule, Preamble, 60 Fed. Reg. 62,137 (Dec. 4, 1995).

155. 43 C.F.R. § 10.8(d)(3).

tailed by regulation.¹⁵⁶ A section has been reserved in the regulations to outline the continuing responsibilities of federal agencies and museums.¹⁵⁷ Pending promulgation of that section, federal agency and museum officials should periodically review their summary submission to make sure it is accurate and updated to reflect new acquisitions, information, and newly recognized Indian tribes. The requirement to produce summaries was not introduced until one month before NAGPRA became law.¹⁵⁸

The second of the informational documents, the inventories, are item-by-item descriptions of human remains and associated funerary objects.¹⁵⁹ "Associated funerary objects" are those funerary objects for which the associated human remains are in the possession or control of an agency or museum.¹⁶⁰ Unlike the summaries, inventories must have been completed in consultation with Indian tribes and Native Hawaiian organizations and represent a decision by the museum or federal agency official as to the cultural affiliation of particular human remains or associated funerary objects. Inventories were to be completed by November 16, 1995 and provided to the culturally affiliated Indian tribes and Native Hawaiian organizations, as well as to the National Park Service, by May 16, 1996.¹⁶¹ Regulations detail these and other requirements for inventories.¹⁶² To date, inventories have been received from 883 federal agencies and museums.¹⁶³ For the National Park Service, 103 parks have completed inventories comprising 6,005 human remains.¹⁶⁴

However, the total number of human remains in the possession or control of all federal agencies and museums is still not known with any precision. In 1990, the Congressional Budget Office estimated that approximately 200,000 Native American human remains were in the possession or control of federal agen-

156. *See id.* § 10.8.

157. *Id.* § 10.13.

158. *See* Native American Graves Protection and Repatriation Act, H.R. 5237, 101st Cong., § 6 (1990).

159. 25 U.S.C. § 3003 (d)(2)(A), (e).

160. The statute requires that unassociated funerary objects be identified as having been removed from a specific burial site. *Id.* § 3001(3)(B). This requirement was expanded to all funerary objects in the regulations. 43 C.F.R. § 10.2(d)(2).

161. 25 U.S.C. § 3003 (b)(1)(B).

162. *See* 43 C.F.R. § 10.9.

163. National NAGPRA Reports, presented to the NAGPRA Review Committee (Nov. 8, 2002), available at <http://www.cr.nps.gov/nagpra/PUBS/NNReport0211.pdf>.

164. Information on file with authors.

cies and museums.¹⁶⁵ More recent estimates of the number of individuals represented have been based on information received from museums applying for grants or inventory extensions.¹⁶⁶ These data are consistent with the earlier 200,000 estimate.

Inventories of "culturally unidentifiable human remains," human remains for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization can be determined,¹⁶⁷ were provided by the National Park Service to the citizens review committee. The citizens review committee is charged with making recommendations regarding the disposition of culturally unidentifiable human remains.¹⁶⁸ While the total number of culturally unidentifiable human remains is also not known, the fact that approximately 25 percent of the 6,005 Native American human remains held by the National Park Service were listed as culturally unidentifiable indicates that at least 50,000 of the estimated 200,000 human remains in federal agency and museum collection may be determined to be culturally unidentifiable. A section has been reserved in the regulations to outline the future responsibilities of federal agencies and museums regarding culturally unidentifiable remains.¹⁶⁹

In the last twelve years, the review committee has considered 18 requests from museums and federal agencies regarding the disposition of specific culturally unidentifiable human remains.¹⁷⁰ Ten of these recommendations involved the disposition of human remains to non-federally recognized groups, including the Mashpee Wampanoag, Nansemond, Salinans, Abenaki, Chinook, Nipmuc, and Monacan.¹⁷¹ Others have used treaty rights as the basis for an Indian tribe's claim.¹⁷² Still others have used applicable state burial laws as the basis for disposition.¹⁷³ After long deliberation, the review committee issued its recommendation regarding a more general process for the disposition of culturally

165. Letter from Robert D. Reischauer, Director, Congressional Budget Office, to U.S. Senator Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs (Sept. 21, 1990), *reprinted in* S. REP. NO. 101-473, at 18-20.

166. Information on file with author.

167. 43 C.F.R. § 10.9(e)(6).

168. *See* 25 U.S.C. § 3006(c)(5) (2000).

169. 43 C.F.R. § 10.13.

170. Draft proposed regulations regarding disposition of culturally unidentifiable human remains, 43 C.F.R. § 10.11, *available at*, <http://www.friendsofpast.org/nagpra/proposed-disposition.html>.

171. *Id.*

172. *Id.*

173. *Id.*

unidentifiable human remains in 2000 and requested the National Park Service to prepare the required regulatory section.¹⁷⁴ This process applies generally accepted notions of burial disposition for non-Native American remains to non-federally recognized Native American groups. Pending promulgation of that section, federal agencies and museums should periodically review their inventory submission to make sure it is accurate and updated to reflect new acquisitions and newly recognized Indian tribes.

In 1990, the Congressional Budget Office estimated that inventory completion would cost between \$50 and \$100 per individual human remain to provide an inventory of the museum or federal agency's collections and to review the existing information to determine origin.¹⁷⁵ More extensive studies costing up to \$500-600 per remain were not considered to be required by the statute.¹⁷⁶ The Congressional Budget Office estimate apparently does not include consultation costs. Data collected by the National Park System Advisory Board as part of a national review of compliance activities by National Park Service units indicates an average cost of \$581 per individual.¹⁷⁷ The attorney for plaintiffs in the *Bonnichsen v. United States* litigation has estimated that government spending for determining the disposition of the remains of the single individual in that case may have exceeded \$3 million.¹⁷⁸ While the Congressional Budget Office estimates may have underestimated some of the costs involved in implementing the statute, it is also clear that Congress did not intend the type of extensive studies that are being used in some situations.¹⁷⁹

While the statute provides for grants to assist Indian tribes, Native Hawaiian organizations, and museums, funds were not

174. Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36,462-64 (June 8, 2000).

175. See Letter from Robert D. Reischauer, Director, Congressional Budget Office, to U.S. Representative Morris Udall (Oct.15, 1990), reprinted in H. REP. NO. 101-877, at 21-22.

176. *Id.*

177. See Report of the National Park System Advisory Board: Review of National Park Service Determinations of Cultural Affiliation as Required by the Native American Graves Protection and Repatriation Act, 2001.

178. See STATEMENT OF ALAN SCHNEIDER, ATTORNEY FOR THE PLAINTIFFS, "THE \$3 MILLION MAN," at <http://www.friendsofamericaspast.org>.

179. See Letter from Robert D. Reischauer, Director, Congressional Budget Office, to U.S. Representative Morris Udall (Oct.15, 1990), reprinted in H. REP. NO. 101-877, at 22 ("More extensive studies costing up to \$500-\$600 per remain would be necessary to determine the origin of some of the remains; however, such studies generally are not required by H.R. 5327.").

appropriated for this purpose until 1994. Since that time, 178 grants have been awarded to Indian tribes and Native Hawaiian organizations, accounting for a total of \$9.8 million. An additional 114 grants were awarded to museums, accounting for \$5.6 million.¹⁸⁰

The statute also authorizes the Secretary of the Interior to assess civil penalties on museums that fail to comply with NAGPRA's provisions.¹⁸¹ Regulations implementing these provisions were published in 1997.¹⁸² The National Park Service has considered 22 allegations of failure to comply since 1997.¹⁸³ Of these, three allegations were determined to be without merit or premature and six institutions were given periods of forbearance from civil penalty.¹⁸⁴ The six subsequently submitted the required inventories.¹⁸⁵ The remaining 13 allegations are under review by the National Park Service and the Office of the Solicitor.¹⁸⁶ To date, no museum has been assessed a civil penalty.

Nine civil cases involving NAGPRA's collection provisions have been filed in federal court to date.¹⁸⁷ Briefly, these cases are as follows:

- In *Board of Trustees of the California State University v. United States Department of the Interior*,¹⁸⁸ the court ordered the university to complete its inventory of culturally unidentifiable human remains and requested the review committee to make recommendations regarding their disposition.¹⁸⁹
- In *Sooktis v. Brady*,¹⁹⁰ the petitioners filed for a temporary restraining order to prevent the reburial of human remains of individuals killed in 1879 at Fort Robinson, Nebraska that had been repatriated to the Northern Cheyenne Tribe by the Peabody Museum of Archaeology and Ethnology, National Museum of

180. See U.S. NATIONAL PARK SERVICE, NATIONAL NAGPRA PROGRAM, NAGPRA GRANTS, at <http://www.cr.nps.gov/nagpra/grants/index.htm> (last modified Jan. 27, 2003).

181. 25 U.S.C. § 3007 (2002).

182. 43 C.F.R. § 10.12 (2003)

183. National NAGPRA Reports, presented to the NAGPRA Review Committee (Nov. 8, 2002), available at <http://www.cr.nps.gov/nagpra/PUBS/NNReport0211.pdf>.

184. *Id.*

185. *Id.*

186. *Id.*

187. See Hutt & McKeown, *supra* note 1, for more detailed accounts of most pre-1999 cases.

188. No. 93-7272 (C.D. Cal. May 21, 1996) (order approving settlement and dismissal).

189. *Id.* at 3. The review committee never took up the issues raised in this case.

190. No. 93-169 (D. Mt. Oct. 16, 1993) (order denying injunction).

Health and Medicine, and Smithsonian Institution.¹⁹¹ After weighing the petitioners' rights as self-identified descendants of those killed at Fort Robinson against the tribe's cultural affiliation with the human remains, the court denied the request¹⁹² and the human remains were reburied by the Northern Cheyenne Tribe.

- In *Na Iwi O Na Kapuna O Mokapu v. Dalton*,¹⁹³ the court ruled that documentation of human remains and associated funerary objects was necessary to complete the required inventory, but that the statute could not be used as authorization for additional scientific studies once the inventory was completed.¹⁹⁴
- In *Pueblo of San Ildefonso v. Ridlon*,¹⁹⁵ the district court mistakenly dismissed a case involving the collection provisions on the grounds that the items were not recovered from federal or tribal lands.¹⁹⁶ Ridlon found the items on county land before 1990 and gave them to a museum. Years later, Ridlon desired to reclaim the items. The landowner county assigned its rights to a property claim to the Pueblo of San Ildefonso. The district court's opinion was reversed on appeal and remanded back to the district court for reconsideration of the matter subject to the collection provisions. Ultimately, the Pueblo dropped its claim to the items, fearing that they would be required to disclose the secret ceremony of which the items were a necessary part. Such disclosure is not required by the law. The Pueblo did not assert the claim of the landowner. The museum chose not to, or could not, show right of possession in its donor records and thus gave the items to the finder.
- In *Monet v. United States*,¹⁹⁷ the court dismissed on ripeness grounds an individual's claim of lineal descent, pending completion of the inventory by a controlling federal agency.¹⁹⁸
- In *City of Providence v. Babbitt*,¹⁹⁹ the court ordered settlement talks between the parties after the Native American Graves Protection and Repatriation Review Committee issued an advisory finding regarding a sacred object in the city's collection. The par-

191. *Id.* at 1-2

192. *Id.* at 7.

193. 894 F. Supp. 1397 (D. Haw. 1995).

194. 894 F. Supp. at 1417 ("NAGPRA Section 3003 (b)(2) merely prevents federal agencies and museums from conducting additional scientific research after completion of the initial inventory.")

195. 103 F. 3d 936 (10th Cir. 1996).

196. *Id.* at 938.

197. 114 F.3d 1195, 1997 WL 272229 (9th Cir. May 21, 1997) (unpublished opinion).

198. 1997 WL 272229, at *1.

199. See Plaintiffs' Complaint, *City of Providence v. Babbitt*, No. CA96-668P (D. R.I. filed Nov. 25, 1996) (on file with author).

ties eventually reached a settlement and the item was transferred to the Native Hawaiian organizations.

- In *American Museum of Natural History v. The Confederated Tribes of the Grand Ronde Community of Oregon*,²⁰⁰ the parties reached a settlement after the museum sought declaratory relief regarding its title to a meteorite claimed as a sacred object by the tribe.²⁰¹ The meteorite had been purchased by the museum years prior to the claim and had been on display. The agreement allows the tribe exclusive access to the meteorite during periods of religious practice.
- In *New York v. Gramly*,²⁰² the state and tribal plaintiffs alleged that the defendants had violated the summary, inventory, and repatriation provisions of the statute.²⁰³ In 1998-1999, Gramly, acting in his capacity as an adjunct professor at Canisius College, conducted an archeological excavation at an Iroquois site located on private land. Gramly excavated, removed and stored human remains and funerary objects from the site in violation of state law. Gramly and Canisius College failed to conduct a summary of the items, consult with the appropriate Indian tribes, or prepare an inventory of the human remains and associated funerary objects. The government settled when Gramly agreed not to excavate any Native American archeological site in the state of New York without the consent of the lineal descendant, culturally affiliated Indian tribe, or Indian tribe that aboriginally occupied the land on which the site was located. The human remains and funerary objects were repatriated to the tribal plaintiffs.
- In *Sac & Fox Nation v. Missouri*, the tribal plaintiff alleged that several state agencies had failed to comply with the summary, inventory, consultation, and notification provisions of the statute and transferred possession of Native American human remains to unauthorized individuals.²⁰⁴

200. See Plaintiff's Complaint, *American Museum of Natural History v. Confederated Tribes of the Grand Ronde Community of Oregon*, No. CV-1509 (S.D.N.Y. Feb. 28, 2000) (on file with author).

201. See *Tribe, Museum OK Deal on Willamette Meteorite*, THE [SHERIDAN, OR] SUN, June 28, 2000.

202. No. 99-1045 (W.D.N.Y. filed July 5, 2000) (stipulation and settlement agreement).

203. The discussion in this paragraph comes from *id. passim*.

204. See Plaintiffs' Amended Complaint at 2-3, *Sac & Fox Nation v. Missouri*, No. 02-00621 (W.D. Mo.) (on file with authors); see also Rick Alm, *Tribe Alleges Highway Officials Desecrated Burial Places*, K.C. STAR, July 3, 2002. On June 6, 2003, the court ruled that the plaintiffs can proceed under 1983 claims against the defendants for their actions denying rights afforded the plaintiffs pursuant to the provisions of NAGPRA and on claims under the common law trust theory that the defendants, as employees of the state agencies, may have breached fiduciary duties to the plaintiffs

Review of the nine collections-related cases reveals that two of the plaintiffs were Native American individuals, four were Indian tribes or Native Hawaiian organizations, and three were “museums” as defined by the statute. Two of the defendants were private citizens, two were museums, two were federal agencies, and three represented Indian tribes or Native Hawaiian organizations. Only one of the nine cases dealt with a conflict between Native American claimants. It should be noted that only slightly over half as many collections-related complaints were filed as compared to the 16 cases related to the excavation and discovery provisions, despite the fact that hundreds of repatriation decisions have been made in the twelve years since the statute was enacted. The reduced number of collections-related complaints may be due in part to the availability of the review committee as an alternative dispute resolution forum.

C. Consultation

One of the key requirements of NAGPRA is that museums and federal agencies must consult with lineal descendants, Indian tribes, and Native Hawaiian organizations prior to making decisions regarding the disposition or repatriation of Native American human remains and cultural items.²⁰⁵ Consultation is defined as a process involving open discussion and joint deliberation with respect to potential issues, changes, or actions by all interested parties.²⁰⁶ Midway between the traditional standards of notification and consent, consultation requires an ongoing dialogue.²⁰⁷ Consultation regarding activities that affect tribal trust resources or property must be carried out on a government-to-government basis.²⁰⁸ Many federal agencies have developed specific protocols regarding consultation activities, including those

as proscribed by NAGPRA. *Id.* The jury trial on damages is set for November 3, 2003. *Id.*

205. See 25 U.S.C. §§ 3002(b), -(c)(2), -(c)(4), 3003(b)(1)(A), 3004(b), 3005(a)(3), 3006(c)(6), -(e) (2000).

206. See PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES, AND FOR OTHER PURPOSES, H.R. REP. NO. 101-877, at 16 (1990).

207. See Colloquium, *Speaking Nation to Nation: Fulfilling our Promise to Native American*, COMMON GROUND, Summer/Fall 1997.

208. See President Bill Clinton, Executive Memorandum, Government-to-Government Relations with Native American Tribal Governments, April 29, 1994 (on file with authors).

related to the disposition or repatriation of Native American human remains and cultural items.²⁰⁹

VI.

HOW TO EVALUATE A REQUEST

Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, the federal agency or museum must expeditiously return human remains or cultural items if all of the following criteria apply: 1) the claimant has standing; 2) the object being claimed conforms to a class of objects covered by the statute; 3) lineal descent or cultural affiliation can be established between the claimant and an object in federal agency or museum possession or control prior to November 16, 1990 (for those excavated or discovered on federal or tribal land after November 16, 1990, claims may be based on lineal descent, tribal land status, cultural affiliation, aboriginal territory, or other cultural relationship); and 4) none of the statutory exemptions apply.²¹⁰ The criteria needed to evaluate requests for the disposition or repatriation of human remains or cultural items are outlined below.

A. *Does the requesting party have standing?*

Lineal descendants, Indian tribes, and Native Hawaiian organizations have standing to request human remains, funerary objects, and sacred objects in federal agency and museum collections or those excavated or discovered on federal or tribal lands. By definition, only Indian tribes and Native Hawaiian organizations have standing to claim objects of cultural patrimony.

Lineal descendants have standing to claim human remains, funerary objects, and sacred objects. Objects of cultural patrimony, which are by definition communal property, can not be claimed by a lineal descendant. To date, nineteen individuals have repatriated human remains, funerary objects, or sacred objects from museum or federal agency collections.²¹¹

209. See, e.g., U.S. DEPARTMENT OF DEFENSE, AMERICAN INDIAN AND ALASKA NATIVE POLICY (1998), at <http://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html>; U.S. DEPARTMENT OF ENERGY, A GUIDE FOR DOE EMPLOYEES WORKING WITH INDIAN TRIBAL NATIONS (2000), at <http://www.em.doe.gov/ftplink/public/tribal.pdf>; U.S. DEPARTMENT OF THE INTERIOR, DEPARTMENTAL MANUAL pt. 512, ch. 2 (1995), at <http://elips.doi.gov/elips/release/3049.htm>.

210. 25 U.S.C. § 3005(a), (c).

211. All of these notices are available at <http://www.cast.uark.edu/other/nps/nagpra/nic.html> and <http://www.cast.uark.edu/other/nps/nagpra/nir.html>.

There are currently 758 "Indian tribes," including 319 Indian tribes in the lower 48 states, 227 Alaska Native villages, 199 Alaska Native village corporations, and 13 Alaska Native regional corporations, that have standing to make requests under the statute.²¹² The current list of Indian tribes is maintained by the National Park Service. Each Indian tribe has full authority to select a representative of its choice, as well as to cooperate with other Indian tribes of its choice.²¹³ Some tribal representatives are not members of the Indian tribe.²¹⁴ The individual claiming to represent an Indian tribe must be authorized to make such a request.²¹⁵ If there is any doubt, the tribal chair, governor, or president can verify that the individual is acting on behalf of the Indian tribe or Native Hawaiian organization.²¹⁶ Some Indian tribes have banded together to establish organizations to act on their behalf. For example, the Wabanaki Tribes of Maine was established in 1992 to represent the repatriation interests of the Penobscot Indian Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmac.²¹⁷ In 1995, all nine Apache tribes signed an agreement authorizing an individual tribe to make requests on behalf of any of the others.²¹⁸ In other situations, the traditional property owning entity, such as a clan or society, does not have standing to make a

212. 25 U.S.C. § 479a (enumerating the BIA list of recognized tribes).

213. Section 3005 refers to the "requesting lineal descendant or tribe or organization," for repatriation, indicating that the law is claim driven. § 3005. The law does not invade the sovereignty of a group to dictate how the group will decide how to present the claim.

214. The agency or museum receiving a claim may expect to receive some assurance that the claim comes as the official request of the group with standing. See 43 C.F.R. §§ 10.8(d)(4), 10.9(d)(4) (2003), requests for information from the claimant, which includes in each case: (i) name and address of the Indian tribe official to act as representative in consultation.

215. *Id.*

216. 25 U.S.C. § 3010. NAGPRA relies on a government-to-government relationship between tribes and the federal government. Therefore, any question on the authority of the purported representative must be directed to the head of the tribal leadership or its leadership council.

217. See 67 Fed. Reg. 45,536-39 (July 9, 2002); 66 Fed. Reg. 54,168-69 (Oct. 9, 2001); 61 Fed. Reg. 17,719-20 (Apr. 22, 1996); 60 Fed. Reg. 36,827 (July 18, 1995); 60 Fed. Reg. 2,611-12 (Jan. 10, 1995); 59 Fed. Reg. 38,987 (Aug. 1, 1994); 59 Fed. Reg. 37,052 (July 20, 1994).

218. See 68 Fed. Reg. 12,372-73 (Mar. 14, 2003). The Western Apache NAGPRA Working Group represents the interests of the Fort McDowell Yavapai Nation, Arizona; San Carlos Apache Tribe of the San Carlos Apache Reservation, Arizona; Tonto Apache Tribe of Arizona; White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; and Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona.

request, but instead acts through the appropriate Indian tribe.²¹⁹ Thus, in 1993, the Yanyeyidi clan requested a clan hat as its cultural patrimony through the Douglas Indian Association, the federally recognized Indian tribe to which the clan members belonged.²²⁰

For Hawaiians, the statute specifically identifies two Native Hawaiian organizations, Hui Malama I Na Kupuna O Hawai'i Nei and the Office of Hawaiian Affairs, as having standing, and it provides criteria to determine if other claimants have standing. To qualify, the organization must demonstrate that it: 1) serves and represents the interests of Native Hawaiians; 2) has as a primary and stated purpose the provision of services to Native Hawaiians; and 3) has expertise in Native Hawaiian affairs. Other organizations that have been identified in published Federal Register notices as culturally affiliated with Native Hawaiian remains and cultural items include: the Alapa 'i Havapi, Association of Hawaiian Civic Clubs, Department of Hawaiian Homelands, Hawaiian Civic Club, Hawaiian Geneology Society, Hawaiian Island Burial Council, Ka Lahui Hawaii, Kamehameha School, Kau/Ni'ihau Island Burial Council, Keohokalole 'Ohana (family), Kekumano 'Ohana (family), Lili'uokalani Trust, Maui/Lanai Burial Council, Molokai Island Burial Council, Molokai Museum and Culture Center, Naha 'Olelo O Kamehameha Society, Na Papa Kanaka O Pu'ukohola Heiau, Nation of Hawaii, Native Hawaiian Advisory Council, O'ahu Island Burial Council, Pa Ku'i-a-lua, Pu'uhonua O Waimanalo, Royal Hawaiian Academy of Traditional Arts, and the Van Horn Diamond 'Ohana (family).²²¹

B. Does the object fit a class covered by the statute?

Four types of objects can be claimed under the provisions of the statute: human remains, funerary objects, sacred objects, and

219. See 25 U.S.C. § 3010 for the unique government-to-government relationship between the federal government and tribes.

220. See 59 Fed. Reg. 34,862 (July 7, 1994). The Douglas Indian Association, an association recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, petitioned for the repatriation of an object of cultural patrimony on behalf of the Yanyeyidi Clan of the Taku Tlingit.

221. This summary of Native Hawaiian organizations is based on a review of the 661 Notices of Inventory Completion and 237 Notices of Intent to Repatriate published in the 12 years since NAGPRA became law. All of these notices are available at <http://www.cast.uark.edu/other/nps/nagpra/nic.html> and <http://www.cast.uark.edu/other/nps/nagpra/nir.html>.

objects of cultural patrimony. Native American human remains can generally be identified based on their morphological characteristics and the context in which they were recovered. Funerary objects can generally be identified based on the context in which they were recovered. Identification of sacred objects requires confirmation by a traditional religious leader that the specific object is needed for the practice of a traditional Native American religion by its present day adherents.²²² Objects of cultural patrimony require confirmation by an Indian tribe or Native Hawaiian organization that the object is of ongoing historical, traditional, or cultural importance, along with anthropological, folkloric, oral traditional, or historic evidence that the object was considered inalienable at the time the object was separated from the group.²²³

C. *Is there a documented relationship between the object and the requesting party?*

An individual or organization with standing must establish one of five possible relationships with the human remains or cultural items being requested: 1) lineal descent; 2) tribal land ownership; 3) cultural affiliation; 4) other cultural relationship; or 5) aboriginal occupation.²²⁴ The criteria for establishing a valid relationship vary depending on whether the objects are part of a federal agency or museum collection or are excavated or discovered on federal or tribal land. Only 1) lineal descendants and 3) culturally affiliated Indian tribes and Native Hawaiian organizations have standing to request the repatriation of objects that were part of federal agency or museum collections on November 16, 1990.²²⁵ All five categories of relationships are valid in requesting the disposition of objects excavated or discovered on federal or tribal land after that date.²²⁶

An individual claiming lineal descent must document his or her ancestry from the individual whose remains, funerary objects, or sacred objects are being claimed.²²⁷ The line of descent must be direct and without interruption according to the traditional

222. 25 U.S.C. § 3001(3)(C) (2000).

223. *Id.* § 3001(3)(D).

224. *See id.* § 3002(a) (as to items excavated on federal lands after Nov. 16, 1990); *id.* § 3005(a)(1) (as to collections as of Nov. 16, 1990).

225. *Id.* § 3005(a)(1)-(2).

226. *Id.* § 3002(a).

227. *See* Definition of Lineal Descendant, 43 C.F.R. § 10.2(b)(1) (2003).

kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descentance.²²⁸ An Indian tribe or Native Hawaiian organization can often provide information on its traditional kinship system to assist in verifying claims of lineal descent. Lineal descendants have priority in requesting human remains, funerary objects, and sacred objects in federal agency or museum collections as well as those excavated or discovered on federal or tribal lands.²²⁹

The land-owning Indian tribe has a statutory right to claim any cultural items obtained from tribal lands after November 16, 1990. The land-owning Indian tribe has first right to claim any objects of cultural patrimony obtained from tribal lands after November 16, 1990 (since lineal descendants do not have a statutory right to claim objects of cultural patrimony). The land-owning Indian tribe's right to claim human remains, funerary objects, or sacred objects obtained from tribal lands after November 16, 1990 is second to that of a lineal descendant. The land-owning Indian tribe does not have a statutory right to claim any cultural items obtain from tribal lands before November 16, 1990.²³⁰ Tribal lands include all lands within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States.²³¹ This may include some federal, state, or private lands that are within the exterior boundary of a reservation. However, reserved rights to tribal lands do not provide the Indian tribe standing to request human remains or cultural items that were in federal agency or museum collections prior to November 16, 1990.²³²

The third relationship, cultural affiliation, is a relationship of shared group identity that can reasonably be traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier

228. *Id.*

229. See 25 U.S.C. §§ 3002 (a)(1), 3005 (a)(1) (concerning priority of claim).

230. Ownership provisions of NAGPRA place tribes in first priority on tribal lands as to all but lineal descendants. However, by definition "cultural patrimony" is central to the group and cannot be individually owned or alienated and, therefore, is not subject to claim by any entity except the federally recognized tribe. *Id.* § 3001(3)(D).

231. *Id.* § 3001(15)(A).

232. Collections as of Nov. 16, 1990, the date of the act, subject to repatriation provisions, *id.* § 3005, summaries, *id.* § 3004(a), and inventories, *id.* § 3005 (a), refer to items in "possession or control over holdings or collections."

group.²³³ A wide variety of evidence can be introduced to document such a relationship, including geographic, kinship, biological, archeological, linguistic, folklore, oral tradition, historic or other information or expert opinion.²³⁴ The law does not place priority on any type of evidence. Unlike claims of lineal descent in which the relationship between the claimant and the individual whose remains or objects are to be claimed must be direct and without interruption, determination of cultural affiliation should be based on an overall evaluation of the totality of the circumstances and evidence and should not be precluded solely because of some gaps in the record.²³⁵ Culturally affiliated Indian tribes may claim human remains and cultural items in federal agency and museum collections as well as those excavated or discovered on federal or tribal lands.²³⁶ Cultural affiliation is used in slightly different ways in the collection and excavation provisions of the statute. The concept is used as a categorical variable in dealing with collections. Museums and federal agencies must determine if human remains and associated funerary objects are either clearly culturally affiliated, reasonably culturally affiliated, or culturally unidentifiable.²³⁷ Federal agencies and museums must expeditiously repatriate human remains in their collections upon receipt of a claim from a culturally affiliated Indian tribe or Native Hawaiian organization, regardless of whether the relationship is clearly or reasonably determined.²³⁸ Cultural affiliation is used as a continuous variable in determining the disposition of

233. See 43 C.F.R. § 10.2(e) (2003).

234. 25 U.S.C. § 3005(a)(4).

235. *Id.* § 3001(2). “[C]ultural affiliation” is defined as “a relationship of shared group identity, which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” *Id.*

236. See *id.* § 3005(a)(1). If cultural affiliation is established by the decision on the inventory a claim may be made, § 3003(d), or if no decision is made and as to unaffiliated funerary objects, sacred items and items of cultural patrimony then § 3005(a)(2) applies.

237. Clearly culturally affiliated is listed in an inventory, § 3003(d)(2)(B); reasonably culturally affiliated, § 3003(d)(2)(C), 3005(a)(2); or culturally unidentifiable, § 3006(c)(5).

238. The distinction between cultural affiliation that has been clearly or reasonably determined has seldom been used by a Federal agency or museum. *But see, e.g.*, Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Control of Tonto National Forest, United States Forest Service, Phoenix, AZ, 61 Fed. Reg. 50,506–10 (Sep. 26, 1996). The distinction may be of little effect as either determination is a decision of the museum or federal agency and can be seen as establishing cultural affiliation in a claimant to the standard of proof set in the law for a prima facie proof of claim, see 25 U.S.C. § 3005(c).

cultural items that are excavated or removed from federal lands after November 16, 1990. If several Indian tribes or Native Hawaiian organizations make separate claims, the federal agency must determine the closest culturally affiliated Indian tribe or Native Hawaiian organization from among the claimants.²³⁹ However, if several Indian tribes or Native Hawaiian organizations make a single joint claim, the federal agency is not required to decide which group within the claimants is most closely affiliated culturally.²⁴⁰

Indian tribes with some other cultural relationship are fourth in priority, after the lineal descendent, tribal land owner, and culturally affiliated Indian tribe, in determining the custody of human remains, funerary objects, and sacred objects. They are third in priority for objects of cultural patrimony that are excavated or discovered on federal or tribal lands after November 16, 1990.²⁴¹ "Cultural relationship" is not defined in the statute or regulations, but clearly constitutes a weaker relationship than those previously listed. In and of itself, this other cultural relationship does not provide standing to claim human remains and cultural items in federal agency or museum collections prior to November 16, 1990.²⁴²

The aboriginal occupant of an identified territory is fifth in priority, after the lineal descendent, tribal land owner, culturally affiliated Indian tribe, and Indian tribe with some other cultural relationship, in determining the custody of human remains, funerary objects, and sacred objects. It is fourth in priority for objects of cultural patrimony that are excavated or discovered on tribal lands after November 16, 1990.²⁴³ Of particular use in identifying aboriginal lands are decisions by the United States Court of

239. *Id.* § 3002(a)(2)(B).

240. Section 3002(a)(2)(B) specifies a determination to the closest claimant. A single joint claim would require that there be cultural affiliation to one of the groups among the joint claimants. Thus the decision would not fall to the next lower priority level unless the "cultural affiliation or the objects cannot be reasonable ascertained." *Id.* § 3002(a)(2)(C). Failing a decision based on cultural affiliation the decision would be made based not on cultural affiliation, but on the claimant having aboriginal occupancy of the area in which the excavation occurred, unless another Indian tribe could show by a preponderance of the evidence that they have a stronger claim of cultural relationship. *Id.* § 3002(a)(2)(C)(2).

241. *Id.* § 3002(a)(2)(C)(2).

242. The term "other cultural relationship" is not found in the collections provisions of NAGPRA. See *id.* §§ 3003, 3004, 3005.

243. *Id.* § 3002(a)(2)(C).

Claims and the Indian Claims Commission.²⁴⁴ Between 1883 and 1947, the United States Court of Claims considered approximately 220 claims by Indian tribes against the United States.²⁴⁵ Fifty-seven of these cases were decided in favor of an Indian tribe, with many of them involving compensation for aboriginal land.²⁴⁶ Tribal claims were shifted to the Indian Claims Commission in 1946.²⁴⁷ The final report of the Indian Claims Commission summarizes the 617 dockets considered by the Commission and includes a map of those areas determined to be the aboriginal land of particular Indian tribes.²⁴⁸ The map does not show the Commission's final determination in all cases.²⁴⁹ With the termination of the Indian Claims Commission in 1978, Indian claims were again referred back to the United States Court of Federal Claims. Other determinations of tribal aboriginal lands have been made by Congress. The Court, the Commission, and Congress considered a wide range of information, including oral history and anthropological evidence, in reaching their decisions. Their findings provide a valuable tool for identifying areas occupied aboriginally by a present-day Indian tribe. Other sources of information regarding aboriginal occupation should also be consulted, particularly the original treaties between the United States and various Indian tribes.²⁵⁰ In and of itself, aboriginal occupation does not provide standing to claim human remains and cultural items in federal agency or museum collections prior to November 16, 1990.²⁵¹

244. *Id.*

245. See E.B. SMITH, *INDIAN TRIBAL CLAIMS: DECIDED IN THE COURT OF CLAIMS OF THE UNITED STATES, BRIEFED AND COMPILED TO JUNE 30, 1947* (1976).

246. *Id.*

247. See 28 U.S.C. § 1505.

248. UNITED STATES INDIAN CLAIMS COMMISSION FINAL REPORT, H.R. DOC. NO. 96-383, at 1 (1979).

249. See, e.g., Letter from Bruce Babbitt, Secretary of the Interior, to Louis Caldera, Secretary of the Army, Regarding Disposition of the Kennewick Human Remains, att. A, (Sept. 21, 2000) (containing the outline for the Confederated Tribes of the Umatilla Indian Reservation's (Umatilla, Cayuse, and Walla Walla) petition (four claims) brought before the ICC), available at http://www.cr.nps.gov/aad/kennewick/babb_letter.htm.

250. See, e.g., C.C. ROYCE, *INDIAN LAND CESSIONS IN THE UNITED STATES, EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, 1896-1897*, at pt. 2 (1899), available at [http://memory.loc.gov/cgibin/query/S?ammem/gmd:@OR\(@field\(AUTHOR+@od1\(Royce,+Charles+C+,+1845-1923+\)\)+@field\(OTHER+@od1\(Royce,+Charles+C+,+1845-1923+\)\)\)](http://memory.loc.gov/cgibin/query/S?ammem/gmd:@OR(@field(AUTHOR+@od1(Royce,+Charles+C+,+1845-1923+))+@field(OTHER+@od1(Royce,+Charles+C+,+1845-1923+)))).

251. § 3005 requires cultural affiliation between the claimant and the item claimed in a collection, although aboriginal occupation of the lands that are the provenance of the item may support a claim of cultural affiliation. See NATIONAL

In some cases, more than one lineal descendant, Indian tribe, or Native Hawaiian organization may request particular human remains or a cultural item. The federal agency or museum faced with this situation should assess all claims in light of the priorities of custody discussed above when working through the administrative process.

D. *Do any exemptions apply?*

A federal agency or museum may retain control of Native American human remains or cultural items that would otherwise be repatriated or disposed of to a lineal descendant, Indian tribe, or Native Hawaiian organization under the regulations if any of three exemptions apply: 1) there are multiple disputing claimants pending dispute resolution;²⁵² 2) the federal agency or museum has right of possession to the item;²⁵³ or 3) the item is part of a federal agency or museum collection and is indispensable to the completion of a specific scientific study, the outcome of which is of "major benefit to the United States."²⁵⁴

A federal agency or museum may retain control of human remains or cultural items that are discovered, excavated, or are part of a collection if there are multiple disputing claims and the agency cannot determine by a preponderance of the evidence which requesting party is the most appropriate recipient. While a museum or federal agency may determine that there are multiple lineal descendants or culturally affiliated Indian tribes or Native Hawaiian organizations, this exemption is only triggered in the face of two or more equally valid requests for disposition or re-

PARK SERVICE, NPS NATIONAL CENTER FOR CULTURAL RESOURCES, LETTER FROM SECRETARY OF THE INTERIOR, at http://www.cr.nps.gov/aad/kennewick/encl_4.htm (last modified Jan. 16, 2003). John Leashy, in a letter to Bruce Babbitt stated:

The ICC determination may not be regarded as conclusive of cultural affiliation, because other kinds of evidence must be weighed as well in the balance, but it deserves considerable respect, not only because it is a formal judicial determination of a geographic connection between the recovery site and present-day tribes, but also because of NAGPRA's fundamental purpose and architecture.

Memorandum from John Leashy, Solicitor, to Bruce Babbitt, U.S. Secretary of the Interior, (Sept. 21, 2000) (regarding NAGPRA and the Disposition of the Kennewick Human Remains) (on file with authors).

252. See 25 U.S.C. § 3005(e) (2000).

253. *Id.* § 3005(c).

254. *Id.* § 3005(b).

patiation.²⁵⁵ The disputed items may be retained until such time as the requesting parties mutually agree on the appropriate recipient or the dispute is otherwise resolved pursuant to the regulations or as ordered by a court of competent jurisdiction.²⁵⁶ There is no set time limit during which such multiple claims must be resolved but the federal agency or museum has an obligation to make a decision. The results of that decision may be taken to the review committee.²⁵⁷ In a dispute before the review committee, the Oneida Tribe of Wisconsin challenged a determination by the Field Museum that a wampum belt was culturally affiliated with the Oneida Nation of New York.²⁵⁸ Ultimately, both Indian tribes agreed to withdraw the dispute from consideration by the review committee and the belt will continue to remain in the possession of the Field Museum until the two tribes agree upon its disposition.²⁵⁹

A federal agency or museum may retain control of human remains or cultural items that are discovered, excavated, or are part of a collection if the federal agency or museum has right of possession to the items. Right of possession means possession obtained with the voluntary consent of an individual or group that had authority of alienation.²⁶⁰ Under the common law, human remains are not considered to be "property."²⁶¹ Recent federal court cases have affirmed that the common law does provide next of kin with a legitimate claim of entitlement and thus a property interest in a dead relative's body that is protected under the Due Process Clause of the Constitution's Fourteenth Amendment.²⁶² Generally, the conveyance of land neither confers any right to the grantee to the bodies of the dead nor authorizes the

255. *Id.* § 3005(e) (stating that the museum will retain the item until the dispute between competing claimants is resolved only if "the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant").

256. *See* 43 C.F.R. § 10.10(c)(2) (2003).

257. 25 U.S.C. § 3006(c)(4).

258. *See* U.S. NATIONAL PARK SERVICE, NATIONAL NAGPRA PROGRAM, MINUTES, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE, TWELFTH MEETING, NOV. 1-3, 1996, at <http://www.cast.uark.edu/products/NAGPRA/DOCS/rms012.html>.

259. *Id.*

260. *See* 25 U.S.C. § 3005(c); 43 C.F.R. § 10.10(a)(2).

261. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *429.

262. *See* *Whaley v. Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991); *see also* Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261 (1998).

grantee to remove the soil over them or to mutilate the graves.²⁶³ Under NAGPRA, the original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with the 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 and funerary objects.²⁶⁴ Regarding personal property, right of possession depends on one party having the right to relinquish control of the item and the other party having the right to obtain the item. Each Indian tribe and Native Hawaiian organization has its own rules regarding individual or group control of property.²⁶⁵

Other rules apply to the right to acquire certain items. The 1796 revision of the Trade and Intercourse Act,²⁶⁶ and thereafter included in its successors, forbade anyone within Indian country from purchasing or receiving from any Indian guns, traps or other articles used in hunting, implements of husbandry, cooking utensils, or clothing.²⁶⁷ Under NAGPRA, the original acquisition of an 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

263. Removal of Remains of Indians, Opinions of the Solicitor No. M-27750, (July 14, 1934), at http://thorpe.ou.edu/sol_opinions/p401-425.html (citing 17 C.J. 1142).

264. See 25 U.S.C. § 3001(13).

265. See, e.g., CHARLOTTE FRISBIE, *NAVAJO MEDICINE BUNDLES OR JISH: ACQUISITION, TRANSMISSION, AND DISPOSITION IN THE PAST AND PRESENT* (1987); PETER J. POWELL, *SWEET MEDICINE: THE CONTINUING ROLE OF THE SACRED ARROWS, THE SUN DANCE, AND THE SACRED BUFFALO HAT IN NORTHERN CHEYENNE HISTORY* (1969); ANN M. TWEEDIE, *DRAWING BACK CULTURE: THE MAKAH STRUGGLE FOR REPATRIATION* (2002).

266. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, 4th Congress, Sess. 1, Chapter 30, Section 9, May 19, 1796. The Act stated:

And be it further enacted, that if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Id. The Act was subsequently revised as § 2135 and later 25 U.S.C. § 265. This provision remained in effect until August 15, 1953. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834*, at 263 (1962).

267. 25 U.S.C. § 265 (repealed 1953); see PRUCHA, *supra* note 268, at 263.

possession to that object.²⁶⁸ In a dispute before the review committee, representatives of the Phoebe Hearst Museum persuasively demonstrated its right of possession to a Kiowa shield by producing a copy of a letter written shortly after the death of the last Kiowa to possess the shield indicating his wishes for disposition of the item.²⁶⁹ That a museum obtained items lawfully under a permit from the federal government does not confer right of possession unless the individual, Indian tribe, or Native Hawaiian organization was a party to the agreement and the permit actually specified a transfer of ownership.²⁷⁰ Permits issued under the Antiquities Act²⁷¹ or ARPA are for study for a given period and are not transfers of title.²⁷²

A federal agency or museum may also retain control of human remains or cultural items that are part of a collection if the items are indispensable to the completion of a specific study, the outcome of which is of major benefit to the United States. The statute did not clarify what type of study might meet the major benefit standard. However, the context makes it clear that such a study would need to necessarily be of sufficient importance to overcome the rights of an individual to claim a parent's body and that such a determination would necessarily be made by the United States, most likely by the Secretary of the Interior.²⁷³

268. 25 U.S.C. § 3001(13).

269. See U.S. NATIONAL PARK SERVICE, NATIONAL NAGPRA PROGRAM, MINUTES, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE, TENTH MEETING, OCT. 16-18, 1995, at <http://www.cast.uark.edu/products/NAGPRA/DOCS/rms010.html>; see also Walter R. Echo-Hawk, *Museum Right vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

270. *Id.* NAGPRA interposes the property right of "an Indian tribe or Native Hawaiian organization with the voluntary consent," rather than the status prior to NAGPRA where the Federal government as the land owner of Federal land or fiduciary for Tribal land, issued permits to which the Indian tribes and Native Hawaiian organizations were not a party.

271. Antiquities Act of 1906, 16 U.S.C. §§ 431-433.

272. See 43 C.F.R. § 3.6 (2003) (stating that no permit under the Antiquities Act will be granted for a period of more than 3 years). The period may be extended for cause upon application. 16 U.S.C. § 470cc(b)(3). Under ARPA items "excavated or removed from public lands will remain the property of the United States." 43 C.F.R. § 7.9(a)(1). ARPA permits will specify the length of the permit. 43 C.F.R. § 7.9(g). Permits issued for a period to exceed one year shall be subject to annual review by the Federal land manager. *Id.*

273. Expedient return is required "unless such items are indispensable for completion of a specific study, the outcome of which would be of major benefit to the United States." 25 U.S.C. § 3001(14). The law places administration of the law in the Secretary of the Interior. *Id.* NAGPRA is consistent with property law and is to be read consistent with the United States Constitution. As such, the desires of scien-

However, many groups object on religious grounds to the post-mortem examination of their members.²⁷⁴ Courts have long held that the federal government may substantially burden sincerely held religious beliefs only after it demonstrates that the federal action is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.²⁷⁵ The major benefit standard would appear to be much higher than the compelling interest standard.²⁷⁶ Studies of major benefit to the United States are likely to be limited to situations involving a public health hazard, national security, or criminal investiga-

tists for study specimens does not trump the rights of family to the remains of their ancestors. See generally, John A. Roberts, *The Scientist's Right to Research and the Legitimacy of Governmental Regulation*, in GENETICS AND THE LAW (Aubrey Milonky & George Annas eds., 2d ed. 1979), and John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203 (1970), for the proposition that while scientists have a right to be free of censorship in their work, they do not have a right to require the government to provide them the corpus of their research and that human rights to their biological material are not subordinate to the desires of scientists. *Accord* *Abbs v. Sullivan*, 963 F.2d 918 (7th Cir. 1992) (stating that the government may put parameters on scientific research that it assists).

274. *Margaret v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980) (objecting to fetal research on religious grounds); see also *Hitchcock v. Collenberg*, 140 F. Supp. 894 (D. Md. 1956) (holding that there is no right to science and that the inherent police power of government allows for the regulation of medicine in the public interest); *Idaho Assn. of Naturopathic Physicians, Inc., v. South Carolina*, 582 F.2d. 849 (4th Cir. 1978) (same).

275. For cases holding that the ability of the government to obtain blood and other biological material from individuals, or to do medical examinations, over a religious objection, must be based on a compelling governmental interest, see *Sandon v. Lewis*, No. 96-15295, 1998 U.S. App. LEXIS 2896 at *1, (9th Cir. Feb. 20, 1998) (objection to cavity searches and drug testing); *Am. Fed'n Gov't Emps. v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993), (objection to the taking of urine samples); *United States v. Hammer*, 121 F. Supp. 2d 794, 802 (M.D. Pa. 2000) (holding that the religious convictions of a death row inmate and his request to not be subject to an autopsy must be given respect absent a compelling state interest and the interest of the state in confirming death was not a compelling reason to overcome the request of the inmate, also the interests of the state could be met in a less invasive manner by external examination); *State v. Biddings*, 550 N.E.2d 975, 980 (Ohio App. 1988) (holding that taking blood samples over religious objection may occur when the state has a compelling reason). *Accord* *United States v. Hammer*, 121 F. Supp. 2d 794, 802 (M.D. Pa. 2000) (holding that a medical examination may not be the least restrictive means of furthering the government interest). A burden on Native American religious practice was not sufficient to overcome the compelling need for water in the west and the court upheld the drowning of Navajo gods in the creation of Lake Powell. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980). However, the United States District Court for the District of Wyoming upheld a ban on climbing during periods of religious practice on Devil's Tower National Monument, as open access to rock climbing was not a compelling interest. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

276. The phrase "major benefit to the United States" appears only once in the United States Code. 25 U.S.C. § 3005.

tion.²⁷⁷ This exemption has never been applied, but, if it ever is, the items must be returned to the appropriate lineal descendant, Indian tribe, or Native Hawaiian organization no later than ninety days after completion of the study.²⁷⁸ This exemption is part of the collection provisions of NAGPRA and does not apply to human remains or cultural items that are discovered or excavated on federal agency lands as those human remains and cultural items are subject to an immediate determination of ownership and as such are not assumed to be in the ownership and control of the United States, which would confer authority on the federal government to issue a permit. In this regard, NAGPRA alters the assumptions of the earlier permitting authority in the Antiquities Act and ARPA that considered all items on federal land to be federal property. In reality this was a fiction. Just as a lost wallet or automobile on federal land would be subject to a search for the owner, NAGPRA requires the government to make an ownership determination for Native American human remains and cultural items upon excavation.²⁷⁹ In 1997 and 1999, Representative Hastings proposed an amendment to the law that would insert a study provision in 25 U.S.C. § 3002. H.R. 2893, 105th Cong., § (3)(1997) and H.R. 2643, 106th Cong., § (3)(1999). A hearing was held and the amendment was dropped.

Although the statute and regulations do not specifically so state, human remains and cultural items held as part of an ongoing criminal investigation may be retained as evidence, but this does not alter the property rights of lineal descendants, Indian tribes, or Native Hawaiian organizations in those cultural items.

277. See Hutt & McKeown, *supra* note 1, at 372 & n.59; see also *Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990) (holding the medical examiner liable for damages for conducting an autopsy without consent of the parents of the child because state interests in reducing liability did not overcome religious interests); *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1257-58 (W.D. Mich 1990) (holding that unconsented autopsy allowed under Michigan law in all violent death cases was religion neutral and presented a valid state interest); *Kohn v. United States*, 591 F. Supp. 568, 572-73 (E.D.N.Y. 1984) (allowing a tort claim for embalming and cremation in violation of religious principles of the plaintiff; however, the autopsy was allowed as there was a legitimate state interest in the investigation of a homicide).

278. 25 U.S.C. § 3005(b).

279. 25 U.S.C. § 3002.

VII.

WHAT ADMINISTRATIVE PROCEDURES
ARE REQUIRED?A. *Final administrative decision*

After careful consideration of all of the available evidence, the federal agency or museum official must decide whether a valid claim can be made for human remains or cultural items under his or her institution's control.²⁸⁰ The standard of proof needed to evaluate claims made under the statute is a preponderance of the evidence.²⁸¹ The preponderance of the evidence, a standard generally applied to civil disputes, is defined as a claim being more likely than not. In the absence of a dispute, when a claimant with standing provides credible evidence of cultural affiliation to human remains, funerary objects, sacred objects, or objects of cultural patrimony, there is a *prima facie* showing to satisfy the claim.²⁸² If there are multiple claimants presenting a *prima facie* claim, then the federal agency or museum must decide which claimant has the more compelling claim. In making decisions about the disposition of human remains and cultural items discovered or excavated from federal lands after November 16, 1990, the federal agency is not an adverse party.²⁸³ Conversely, in decisions regarding the repatriation of human remains and cultural items from collections, the federal agency or museum may assert a right of possession and present evidence of the claim by a preponderance of the evidence to overcome the tribal claim.²⁸⁴ The same standard of proof applies to tribal claimants and those asserting a right of possession. The concept of proof by "enough of a preponderance of the evidence" is not recognized in the civil law. Claimants do not have to establish aspects of their claims with scientific certainty.²⁸⁵

280. *Id.* § 3004(a). The decision is "based upon available information." 43 C.F.R. § 10.10 (a), (b) (2003).

281. 43 C.F.R. § 10.14(f).

282. 25 U.S.C. § 3005(c).

283. NAGPRA places the federal agency in the position of decision maker and not a claimant. Federal agencies are to resolve disputes between tribes and lineal descendants, *id.* § 3005(e), and determine whether museums can carry the burden to overcome the property interests of those enfranchised in NAGPRA by a showing of a right of possession, *id.* § 3001(13). A Federal agency may also have the right of possession to an item, *id.* § 3005(c), if it obtained the item "with the voluntary consent of an individual or group that had authority of alienation," *id.* § 3001(13).

284. *Id.* § 3005(c).

285. NAGPRA adheres to the standards of proof for civil matters generally. An insistence on proof of cultural affiliation to a scientific certainty was asserted by

A decision's timing depends upon the type of object being considered and when the object came under federal agency or museum control. Decisions regarding the repatriation of human remains and associated funerary objects in a federal agency or museum collection prior to November 16, 1990 were required to be made by November 16, 1995 with notification of the decision going to the appropriate lineal descendants by May 16, 1996.²⁸⁶ Copies of the completed inventories were to be sent to each lineal descendant and each culturally affiliated Indian tribe and Native Hawaiian organization, as well as to the National Park Service.²⁸⁷ Copies of listings of culturally unidentifiable human remains were referred to the Native American Graves Protection and Repatriation Review Committee.

Unlike the inventory decisions that are driven by a statutory deadline, decisions regarding the repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony acquired before November 16, 1990 are claim driven. Many Indian tribes and Native Hawaiian organizations have responded to the summaries by requesting additional documentation and visiting the collections.²⁸⁸ Regulations stipulate that repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony must take place within ninety days of receipt of a valid request.²⁸⁹ Decisions about the disposition of human remains and cultural items excavated or discovered on

plaintiffs as necessary and accepted by the court in *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Ore. 2002). The court found that the decision of the Secretary of Interior of Sept. 20, 2000, was arbitrary and capricious because it did not rely on science and instead weighed the scientific evidence with that presented by tribes in coming to a decision on cultural affiliation. While proof to a scientific certainty is the quest of scientists, it has never been accepted as a level of proof necessary to establish a claim in the courts of the United States. See *Lummi Nation v. Golder Associates*, 236 F.Supp. 2d 1183 (C.D. Wash. 2002), in which the tribe was determined to be a third party beneficiary to a contract between a city and its archeological contractor and allowed to bring an action for mistreatment of human remains. The court held that establishing a relationship between the present-day Indian tribe and the ancient remains required only some cultural relationship and not a "particular degree of biological relationship." *Id.* at 1187.

286. 43 C.F.R. § 10.9 (2003).

287. *See id.* § 10.9(e).

288. 43 C.F.R. § 10.9(g); *see* NATIONAL NAGPRA REPORTS, PRESENTED TO THE NAGPRA REVIEW COMMITTEE (Nov. 8, 2002), at <http://www.cr.nps.gov/nagpra/PUBS/NNReport0211.pdf>.

289. *Id.* § 10.10(a)(3). Since 1994, the U.S. National Park Service has awarded approximately \$20 million to Indian tribes, Native Hawaiian organizations, and museums to facilitate consultation, provision of documentation, and visiting collections. *See* National NAGPRA Reports, *infra* note 295.

federal lands must be made expeditiously upon receipt of a valid request. Prior to the repatriation of human remains and cultural items in federal agency or museum collections, the Secretary of the Interior is required to publish a notice in the Federal Register.²⁹⁰

A Notice of Inventory Completion summarizes the contents of a completed inventory of human remains and associated funerary objects in sufficient detail so as to enable other individuals, Indian tribes, and Native Hawaiian organizations to determine their interest in claiming the inventoried items.²⁹¹ Repatriation of human remains and associated funerary objects may not occur until at least 30 days after the Notice of Inventory Completion has been published in the Federal Register.²⁹² In the 12 years since NAGPRA became law, 661 Notices of Inventory Completion have been published, accounting for 27,211 human remains and 536,853 associated funerary objects.²⁹³ One notice accounted for the remains of 2,992 individuals.²⁹⁴ Another notice included 65,160 associated funerary objects, including glass beads, wampum, silver jewelry, hair ornaments, armbands, animal bones, feathers, cooking utensils, muskets, knives, tomahawks, buttons, woven fabrics, scissors, awls, pipes, tools, tin cones, bells, wood/bark fragments, gorgets, keys, locks, lithics, bottles, leather, projectile points, and fishing spears.²⁹⁵ Seven notices represented human remains or associated funerary objects for which a lineal descendant could be identified.²⁹⁶ Fifteen notices represented "culturally unidentifiable" human remains for which no federally recognized Indian tribe could be identified.²⁹⁷ The remaining 639 notices represented cultural affiliation determinations between human remains or associated funerary objects and

290. 43 C.F.R. § 10.8(f).

291. *Id.*

292. *See id.* §§ 10.9(e)(7), 10.10(b)(2).

293. *See* U.S. NATIONAL PARK SERVICE, NATIONAL NAGPRA PROGRAM, NOTICES OF INVENTORY COMPLETION (2003), at <http://www.cast.uark.edu/products/NAGPRA/nic.html>.

294. *See* Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Control of the Coconino National Forest, United States Forest Service, Flagstaff, AZ, 62 Fed. Reg. 51,898-903 (Oct. 3, 1997).

295. *See* Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from Bay County, MI, in the Possession of the Michigan State University Museum, Michigan State University, East Lansing, MI, 61 Fed. Reg. 47,526 (Sept. 9, 1996).

296. *See* U.S. NATIONAL PARK SERVICE, *supra* note 295.

297. *See id.*

Indian tribes or Native Hawaiian organizations.²⁹⁸ Roughly half of the notices identified a single culturally affiliated Indian tribe or Native Hawaiian organization. One notice identified 34 culturally affiliated Indian tribes.²⁹⁹ The average was about 3.5 culturally affiliated Indian tribes or Native Hawaiian organizations per notice.

While serving as staff to the Departmental Consulting Archaeologist, attorney Jason Roberts analyzed 317 Notices of Inventory Completion and 15 corrections that were published in the Federal Register between 1990 and the end of 1999.³⁰⁰ The data disproved his initial hypothesis that the more information collected by an institution—as measured by increased numbers of human remains, associated funerary objects, modes of evidence, and consulted tribes—the more precise the determination of cultural affiliation, as measured by a decrease in the number of culturally affiliated Indian tribes. The converse was true: more information yielded decisions involving larger numbers of culturally affiliated Indian tribes. Further, the data indicated that federal agencies tended to rely on a larger range of data and to identify more culturally affiliated Indian tribes than did museums.

A Notice of Intent to Repatriate describes unassociated funerary objects, sacred objects, or objects of cultural patrimony being claimed in sufficient detail to enable other individuals, Indian tribes, and Native Hawaiian organizations to determine their interest in the claimed objects.³⁰¹ Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony may not occur until at least 30 days after the Notice of Intent to Repatriate is published in the Federal Register.³⁰² In the 12 years since NAGPRA became law, 237 Notices of Intent to Repatriate have been published accounting for 76,522 unassociated funerary objects, 1,022 sacred objects, 262 objects of cultural patrimony, and 509 items fitting both the sacred object and

298. *See id.*

299. *See* Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, 66 Fed. Reg. 51,466–67 (Oct. 9, 2001).

300. J.C. Roberts, *A Native American Graves Protection and Repatriation Act Census: Examining the Status and Trends of Culturally Affiliating Native American Human Remains and Associated Funerary Objects Between 1990 and 1999*, in *TOPICS IN CULTURAL RESOURCE LAW* (Donald Craib ed., 2000).

301. 43 C.F.R. § 10.8(f) (2003).

302. 43 C.F.R. § 10.8(f).

object of cultural patrimony categories.³⁰³ Nine of the Notices of Intent to Repatriate were based on claims by lineal descendants while the remaining 228 notices were based on claims by culturally affiliated Indian tribes or Native Hawaiian organizations.³⁰⁴ 164 Indian tribes and 14 Native Hawaiian organizations are identified in these notices, with Indian tribes in the southwest United States most commonly listed.³⁰⁵

Notification prior to the disposition of human remains and cultural items excavated or discovered on federal or tribal lands after November 16, 1990, is guaranteed through newspaper notification.³⁰⁶ The notice must be published twice, at least one week apart, in a newspaper of general circulation in the area in which the human remains or cultural items were excavated or discovered and, if applicable, in a newspaper of general circulation in the area(s) in which affiliated Indian tribes or Native Hawaiian organizations now reside.³⁰⁷ Disposition of human remains or cultural items may not occur until at least 30 days after the second notice is published.³⁰⁸ Copies of the newspaper notice with information on when and in what newspaper it was published must be sent to the National Park Service.³⁰⁹ In the 12 years since NAGPRA became law, 30 pairs of Notices of Intended Disposition have been published in local newspapers accounting for 79 human remains, 181 funerary objects, no sacred objects, and 5 objects of cultural patrimony.³¹⁰ One pair of newspaper notices was subsequently rescinded as part of ongoing litigation.³¹¹ Of the remaining 29 Notices of Intended Disposition,

303. See U.S. NATIONAL PARK SERVICE, NATIONAL NAGPRA PROGRAM, NOTICES OF INTENT TO REPATRIATE, at <http://www.cast.uark.edu/products/NAGPRA/nir.html>.

304. See *id.*

305. See *id.* (Hopi Tribe: 26 notices; Navajo Nation: 16 notices; Zuni Tribe: 12 notices; San Carlos Apache: 11 notices).

306. 43 C.F.R. § 10.6(c).

307. *Id.*

308. *Id.*

309. *Id.*

310. See U.S. NATIONAL PARK SERVICE, NATIONAL NAGPRA PROGRAM, NOTICES OF DISPOSITION (2003), at <http://www.cast.uark.edu/products/NAGPRA/nid.html>.

311. See *Bonnichsen v. United States*, CR96-1481 (D. Or. Oct. 16, 1996) (complaint); *Asatru Folk Assembly v. United States*, CR96-1516 (D. Or. Oct. 24, 1996) (complaint). See FRIENDS OF AMERICA'S PAST, JUDGE'S OPINION AND ORDER IN THE KENNEWICK MAN LAWSUIT (2002), at <http://friendsofpast.org/kennewick-man/court/opinions/decision-020830.html>.

26 dealt with claims based on cultural affiliation and three dealt with claims based on aboriginal land.

Notification is not meant as a primary means of communication with potential claimants but as a last chance for any legitimate claimants that may have been inadvertently overlooked to voice their concerns. Likewise, notification does not necessarily mean that disposition or repatriation of the cultural items has been completed, only that the museum or federal agency has come to a decision that a particular lineal descendant, Indian tribe, or Native Hawaiian organization has a right to claim the items.³¹²

B. *Appeals*

In some cases, it may not be possible for the federal agency or museum and the interested individuals, Indian tribes and Native Hawaiian organizations to agree on the disposition or repatriation of particular human remains and cultural items.

A lineal descendant, Indian tribe, or Native Hawaiian organization may decide to present more evidence following a federal agency or museum's decision not to dispose of or repatriate particular objects. This situation is most likely to arise regarding repatriation of human remains and associated funerary objects in federal agency or museum collections, since due to the statutory deadline for inventory completion, some information may not have been readily available at the time the decision was made. The federal agency or museum should give such additional evidence full consideration and should revise the decision regarding disposition or repatriation if necessary.

The Native American Graves Protection and Repatriation Review Committee is charged with facilitating the resolution of disputes among lineal descendants, Indian tribes, Native Hawaiian organizations, museums, and federal agencies relating to the return of human remains and cultural items in federal agency and

312. Primary communication is consultation. See 43 C.F.R. §§ 10.8, 10.9; *id.* § 10.9(e) (stating that notice of inventory completion must be sent to tribes within six months of completion; when a written request for repatriation is received from a tribe or Native Hawaiian organization, repatriation must occur within 90 days, provided that 30 days have elapsed after publication in the Federal Register); *id.* § 10.10(a)(3) (requiring opportunity to voice a competing claim occurs upon receipt of inventory decisions and finally upon notice of intent to repatriate, and that, absent a dispute, transfer will occur 30 days from the date of notice); *id.* § 10.10(d) ("There are no further procedures. Once transfer occurs the repatriation is final.").

museum collections.³¹³ The review committee will consider requests to facilitate the resolution of a dispute from any of the involved parties. If the review committee decides to attempt to facilitate the dispute, it will initially request written documentation regarding the dispute from all involved parties. This information will be reviewed and, if appropriate, the disputing parties will be invited to appear before the committee. Review committee recommendations, which are made to the Secretary of the Interior, are not binding.³¹⁴

To date, the review committee has issued recommendations in six such disputes. In one, the committee recommended the holding institution revise its determination of cultural affiliation and repatriate human remains to a Native Hawaiian organization.³¹⁵ In a second dispute, also involving a Native Hawaiian organization, the information was less convincing and the review committee recommended the holding institution transfer human remains to another institution where the issue of cultural affiliation could be better addressed.³¹⁶ In both cases, the institution complied with the review committee's recommendations and the remains were ultimately repatriated. In the third dispute, the review committee found that a carved wooden figure fit the definition of "sacred object" and recommended it be repatriated, again to Native Hawaiian organizations.³¹⁷ In this latter case, the holding institution responded to the committee's recommendation by resorting to federal court. However, the situation has since been settled by agreement between the institution and the Native Hawaiian organizations.³¹⁸ In a fourth dispute, an Indian tribe objected to the process used by a federal agency to determine cultural affiliation. The review committee recommended the fed-

313. 25 U.S.C. § 3006(c)(4) (2000).

314. See U.S. DEPARTMENT OF THE INTERIOR, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE, DISPUTE PROCEDURES OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE (May 10, 2003), at <http://www.cr.nps.gov/nagpra/REVIEW/Dispute%20procedures.0305.pdf>.

315. See Finding Regarding Human Remains Identified as 12-10738-39, from Waimanalo, Oahu, Hawaii, 58 Fed. Reg. 19,689 (Apr. 15, 1993).

316. See Finding Regarding Human Remains Identified as 12-5456, from the Hawaiian Islands, 58 Fed. Reg. 19,688 (Apr. 15, 1993).

317. See NAGPRA Review Committee Advisory Findings And Recommendations Regarding a Carved Wooden Figure from the Hawaiian Islands, 62 Fed. Reg. 23,794-95 (May 1, 1997).

318. See C.J. Chivers, *An Intense Aloha: City of Providence Bids Farewell to Disputed Hawaiian Artifact*, PROVIDENCE J.-BULL., Aug. 28, 1998, at 1B.

eral agency reconsider its process.³¹⁹ In a fifth dispute, the review committee recommended that a federal agency revise its determination of cultural affiliation and repatriate 9,000 year-old remains to an Indian tribe.³²⁰ In the sixth dispute, the review committee found the information presented by a coalition of Apache tribes sufficient to determine the identity and cultural affiliation of several sacred objects.³²¹

When a dispute arises from the disposition of items removed from federal or Indian lands, the matter does not go to the review committee, but instead goes directly to federal district court.³²² A federal land manager's decision regarding the disposition of human remains or cultural items is subject to court review under the Administrative Procedure Act (APA).³²³ The trial court's review is limited to a determination of whether the federal agency's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.³²⁴ The trial court is required to give deference to the federal agency's understanding of its statutory duty.³²⁵ If the trial court finds the agency's decision to be arbitrary or capricious, the remedy is to remand the decision to the agency for further consideration. Nothing in the law gives the court authority to alter or supplant the decision of the agency.³²⁶ While a variety of individuals and groups may have standing to bring an action under the APA alleging that they will be harmed if the court does not review the

319. See NAGPRA Review Committee Advisory Findings and Recommendations Regarding Human Remains and Associated Funerary Objects in the Control of Chaco Culture National Historical Park, 65 Fed. Reg. 6621-22 (Feb. 10, 2000).

320. See Native American Graves Protection and Repatriation Review Committee Findings and Recommendations Regarding Human Remains and Associated Funerary Objects from Spirit Cave in Nevada, 67 Fed. Reg. 17,463 (Apr. 10, 2002).

321. See Native American Graves Protection and Repatriation Review Committee Findings and Recommendations Regarding Cultural Items in the Possession of the Denver Art Museum, 67 Fed. Reg. 57,836-37 (Sept. 12, 2002).

322. 43 C.F.R. § 10.17 (2003). Matters not assigned by law to the Review Committee will be pursued in court. 25 U.S.C. § 3006 (c) (2000) assigns to the Review Committee the monitoring of inventory and identification of cultural items under §§ 3003 and 3004, *id.* § 3006(c)(2); facilitating the return of those items, *id.* § 3006 (c)(4); compiling lists of culturally unidentifiable, *id.* § 3006(c)(5); and recommending future care of items to be repatriated, *id.* § 3006(c)(9). None of the enumerated duties of the Review Committee reference the process under § 3002, the ownership section, other than to generally assign to the Committee the responsibility to consult with the Secretary on regulations to carry out the act. *Id.* § 3006(c)(7).

323. 5 U.S.C. § 706 (2000).

324. See *id.*; SHERRY HUTT ET AL., *HERITAGE RESOURCES LAW* 175 (1999).

325. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984).

326. See *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).

agency's action, nothing in the APA or NAGPRA gives an individual or group standing to claim the human remains or cultural items of a Native American except as expressly stated within NAGPRA.

C. *Disposition or repatriation*

Disposition or repatriation of human remains and cultural items occurs when the control or custody is transferred from the federal agency or museum to the appropriate lineal descendant, Indian tribe, or Native Hawaiian organization.³²⁷ When transferring control or custody, the federal agency or museum must ensure that the human remains and cultural items are deaccessioned according to federal agency or museum procedures, including assigning deaccession numbers, updating accession and catalogue records, completing a deaccession form, and filing all documentation in the accession or optional deaccession file.³²⁸

Preparation for disposition or repatriation must also involve additional consultation with the appropriate lineal descendant, Indian tribe, or Native Hawaiian organization to determine the place and manner of delivery.³²⁹ Museum or federal agency officials are required to inform the recipient of cultural items of any presently known treatment with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.³³⁰ In one of the largest repatriations to date, five different museums and federal agencies returned the remains of over 2000 individuals to the Pueblo of Jemez.³³¹ The human remains were reburied at Pecos National Historical Site near the spot from where they had originally been excavated between 1915 and 1929.³³²

327. 43 C.F.R. § 10.10(d) (stating that the final act is the transfer of possession and control).

328. See C.T. McKeown et al., *Ethical and Legal Issues: Complying with NAGPRA*, in *THE NEW MUSEUM REGISTRATION METHODS* 311 (Rebecca A. Buck & Jean Allman Gilmore eds., 1998).

329. See 25 U.S.C. § 3005 (a)(3) (2000).

330. See 43 C.F.R. § 10.10(e) (2003).

331. See 64 Fed. Reg. 18,446-47 (Apr. 14, 1999); 64 Fed. Reg. 7411 (Apr. 9, 1999); 64 Fed. Reg. 13,444-47 (Mar. 18, 1999); 63 Fed. Reg. 65,216-17 (Nov. 25, 1998); 63 Fed. Reg. 54,728-29 (Oct. 13, 1998); 63 Fed. Reg. 54,729-30 (Oct. 13, 1998); 63 Fed. Reg. 43,720-21 (Aug. 14, 1998).

332. See Cliff Tarp, *Pueblo Ancestors Return Home*, *NAT'L GEOGRAPHIC*, Nov. 2000, at 118.

VIII.

TRAFFICKING IN NATIVE AMERICAN HUMAN REMAINS
& CULTURAL ITEMS

Section 4 of NAGPRA amends Title 18 of the federal Criminal Code, making it illegal to traffic in Native American human remains and cultural items.³³³ Conviction for a first offense is a misdemeanor and subsequent convictions are felonies.³³⁴

18 U.S.C. § 1170 (a) states that “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” shall be fined or imprisoned, or both.³³⁵ To obtain a conviction under this section, the human remains need not be traced to prior internment in federal or Indian land.³³⁶ There is no age requirement for protection and the value placed on the human remains in the transaction have no threshold limit for a felony upon a second conviction.³³⁷ In the 12 years since NAGPRA became law, five individuals and one corporation have been convicted under this provision.³³⁸ All pled guilty to the charges.

Only one 18 U.S.C. § 1170 (a) case has gone to trial.³³⁹ In 1998, a Chicago area antique shop offered to sell a human skull for \$265. The shop owner identified the skull as having come from the area of Ottawa, Illinois. Federal agents seized the skull and charged the antique shop owner with knowingly selling Native American human remains without right of possession. Gov-

333. 18 U.S.C. § 1170.

334. *Id.* § 1170 (a). There is no financial level of trafficking set as a threshold for a felony, such as there is in ARPA, 16 U.S.C. § 470ee (d).

335. 18 U.S.C. 1170(a).

336. Jurisdiction of the federal government in 18 U.S.C. § 1170 (a) is based on the Native American nature of the human remains and is not land based as in ARPA, 16 U.S.C. § 470ee(a).

337. ARPA applies only to materials of archeological interest of at least 100 years of age. *Id.* § 470bb(1). Criminal penalties for violation of ARPA double if the commercial or archeological value of the archeological resources and the cost of restoration and repair of such resources exceeds \$500. *Id.* § 470ee(d); see Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135, 147-48 (1992).

338. See *United States v. Courtney C. Smith*, CR-01-422-001 (E.D.Va. July 25, 2001); *United States v. Great Southern Arsenal, Inc.*, CR-01-271-01 (E.D.Va. July 25, 2001); *United States v. Sean Adam Long*, CR-00-20 (W.D.Ky. Mar. 7, 2001); *United States v. William Stevens*, CR-98-232 (E.D.N.Y. June 25, 1998); *United States v. Richard Jay Lamb*, CR-97-318 (D. Utah Feb. 17, 1998); *United States v. Richard Phillip Maniscalco*, CR-94-1139 (E.D.Va. Dec. 21, 1995).

339. See *United States v. Ugo G. DeLuca* (N.D.Ill. July 18, 2002).

ernment expert witnesses dated the skull between 1030 and 1290 A.D. and, hesitant to identify the geographic origin of the skull to a scientific certainty, indicated that it was "most probably" Native American. The defense argued that the government had not shown beyond a reasonable doubt that the human remains met the statutory definition of Native American. On July 19, 2002, the shop owner was acquitted.³⁴⁰ After deliberating for one and a half days, several jurors explained that the government had failed to prove that the human remains had come from a burial site in the United States.³⁴¹ This case demonstrates the importance for both expert witnesses and the courts to understand that the reasonable knowledge standard applies to such determinations and not some higher standard of "scientific certainty." Interestingly, upon the jury's recommendation and with the shop owner's concurrence, the human remains were ultimately transferred to United States Fish and Wildlife Service for repatriation under a preponderance of the evidence standard.³⁴²

18 U.S.C. § 1170 (b) states that "whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, any Native American cultural items obtained in violation of [the statute] shall be fined" or imprisoned, or both.³⁴³ This section applies to all cultural items, other than human remains, and is narrowed to actions done in violation of the statute. The statute may be violated by: 1) removing cultural items from federal or Indian lands without a permit or otherwise in accordance with the ownership determination requirements; or 2) failing to complete the summary, inventory, consultation, and repatriation provisions for cultural items in federal agency or museum collections.³⁴⁴ There is no threshold age or value amount required to proceed under this section. In the 12 years since NAGPRA became law, 13 individ-

340. *Id.*

341. See Matt O'Connor, *Merchant Acquitted in Skull Sale Trial: Federal Jurors Say Native American Origin Not Proved*, CHI. TRIB., July 19, 2002, at 1.

342. *Id.*

343. 18 U.S.C. § 1170(b) (2000).

344. There are two compliance aspects to NAGPRA, and thus two ways to violate 18 U.S.C. § 1170 (b), to wit: removing cultural items from federal or tribal land without disposition to the owner as determined in 25 U.S.C. § 3002; and removing a cultural item from the repatriation process in violation of 25 U.S.C. § 3005.

uals have been convicted under this provision, one twice.³⁴⁵ Of the 14 convictions, 12 resulted from guilty pleas.³⁴⁶

One of the § 1170(b) cases that went to trial involved the trafficking of a Navajo medicine bundle.³⁴⁷ On August 23, 1993, Richard N. Corrow knowingly purchased and transported 22 Navajo Yei'i Be Chei masks. Corrow later attempted to sell the masks to an undercover federal agent. The masks were identified as objects of cultural patrimony. Corrow had not been given permission by the Navajo Nation to remove the masks from tribal land. On April 26, 1996, Corrow was found guilty of illegal trafficking of Native American cultural items obtained in violation of NAGPRA. On July 3, 1996, Corrow was sentenced to five years probation and 100 hours of community service to benefit the Navajo Nation. The masks were transferred into the care of the Navajo Nation. Corrow subsequently appealed his conviction to the United States Court of Appeal for the Tenth Circuit. He argued that the definition of object of cultural patrimony was unconstitutionally vague and that the district court had erred by not requiring proof of the requisite criminal intent.³⁴⁸ The court of appeals affirmed the conviction, holding that the definition of object of cultural patrimony provides sufficient objective guidance to law enforcement personnel to avoid the likelihood of arbitrary enforcement.³⁴⁹ The court also held that NAGPRA provided Corrow fair notice that the conduct he engaged in was illegal.³⁵⁰ Corrow's subsequent petition for a writ of certiorari was denied by the U.S. Supreme Court.³⁵¹

The second § 1170(b) case that went to trial involved the trafficking of six Hopi ceremonial masks and Roman Catholic robes, vestments, and other liturgical items from the Pueblo of

345. See *United States v. Tidwell*, 191 F.3d 976, 982 (9th Cir. 1999); *United States v. Kramer*, 168 F.3d 1196, 1203 (10th Cir. 1999); *United States v. Corrow*, 941 F.Supp. 1553, 1565 (D.N.M. 1996) *aff'd*, 119 F.3d 796 (10th Cir. 1997); see also *United States v. Cavaliere*, CR-02-1386, (D.N.M.); *United States v. Baer*, CR-01-1428 (D.N.M.); *United States v. Somers*, CR-99-559-001 (D.Ariz. July 12, 1999); *United States v. Fraqua*, CR-97-482 (D.N.M. Feb. 25, 1998); *United States v. Hicks*, CR-98-399 (D.Ariz. June 25, 1998); *United States v. Tidwell*, CR-95-82 (D.N.M. Oct. 31, 1995); *United States v. Garcia*, CR-92-515 (D.N.M. May 19, 1993).

346. Kramer's subsequent motion to withdraw his guilty plea was denied. *Kramer*, 168 F.3d at 1202.

347. *Corrow*, 941 F. Supp. at 1556. The facts listed in the paragraph are from *id.* at 1556-57.

348. *Corrow*, 119 F.3d at 799.

349. *Id.* at 804.

350. *Corrow*, 119 F.3d at 804.

351. 522 U.S. 1133 (1998).

Acoma.³⁵² From April to October 1996, Rodney Phillip Tidwell knowingly purchased six Hopi ceremonial masks from Ernest Wendell Chapella, a resident of the Hopi Indian reservation. Tidwell subsequently sold the masks. At trial, the masks were identified as objects of cultural patrimony. In a separate transaction, Tidwell knowingly purchased, transported, and sold robes, vestments, and other liturgical items believed to have belonged to a Roman Catholic priest who died during the Pueblo Revolt in 1680 and which were currently in use by the Altar Society at Acoma Pueblo. The robes, vestments, and other liturgical items were identified as objects of cultural patrimony. Tidwell was not given permission by either pueblo to remove the objects of cultural patrimony from tribal land. On December 11, 1997, a jury found Tidwell guilty of illegal trafficking of Native American cultural items obtained in violation of NAGPRA. Tidwell was also found guilty of conspiracy, theft of tribal property, and trafficking in unlawfully removed archeological resources. On March 16, 1998, Tidwell was sentenced to 33 months' imprisonment and fined \$12,000. Tidwell's conviction was affirmed on appeal.³⁵³ Chapella, who was charged along with Tidwell, took his own life prior to trial.³⁵⁴

Review of the twenty 18 U.S.C. § 1170 convictions reveals that the two subsections of the criminal provisions are being applied differently. Of the six convictions for illegal trafficking in Native American human remains, five were prosecuted in the eastern United States, with three prosecuted in Virginia.³⁵⁵ Conversely, all 14 cases resulting in convictions for illegal trafficking in Native American cultural items were prosecuted in either New Mexico or Arizona.³⁵⁶ This may be due in part to the location of trained prosecutors working as team members with dedicated law enforcement agents.

Over the past 12 years, sentencing for violations of 18 U.S.C. § 1170 have included fines, restitution, probation, community

352. *Tidwell*, 191 F.3d at 979 (robes); *id.* at 982 (masks).

353. *Tidwell*, 191 F.3d at 982.

354. *Id.* at 979.

355. *United States v. Great Southern Arsenal, Inc.*, CR-01-271-01 (E.D.Va. July 25, 2001); *United States v. Courtney C. Smith*, CR-01-422-001 (E.D.Va. July 25, 2001); *United States v. Sean Adam Long*, CR-00-20 (W.D.Ky. Mar. 7, 2001); *United States v. William Stevens*, CR-98-232 (E.D.N.Y. June 25, 1998); *United States v. Richard Phillip Maniscalco*, CR-94-1139 (E.D.Va. Dec. 21, 1995).

356. *See supra* note 355.

service, and incarceration.³⁵⁷ On November 1, 2002, the Federal Sentencing Guideline Manual was amended to require stiffer sentencing for violation of 18 U.S.C. § 1170 and other cultural property crimes.³⁵⁸ The new guidelines increased the base offense level and directed additional increases for financial incidents involving human remains, funerary objects, sacred objects, or objects of cultural patrimony, both of which are required elements of 18 U.S.C. § 1170 violations.³⁵⁹ Absent some downward departure for specific mitigating circumstances, a first-time offender can now expect to be sentenced to imprisonment for 10 to 12 months.³⁶⁰

IX.

CONCLUSION

On October 26, 1990, Senator McCain's co-chair on the Senate Select Committee on Indian Affairs, Senator Daniel Inouye, also addressed the members of the Senate. He stated:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

In light of the important role that death and burial rites play in Native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. . . .

357. Most convicted defendants receive sentences combining fines and probation. Corrow also was sentenced to 100 hours of community service. Gerald Garcia was sentenced to 3 months incarceration. William Stevens was sentenced to 12 months incarceration. Rodney Tidwell was sentenced to 33 months incarceration.

358. See U.S. SENTENCING COMMISSION, 2002 FEDERAL SENTENCING GUIDELINES, § 2B1.5 (2002), at http://www.ussc.gov/2002guid/2b1_5.htm.

359. *Id.* § 2B1.5(a), (b)(3)-(4).

360. Senator Patrick Leahy recently introduced legislation that would increase the maximum penalty up to the level of the new sentencing guidelines. The bill would provide for a maximum ten-year sentence for trafficking in Native American human remains, regardless of the number of previous offenses. S. 2598, 107th Cong. § (c)(1) (2002). For convictions involving trafficking of Native American cultural items, the bill would require monetary evaluation of sensitive Native American cultural items; delete the automatic felony designation for a second offense under the current statute when the first offense was a civil violation or misdemeanor; and give federal prosecutors the ability to seek a felony on a first time offense while depriving them of the ability to guarantee felony treatment of subsequent offenses unless they can show the requisite dollar level of damage. *Id.* § (c)(2). This bill was not enacted by the 107th Congress and has not as yet been reintroduced in the 108th Congress.

Mr. President, the bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.³⁶¹

Taken together, the system of subject parties, parties with standing, purview, and processes outlined by the statute provide a workable compromise for resolving the complex and potentially contentious issues surrounding the disposition of Native American human remains and cultural items that are excavated or discovered on federal or tribal lands or held in federal or museum collections. Returning control of these human remains and funerary objects to lineal descendants, Indian tribes, and Native Hawaiian organizations will help to remedy years of unequal treatment. Acknowledging the communal property systems traditionally used by some Indian tribes not only returns those objects of cultural patrimony to their rightful owners, but reinforces the complex social webs in which they serve. Neither idea is very new, both reflecting the guarantee of equal protection under the law imagined by America's founding fathers and codified in the Constitution of the United States. "We shouldn't have to have a law to make people do what is morally right," Ben Nighthorse Campbell lamented. "But unfortunately we have to in some cases."³⁶²

In an extension of remarks introduced the day H.R. 5237 passed the House of Representatives and was sent on its way to President George Bush for signature, Representative Morris Udall hailed passage of the bill:

For decades, the skeletal remains of American Indians were removed from their burial sites, studied, cataloged, and relegated to the bins of museums and science. This legislation is about respecting the rights of the dead, the right to an undisturbed resting place. It is a good bill, and long overdue. . .

What we are saying to American Indians today, Mr. Speaker, is simply that your ancestors and their burial grounds are sacred, and will remain so.

In the larger scope of history, this is a very small thing.

In the smaller scope of conscience, it may be the biggest thing we have ever done.³⁶³

361. 136 CONG. REC. S17,174 (1990).

362. Judith Weinraub, *Museum Sets Policy on Indian Remains, Smithsonian Eases Return of Objects*, WASH. POST, Mar. 6, 1991, at B1.

363. 136 CONG. REC. E3484 (1990) (statement of Rep. Udall).