

LAW: NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)¹

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The Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001 et seq.) is the primary US federal law that enables the repatriation of Native American human remains and objects with particular cultural significance. In addition, it authorizes a program of federal grants to assist in the repatriation process. While its focus is repatriation, the law prohibits trafficking in Native American human remains and other cultural items obtained in violation of the law.

Scope. NAGPRA covers specifically defined Native American “cultural items” that are either held by museums or federal agencies or that are newly found on federal or Indian lands. Under NAGPRA, “cultural items” are human remains, funerary objects, and narrowly defined classes of “sacred items” and collectively owned “objects of cultural patrimony.” Claimants recognized by the law include lineal descendants (in the rare cases in which they can be identified), federally recognized Indian tribes, and Native Hawaiian organizations. The Smithsonian Institution is exempt from NAGPRA but is covered by the National Museum of the American Indian Act (20 U.S.C. 80q). The implementation of the law is governed by regulations promulgated by the Department of the Interior (43 C.F.R. 10).

Generally speaking, a federally recognized Indian tribe or Native Hawaiian organization that is determined to have a “**cultural affiliation**” with human remains or other cultural items is entitled to their repatriation. Cultural affiliation is defined in the law to mean “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.” As the pivotal concept in the law, cultural affiliation defines the threshold for closeness of relationship that is required for a modern group to be entitled to repatriate Native American human remains or other cultural items.

NAGPRA provides for repatriation of human remains and other cultural items that are held by museums or federal agencies and, somewhat differently, with human remains and objects that are newly discovered on federal or Indian land as a result of an ongoing excavation or inadvertent discovery.

Museum Collections. Under the law, museums (including universities) receiving federal funds and federal agencies were required to inventory their collections of human remains and associated funerary objects and, in consultation with tribes and Native Hawaiian organizations, determine their cultural affiliation whenever possible. Each museum and agency had to provide affected groups with this inventory and a summary of its collections of unassociated funerary objects (those without associated human remains), sacred objects, and objects of cultural

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patrimony. The Secretary of the Interior is required to publish notice of completed inventories and intended repatriations in the *Federal Register*. Native American lineal descendants, federally recognized Indian tribes and Native Hawaiian organizations that are identified by the museum or agency as culturally affiliated (or that separately demonstrate their cultural affiliation) are entitled to the repatriation of the affiliated remains or other cultural items from the custodial institution so long as there are no competing claims.

NAGPRA provides museums and agencies with deadlines for the distribution of inventories and summaries. However, there is no deadline for culturally affiliated tribes and Native Hawaiian organizations to make a claim (so long as the museum or agency has not repatriated the human remains or other cultural items to another claimant). In the absence of a claim, the museum or agency retains the human remains or objects.

The law does not explicitly provide for the disposition of culturally unidentifiable human remains or other cultural items (those lacking cultural affiliation). Museums repatriating such remains and objects on their own initiative do so without the shield from legal claims of breach of fiduciary duty, public trust or violations of state law that NAGPRA provides for repatriations that are accomplished pursuant its provisions.

NAGPRA does not prohibit scientific study of human remains or objects in museum or agency collections. It includes a rarely, if ever, used provision that permits delay of repatriation for the completion of scientific study whose outcome would be of “major benefit to the United States”

Intentional Excavation and Inadvertent Discovery. Human remains or other cultural items that are intentionally excavated or inadvertently discovered on federal or Indian land after November 16, 1990 are subject to somewhat different provisions. As with museum and agency collections, lineal descendants have the highest priority as claimants of human remains and associated funerary objects. If the remains or other cultural items are from Indian land, ownership lies with the tribe on whose land they were discovered. Failing that, ownership or control is vested in a culturally affiliated tribe if one is identified and makes a claim. In the absence of a culturally affiliated tribe, a tribe that is legally recognized as having aboriginally inhabited the area in which the remains or objects were discovered can claim them. The disposition of human remains or objects that are not claimed will be determined by regulations that have not yet been issued by the Department of the Interior.

The intentional excavation of Native American human remains or other cultural items on federal or Indian land is allowed only with a federal permit (issued under the Archaeological Resources Protection Act) and after consultation with appropriate Indian tribes or Native Hawaiian organizations. Inadvertent discoveries of human remains or other cultural items on federal or Indian land entail prompt notification of the land managing agency or tribe, consultation with appropriate tribes, and if ground disturbing activities precipitated the discovery, cessation of those activities.

Review Committee. The law establishes a Review Committee, appointed by the Secretary of the Interior, whose primary responsibility is to hear disputes and provide recommendations on their resolution. The committee is charged with compiling an inventory of culturally unidentifiable human remains and making recommendations about a process for their disposition. It also makes an annual report to Congress. The committee is composed of three members nominated by museum and scientific organizations, three nominated by Indian Tribes and Native Hawaiian Organizations (two of whom must be traditional religious leaders), and one member from a list composed, and agreed to, by the other six. Staff support to the committee is

provided by the Department of the Interior and is presently housed in the National Park Service within the Department.

History. Passed in 1990, NAGPRA was the culmination of several attempts to pass repatriation legislation. However, it was the first national legislation that included a substantial and open effort to accommodate scientific and museum concerns as well as Native American interests. NAGPRA was the result of a compromise among national organizations representing American Indian organizations, professional organizations representing the scientific community (primarily the Society for American Archaeology), and the American Association of Museums. As passed, the law was supported by a broad range of organizations representing American Indian, scientific, museum, and preservation interests.

Implementation. NAGPRA has had a dramatic effect on the day-to-day practice of archaeology and physical anthropology in the US. In many cases, NAGPRA helped stimulate interactions of archaeologists and museum professionals with Native Americans that were felt to be constructive by all parties. However, considerable criticism has been leveled at individual federal agencies and some museums, both by Native Americans and archaeologists, for their failure to follow the provisions of the Act.

A more fundamental criticism comes from some scientists who argue that scientific progress should not be subordinated to what they describe as essentially religious concerns of Native Americans. From a different angle, some Native Americans and some archaeologists argue that repatriation of Native American human remains and objects is an ethical or human rights issue in which science should have no say. Milder critics would say either that NAGPRA goes too far to accommodate the interests of scientists or it is overly favorable to Native Americans.

Courts. The most prominent NAGPRA court case was a challenge by a group of scientists of a federal agency finding that a 9000 year old skeleton known as Kennewick Man was culturally affiliated with a coalition of five Northwest US tribes. The court rejected this finding and ruled that the remains were not Native American under the definition in the Act. The court ruled that age alone is insufficient to satisfy the definition and that in order to be considered Native American, some relationship must be shown between a set of remains and a modern Indian tribe. The court ruled that the plaintiff scientists could be able to pursue additional studies of the remains (*Bonnichsen v. United States*, 217 F. Supp. 2d 1116; D. Or. 2002).

Another suit, *Na Iwi O Na Kapuna O Makapu v. Dalton*, challenged the Navy's use of standard methods of physical anthropological examination in the completion of a NAGPRA inventory. The court held that "Examinations done for the purpose of accurately identifying cultural affiliation or ethnicity are permissible because they further the overall purpose of NAGPRA, proper repatriation of remains and other cultural items (894 F. Supp. 1397; D. Haw. 1995)."

Keywords: repatriation, NAGPRA, cultural affiliation, Kennewick man.

Cross References: Who Owns the Past, Politics of Archaeology

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Biography

Keith Kintigh is Professor of Anthropology at Arizona State University and a former president of the Society for American Archaeology. As chair of the Society's Committee on Repatriation, he was involved in the legislative process leading to the passage of the Native American Graves Protection and Repatriation Act in 1990 and has been involved in repatriation issues, both nationally and in the Southwest since that time. His research focuses on the social, political, and economic organization of middle-range societies. Over the last 20 years, he has directed extensive archaeological survey and excavation in the Cíbola area, on and around the Zuni Indian Reservation in New Mexico and across the state line along the upper Little Colorado River in Arizona. Professor Kintigh has also held academic appointments at the University of California at Santa Barbara and the University of Arizona. He earned a Master of Science degree in Computer Science at Stanford University in 1974 and a PhD in Anthropology at the University of Michigan in 1982.