

Appendix 10: The Native American Graves Protection and Repatriation Act (NAGPRA): A detailed analysis

The legal provisions of NAGPRA

1. NAGPRA develops a systematic process for determining the rights of lineal descendants, Indian Tribes and Native Hawaiian Organisations to four categories of objects which are:
 - human remains;
 - funerary objects;
 - sacred objects; and
 - objects of cultural patrimony.
2. The legislation applies to collections of most American remains and associated funerary objects held by Federal Agencies in federally funded museums and universities or in the possession of any institution, whether State or Local Government, which receives Federal funds or objects found on Federal or tribal land.
3. It imposes a duty upon any Federally funded museum or other institution to compile a summary of collections based upon available information and an inventory of human remains and associated objects in its possession or control and to identify the cultural and geographical association of each object. The purpose is to 'facilitate repatriation' by providing clear descriptions of the human remains and associated objects and establishing the cultural affiliation between those objects and present day Indian Tribes and Native Hawaiian Organisations.
4. The legislation imposes a positive duty on museums or Federal Agencies to repatriate human remains or associated objects to a lineal descendant, Indian

Tribe or Native Hawaiian Organisation if a request or claim for return has been made. Whilst the duty becomes imperative only if a claim is made, the Act does require museums or Federal Agencies to adopt a proactive approach to remains in a collection and provide certain information to those whom they believe may be interested in their claim even if one has not actually been made.

5. If remains are inadvertently excavated the finder must stop working on the site, notify the appropriate Indian Tribe or Native Hawaiian Organisation and secure the site. If the excavation is intentional then archaeologist must consult with the Tribe prior to the excavation commencing if it is reasonable to assume that a planned activity may result in excavation of remains. The excavation of human remains, funerary objects or other objects covered by the Act are only permitted if they follow the requirements of the Archaeological Resources Protection Act (ARPA) and its implementing regulations which require those excavating to obtain a permit before commencing work. Proof of consultation and consent with the relevant Tribe or Organisation is mandatory and must be available before a permit will be issued.

6. Sections 5 and 6 of NAGPRA set out the duties on each museum and Federal Agency to document and disclose details of items in their collection. Section 5 deals with the possession or control of human remains and associated objects and requires museums or Federal Agencies to compile an inventory of such objects and list the geographical and cultural identity of each. Inventories should be completed after consultation with Tribal and Native Hawaiian Organisation officials and traditional religious leaders within five years. The purpose of the inventory is to 'facilitate repatriation by providing clear descriptions of human remains and associated objects and establishing the cultural affiliation between these objects and present day Indian Tribes and Native Hawaiian Organisations'. Museum and Federal officials must consult with the lineal descendants of any individuals whose remains and associated objects are likely to be subject to the inventory provisions or likely to be culturally affiliated and from whose original

- land the human remains/associated objects originated.
7. Section 6 deals with unassociated funerary objects, sacred objects and objects of cultural patrimony and requires the museums and Federal Agencies which have possession or control to provide a written summary of the objects.
 8. Section 7 provides for the return of human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony identified pursuant to Sections 5 and 6. It calls for all returns to be completed in consultation with a requesting descendent, Tribe or Native Hawaiian Organisation.
 9. The remains must be repatriated expeditiously if a claim is made subject to the following criteria: Cultural affiliation has been established and the object falls within the definitions outlined in the Act. Repatriation must take place within 90 days of receipt of a written request and not less than 30 days after the publication of Notice of Intent to Repatriate.
 10. This section has a provision that the Federal Agency or museum must share its information with the requesting descendent, Tribe or Native Hawaiian Organisation to assist them in making a claim and establishing their right to possession to the object.
 11. NAGPRA does not ignore the benefits of scientific research on remains and provides that if an item is needed for a specific scientific study, the outcome of which 'would be of major benefit to the United States', the item may be retained but must be returned within 90 days of completion of the study. If there are legitimate competing claims for any cultural item then the Federal Agency or museum can also retain the item until the requesting party or the Courts decide who the appropriate Claimant is.
 12. Once the Claimants have been identified and repatriation agreed then the remains or objects must be accomplished by the museum or Federal Agency in

consultation with the requesting Claimant to determine the place and manner of the repatriation. The Claimant recipient must be informed of any presently known treatment of the human remains or objects with pesticides, preservatives, or other substances which represent a potential hazard to the object or to the person handling them.

13. NAGPRA further assists both the potential Claimants and the Federal Agencies and museums in cooperating with each other and working together to ensure that the spirit of community that the Act promotes can be achieved. Section 10 of the Act provides for grants to museums to assist in the inventory and summary requirements of the Act, and also provides grants to Tribes and Native Hawaiian Organisations to assist in the return of items covered by the Act.
14. This desire to promote cooperation is also evident in the dispute resolution clause which ensures that any party who wishes to contest an action taken by a museum, Federal Agency, Tribe or Organisation with respect to repatriation or disposition of the remains/objects is encouraged to do so through informal negotiations to achieve 'a fair resolution of the matter'. The Act sets up a review committee to monitor and review the implementation and provisions of the Act, and the services of this committee can be used to try to achieve formal resolutions of disputes which are not resolved by 'good faith negotiations'. These actions may include convening meetings between the parties, making advisory findings as to contested facts and making recommendations to the disputed parties or to the secretary as to the proper resolution of disputes.
15. The Act itself is clear in that it does not intend to restrict access to any Court or limit rights to individuals, Tribes or Organisations to access to the law. It confirms that the United States District Courts retain jurisdiction over any action brought that alleges a violation of the Act.

The benefits of NAGPRA

16. More than a decade of NAGPRA activity has demonstrated real benefits to the museum profession from such work; it has also raised real problems. In reviewing these, and the lessons learned overall from NAGPRA, we recognise that NAGPRA bears only on Native American remains, while our terms of reference require us to take a broader view, and that NAGPRA compels repatriation within certain categories of artefact.

17. Since 1990, thousands of human remains and associated funerary objects, and smaller numbers of culturally significant artefacts, have been repatriated from US museums to Native American people. Figures are not available on the numbers of human remains returned, although NAGPRA officials clearly expect all culturally identifiable remains (out of an estimated pre-1990 total of 200,000 individuals represented by remains in US museum collections) to be returned from museums, along with some culturally unidentifiable remains to be returned to regional alliances of tribes.¹ Notices of Intent to Repatriate, the final administrative step before return, have been published for 50,887 unassociated funerary objects, 898 sacred objects, 237 objects of cultural patrimony, and 383 items fitting both sacred and cultural patrimony definitions.² The vast majority of human remains returned have been buried or cremated.

1 C. Timothy McKeown, 'Implementing a "true compromise": The Native American Graves Protection and Repatriation Act after ten years, in Cressida Fforde, Jane Hubert and Paul Turnbull, eds., *The Dead and their Possessions: Repatriation in Principle, Policy and Practice* (2002) London: Routledge pp 117 and 124, and M. Simpson, *Making Representations: Museums in the Post-Colonial Era*, (2001) London: Routledge p 285.

2 McKeown, op. cit.p 124.

18. Given the historical and political pressures involved, it is only very recently that collaborative research efforts – allowing research on human remains followed by reburial or cremation – seem to be gaining strength. Some artefacts have also recently been legally repatriated but permitted to remain in the physical care of museums; other artefacts have gone to tribal museums or ritual practitioners, or been buried or permitted to decay naturally.
19. Three extremely important benefits appear to have emerged as the result of implementing NAGPRA: healing for Native American peoples; consultation and dialogue between Native Americans and museums; and improved documentation for museum collections.
20. The ability to honour one's duty to ancestors by according their remains proper burial has been extremely important to Native Americans. For the northern Cheyenne, for instance, who claimed from the Smithsonian the remains of ancestors massacred by the US Army at Antelope Creek in 1877, burying their dead involved mourning for the individuals involved as well as resolving anger at the massacre and its aftermath, during which the bodies of their ancestors were collected for scientific study. This repatriation did much to reinforce the pride and strength of the Cheyenne nation today and for the future.³ Being recognised by museums and scholars as having legitimate interests in ancestral remains and possessing valuable knowledge about museum collections has also been empowering for Native Americans.

The emphasis on consultation

21. Tribal consultation with museums is part of the NAGPRA process. Such meetings, which bring tribal representatives into museum storerooms and archives, have done a great deal to bridge the historic gulf between collections of Native materials and living members of the tribes from which the collections come. They have also functioned as a collective education process for museum professionals who have learned much about the cultural meanings and histories of

collections, of the importance of historic materials to Native peoples today, and of cultural protocols for showing respect.

Inventories and documentation

22. Having to provide cultural inventories of Native American collections has greatly improved museum record-keeping and generated a wave of research. As a result of this process many museums now have computerised databases that incorporate all historical information and new research on the collection, and which without NAGPRA would have taken decades longer to achieve.⁴ Much new information, and many corrections of misinformation on old records, have arisen as the result of tribal consultation and visits (Isaac, personal communication to Peers, 2000). New research on collections to determine their cultural affiliation for inventorying has also sparked a great deal of new intellectual activity.

Challenges and burdens

23. NAGPRA has not achieved these benefits without considerable problems. Given that it will result in the loss of human remains from museum collections, NAGPRA does impose constraints on certain kinds of scientific research

3 R. Thornton, 'Who owns our past? The repatriation of Native American human remains and cultural objects,' in R. Thornton, ed., *Studying Native America: Problems and Prospects* Madison: University of Wisconsin pp 385-6.

4 For example, B. Isaac, 'Implementation of NAGPRA: the Peabody Museum of Archaeology and Ethnology, Harvard, in Fforde, et al., op.cit. pp 164-5.

now and in the future.⁵ As a result, it has also sharpened differences between Native communities and elements of the scientific community, and within the scientific community itself.⁶

24. Pragmatically, the difficulty of meeting deadlines for completion of cultural inventories by museums was underestimated and the process underfunded by legislators.⁷ Few items in collections are well provenanced; establishing provenance requires time and skilled research, which is expensive. Delays in publishing guidelines for interpreting the legislation, in responding to correspondence and queries, and in publishing notices on the part of the regulatory office in Washington caused uncertainty and stress for all parties.⁸ Even the question of whether the museum or the Tribe pays for the cost of repatriation is unclear in the legislation.⁹ Finally, the knowledge and skill required by museums to consult adequately with tribal groups over historical and prehistoric human remains is considerable, and often painfully acquired: 'The remains of nine Flathead individuals resulted in consultation with eight tribes ... Each consultation demands specific knowledge of territory and custom; the process may be likened to having diplomatic relations with hundreds of nations.'¹⁰

5 Francis P. McManamon, 'Repatriation in the USA: A decade of federal agency activities under NAGPRA,' in Fforde, et al., op.cit. p 141.

6 *ibid.* p 143-4.

7 Isaac, op. cit. p163; McManamon, op. cit. p 140.

8 Isaac, op. cit. p 165.

9 Isaac, op. cit. p 166.

10 Isaac, op. cit. p 165.

25. Other problems involve inadequate guidance within the legislation for the disposition either of culturally unidentifiable human remains or of funerary objects associated with them; these guidelines are only now being produced.¹¹ Most problematic of all are issues of ancient or socially complex remains where there are no clear genealogical or cultural descendants to claim them, such as the ancient Kennewick Man remains, and several fiercely disputed cases in the Southwest where multiple communities legitimately claim the same ancient remains.¹²

¹¹ Isaac, op. cit. p 163 and 165.

¹² David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (2000) New York: Basic Books. [On Kennewick Man see also the links at the National Parks Service website, <http://www.cast.uark.edu/products/NAGPRA/>]; Isaac, op. cit. p 166.