A Look Into NAGPRA: Application, Issues, and the Future

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ABSTRACT

During Colonization, American Indian tribes lost homes, language, and culture. The Native American Grave Protection and Repatriation Act (NAGPRA) was passed to help rebuild the relationship with American Indian tribes after it had been destroyed during colonization. NAGPRA

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sets forth laws regarding the repatriation of remains and cultural objects which are being held in museums and by federal agencies. The legislative history behind this act shows Congress worked hard to find the best device to help with repatriation. However, NAGPRA’s language left holes in the law which led to different issues argued in litigation. Many American Indians began feeling that NAGPRA was not the answer they were looking for. This Comment analyzes the NAGPRA including its legislative history, issues argued in litigation, and the proposed 2023 implementations to the regulations.

I. INTRODUCTION

History should “‘seize hold of a memory as it flashes up in a moment of danger’ and as it articulates historical trauma.” The history of American Indians is full of trauma as “legislation supported forced assimilation and stripped [their] property rights.” American Indians were forced into boarding schools, were forced onto reservations, and were left with the idea their way of life was not something to be proud of.

As colonizers came to America, they took for their own use the remains and funeral objects of American Indians. American Indians watched as these objects were hung in museums, and there was little they could do about it. When the Native American Grave Protection and Repatriation Act (NAGPRA) was passed in 1990, the hope of reacquiring this lost property emerged. While NAGPRA seemed to be the answer, it has not been as successful as many hoped.

[References]

2. FAQ: Teaching & Learning about Native Americans, Nat’l Museum Am. Indian, https://americanindian.si.edu/nk360/faq/did-you-know (last visited Dec. 17, 2023) [https://perma.cc/K48C-Y4XU]. It had been asked which names indigenous prefer. Many prefer the name of their tribe, but since this Comment is not referring to a single tribe throughout, the Comment will use the term “American Indian” based on the National Museum of the American Indian.
4. Fine-Dare, supra note 1, at 3.
6. See Murphy, supra note 3, at 506.
9. See id.
Part II of this Comment analyzes the treatment of American Indian remains and funeral objects by people other than American Indians.10 It explores the legislative history of NAGPRA before examining different parts of the Act.11 Part III addresses the shortcomings of NAGPRA by analyzing different controversies over issues not expressly covered under the Act.12 Part IV outlines the proposed amended resolutions to NAGPRA.13 Part V applies NAGPRA to the University of Wyoming Anthropology Department (UWAD), analyzing whether UWAD has followed NAGPRA and what UWAD must do to comply with NAGPRA.14 Finally, Part VI explores whether NAGPRA has been effective.15

II. OVERVIEW OF NAGPRA

A. Treatment of American Indians by Other People

American Indian tribes view human remains as “the remnants of a once-living, once-breathing person deserving of respect and a proper burial.”16 Colonizers and the United States (U.S.) government did not share this view and took remains and objects from tribes without their consent.17 American Indian objects and remains were put on display in museums, showing colonists how the American Indians were a vanishing culture that needed to be preserved.18

History shows the illicit taking and collection of American Indian remains and cultural objects.19 To colonizers “Indian dead bodies [were] viewed as specimens or trophies and not as people.”20 Many others saw these remains and cultural artifacts as belonging to ancient American Indian cultures not associated with living tribes.21 President Thomas Jefferson learned about American Indian burial grounds, dug up the

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10 See infra Part II.
11 See infra Part II.
12 See infra Part III.
13 See infra Part IV.
14 See infra Part V.
15 See infra Part VI.
16 Cryne, supra note 8, at 100.
17 Id. at 102.
18 Murphy, supra note 3, at 501.
20 FINE-DARE, supra note 1, at 117.
remains, and looted the graves, taking whatever he wanted.22 Scientists gathered American Indian body parts to study them and prove American Indians were an inferior race.23 The U.S. government seemed to support the destructive and disrespectful practice when it instructed the U.S. army in 1868 to find American Indian body parts for use in the Army Medical Museum.24 This led to the taking of “more than 4,000 heads from battlefields, hospitals, and graves across the country.”25

Once remains or objects reached museums, museum workers stored them haphazardly and in toxic conditions.26 Museums would preserve American Indian artifacts and remains in cyanide and other pesticides, making it now impossible for tribes to use them in rituals and ceremonies due to the threat of serious health risks.27 Museums were disorganized when it came to American Indian remains, often throwing different remains in one box, making it difficult to know how many individual remains there were and which remains belonged to which tribe.28 Further, remains and objects were poorly cared for and even destroyed by water damage due to inadequate storage.29 The treatment of American Indian remains and objects has left American Indians feeling dehumanized and disrespected.30 The government saw these remains and objects as nothing more than resources to be studied and consigned to museums.31 After learning that the Smithsonian had more than 14,000 American Indian remains, American Indian tribes began advocating for the return of the remains and objects, which led Congress to realize it was time for something to change.32

24 Id.
25 Id.
26 Eynon, supra note 19, at 243.
27 Id. at 244 (2019).
28 Id. at 243–44.
29 Id. at 243.
30 Melillo, supra note 23, at 150.
31 Id. at 150–51.
B. *NAGPRA Legislative History*

In 1906, Congress passed the Antiquities Act hoping to protect archeological resources from looters. However, it defined American Indian remains found on the land as “archaeological resources,” which meant any remains found on the land were federal property. This authorized the federal government to dig up American Indian remains and preserve them in a museum, instead of leaving them where they had been buried.

In 1979, The Archaeological Resources Protection Act (ARPA) was passed and required the government to “provide notice to Native American tribes when government action might disturb sites of religious or cultural importance.” ARPA banned the unauthorized excavation of archeological resources and established criminal penalties for violations, which included fines up to $100,000 and potential jail time. However, ARPA was not the answer Congress was looking for because the existing safeguards in ARPA could not adequately protect archeological sites from robbery and destruction. Ten years later, Congress passed the National Museum of the American Indian Act (NMAIA) in 1989. The NMAIA was the first piece of legislation to address the idea of repatriating American Indian remains and funerary objects. Repatriation is “the act or process of restoring or returning someone or something to the country of origin, allegiance, or citizenship.” While the NMAIA addressed the issue of repatriation, it focused exclusively on the Smithsonian Museum, leaving out other museums holding American Indian remains and objects. Both the ARPA and NMAIA failed to take into consideration

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33 Melillo, *supra* note 23, at 152. The Antiquities Act “authorized the President to create national monuments, granted the executive power to establish areas for preservation, and required that institutions obtain permits in order to conduct research on a site.” *Id.* at 153; *see also* Antiquities Act of 1906, ch. 3060, § 2, 34 Stat. 225, 225 (1906) (codified as amended at 54 U.S.C. § 320301).


41 See National Museum of the American Indian Act, 103 Stat. 1336, 1336–47.
the interests of living American Indians, reiterating the idea that American Indian remains and objects were in no way connected to modern tribes.43

With support from tribal organizations, NAGPRA was introduced into the House of Representatives on July 10, 1990.44 “[L]egislators framed the bill as human rights legislation because it sought to end the disparate treatment of Native American remains as compared to those of other groups and ensured Native Americans’ right to protect their dead.”45 NAGPRA was significant as it was the first piece of American legislation that recognized a connection between modern American Indian tribes and those of the past.46 President George H.W. Bush signed NAGPRA into law on November 16, 1990, seeking to provide an adequate repatriation process for Native remains and cultural objects held by federal agencies and federally funded museums.47 After years of lobbying, NAGPRA was a victory for tribes who wanted to bring home the remains of their ancestors.48

C. The Current State of Repatriation: NAGPRA

NAGPRA has two main purposes: “first, to control the removal of Native American remains and cultural items from federal or tribal lands after November 16, 1990, and second, to address the disposition of Native remains and cultural objects currently held or controlled by federal agencies and museums.”49 NAGPRA works toward both purposes by identifying ownership of American Indian remains and cultural objects found on federal land to American Indian tribes.50 It establishes a procedure in which they can make claims for the repatriation of remains and objects found.51 “NAGPRA is not just about taking careful inventory of American Indian remains and objects so repatriation can take place.”52 For American Indians, NAGPRA provides the opportunity to return remains and objects controlled by the U.S. government.53

Under NAGPRA, cultural items—including human remains, funerary objects, and other tribal objects—can be repatriated.54 “[A]ssociated

43 Niesel, supra note 21, at 843.
44 Id.
45 Id. at 844.
46 Id.
47 Id. at 843.
48 Id.
49 Yasaitis, supra note 32, at 267.
50 Id.
51 Id.
52 FINE-DARE, supra note 1, at 140.
53 Niesel, supra note 21, at 841.
funerary objects” are objects that “are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and funerary objects are presently in the possession of a Federal agency or museum.”\(^{55}\) “[U]nassociated funerary objects” are objects which have been placed with remains around the time of death and are in the possession or control of a federal agency or museum, while the remains are not.\(^{56}\) “[S]acred objects” are objects of cultural patrimony which are objects that have an ongoing historical, traditional, or cultural importance central to the American Indian culture.\(^{57}\) NAGPRA only applies to objects and remains found on federal land or in federally funded agencies and museums.\(^{58}\) In other words, American Indian tribes cannot repatriate anything found on private land or owned by private individuals.\(^{59}\)

While scientists were afraid NAGPRA would affect their ability to study human remains, NAGPRA states if American Indian tribes ask for the remains back, an agency must do so unless the “items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States.”\(^{60}\) NAGPRA does not specify what would fall under this category.\(^{61}\)

Since the passing of NAGPRA, each federal agency and museum is required to complete an inventory of the items it possesses “to the extent possible based on information possessed by such museum or Federal agency, [to] identify the geographical and cultural affiliation of [Native American human remains and associated funerary objects].”\(^{62}\) All inventories should be completed five years after November 16, 1990.\(^{63}\) However agencies can request an extension as long as they act in good faith.\(^{64}\) Good faith includes active consultation with a tribal member, documentation regarding the remains, and a written plan to carry out the inventory process.\(^{65}\) Once a museum or agency identifies the geographical and cultural affiliation of each item, they are to notify the affected tribe no later than six months after the completion of the inventory, summarizing

\(^{56}\) Id. § 3001(3)(B).
\(^{57}\) Id. § 3001(3)(D) (2018).
\(^{59}\) Id.; 25 U.S.C. § 3002(a).
\(^{60}\) 25 U.S.C. § 3005(b). The items must be returned within 90 days of the study.
\(^{61}\) See id. § 3005(b).
\(^{62}\) Id. § 3003(a).
\(^{63}\) Id. § 3003(b)(1)(B).
\(^{64}\) Id. § 3003(b)(1)(B); see Jeannin-Melissa Kapuakawekiu Russo, Comment, How to Remedy the NAGPRA’s Unintended Effect on Hawai’i After Brown v. Hawaii, 12 ASIAN-PAC. L. & POL’Y J. 186, 197–98 (2011); see also 43 C.F.R. § 10.9(f) (2023).
\(^{65}\) Russo, supra note 64, at 198 (citing 43 C.F.R. § 10.9(f)).
“the contents of the inventory in enough detail to allow recipients to determine their interest in the remains.” This allows interested parties to come forth and begin the process of repatriation. The Secretary of the Interior can authorize grants to museums to help with the cost of repatriation, such as the cost associated with documenting each item and where it belongs. Objects are returned in the following order:

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

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

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

To ensure inventories occur, NAGPRA requires the establishment of review committees to monitor federal agencies’ and museums’ processes. Committee responsibilities include:

(3) upon the request of any affected party, reviewing and making findings related to--
   (A) the identity or cultural affiliation of cultural items, or
   (B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of

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66 Id. (citing 43 C.F.R. § 10.9(f)); see also 25 U.S.C. § 3003(d)(1).
67 Russo, supra note 64, at 199.
69 Id. § 3005(a)(5).
70 See id. § 3006(a).
each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this chapter;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.\(^{71}\)

Once remains or cultural objects have been identified or a tribe makes a claim, the burden rests on the American Indian tribe to prove it is an eligible group.\(^{72}\) To prove their eligibility, tribes must show they have a "‘shared group identity’ with . . . an ‘identifiable’ earlier group the remains represent."\(^{73}\) This can be done by establishing the existence of an identifiable present-day American Indian tribe under NAGPRA, showing through a preponderance of the evidence the existence of the earlier group and providing evidence of the existence of a shared group identity that can be traced between the modern tribe and the earlier group.\(^{74}\) One way American Indian tribes can provide evidence for these three things is through oral storytelling.\(^{75}\)

Some courts have realized “for many Native American tribes, oral traditions ‘are the only record of their past.’”\(^{76}\) Their oral traditions are full of parables and myths which are mixed with “genuinely historical components.”\(^{77}\) American Indians have proven repeatedly how important

\(^{71}\) Id. § 3006(c).

\(^{72}\) See id. § 3005(a)(5); see also Rebecca Tsosie, NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework, 44 ARIZ. ST. L.J. 809, 817 (2012).

\(^{73}\) Tsosie, supra note 72, at 818 (quoting 43 C.F.R. § 10.10 (2005)).

\(^{74}\) 43 C.F.R. § 10.14(c), (f); 25 U.S.C. § 3005(a)(4).

\(^{75}\) Cathay Y.N. Smith, Oral Tradition and the Kennewick Man, 126 YALE L.F. 216, 219 (2016).

\(^{76}\) Id. at 221 (quoting Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 87 (Can.)).

\(^{77}\) Id. (quoting Peter M. Whiteley, Archaeology and Oral Tradition: The Scientific Importance of Dialogue, 67 AM. ANTIQUITY 405, 412–13 (2002)).
their oral traditions are, with federal agencies and museums using oral history in over 300 instances when determining the cultural affiliation of the items being repatriated.\textsuperscript{78} NAGPRA encourages American Indian tribes to show cultural affiliation through “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”\textsuperscript{79} Congress has thus acknowledged oral tradition is valuable evidence that courts should consider when determining whether cultural items and human remains are considered under NAGPRA.\textsuperscript{80}

III. ISSUES WITH NAGPRA SHOWN THROUGH CASES AND PAST CONTROVERSIES

NAGPRA was the culmination of “decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property.”\textsuperscript{81} For American Indians, their religion saw these remains differently than others, believing that:

\begin{quote}
When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest . . . To put these spirits at ease, the remains must be returned to the ground as soon as possible.\textsuperscript{82}
\end{quote}

However, American Indians encountered many problems while trying to repatriate remains and objects.\textsuperscript{83}

A. The Kennewick Man

In July 1996, teenagers discovered a human skull and scattered bones along the Columbia River in Washington.\textsuperscript{84} The remains were found on federal land being used by the U.S. Army Corps of Engineers (the Corps).\textsuperscript{85} Local anthropologists believed these were remains of an early European

\textsuperscript{78} Id. at 222–23.
\textsuperscript{79} Id. at 222–23.
\textsuperscript{80} Id. at 223.
\textsuperscript{81} Smith, supra note 75, at 223.
\textsuperscript{83} Yasaitis, supra note 32, at 269.
\textsuperscript{84} Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1121 (D. Or. 2002), aff’d and remanded, 357 F.3d 962 (9th Cir. 2004), opinion amended and superseded on denial of reh’g, 367 F.3d 864 (9th Cir. 2004).
\textsuperscript{85} Id.
settler, but after radiocarbon dating the bones, they were shocked to find the bones were over 9,000 years old. While the anthropologists wanted to keep the bones to study, many American Indian tribes came forward, asking for repatriation under NAGPRA.

The finding of the Kennewick Man led to the case of *Bonnichsen vs. United States*, which brought to light many issues that are not resolved under NAGPRA. After further study of the Kennewick Man, the Ninth Circuit Court of Appeals found “no evidence of cultural similarities between Kennewick Man and modern Indians exists.” Since the remains were over 9,000 years old, it was hard for American Indian tribes to show any physical connection to the remains. As a result, the court held the remains did not fall under NAGPRA requirements, meaning the remains would not be repatriated through NAGPRA. The court interpreted NAGPRA to require the human remains to “bear some relationship to a presently existing tribe, people, or culture to be considered Native American.”

The unanswered question is thus: how much time from the past to the present is too much time? The court believed there must be some continuity between the remains and a modern-day tribe. The court’s holding suggests that when it comes to any ancient remains it is almost impossible to establish any relationship with any existing American Indians because the remains are too old to be considered American Indian.

Another issue the Kennewick Man brought up was the use of oral traditions as evidence. Even though oral evidence is allowed under NAGPRA, the Ninth Circuit held

[Oral] traditions include myths that cannot be considered as if factual histories . . . and because the record as a whole does not show where historical fact ends and mythic tale

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86 *Bonnichsen*, 217 F. Supp. 2d at 1121.
87 *Id.* at 1120.
89 *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2004).
90 *Id.*
91 *Id.* at 882.
92 *Id.* at 875.
93 *See* Seidemann, *supra* note 88, at 158.
94 *Id.* at 169; *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1143 (D. Or. 2002), *aff’d and remanded*, 357 F.3d 962 (9th Cir. 2004), *opinion amended and superseded on denial of reh’g*, 367 F.3d 864 (9th Cir. 2004).
95 *See* *Bonnichsen*, 367 F.3d at 879; *Cryne*, *supra* note 8, at 116.
96 *See* *Bonnichsen v. United States*, 367 F.3d 864, 882 (9th Cir. 2004).
begins, we do not think that the oral traditions . . . were adequate to show the required significant relationship of the Kennewick Man’s remains to the Tribal Claimants. 97

The court rejected the evidentiary value of American Indian oral tradition and relegated it to the same “evidentiary value as myth.” 98 This led other courts to the same conclusion, and even though NAGPRA allows oral tradition as evidence, it seemed some courts would not. 99

B. Muwekma Tribe v. Babbitt

Congress has the power under the Indian Commerce Clause to recognize Indian tribes. 100 The Indian Commerce Clause allows Congress to make all laws which pertain to American Indian trade, and has been expanded to also include making treaties and selling tribal land. 101 An “Indian Tribe” is “any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 102 The U.S. government recognizes 574 tribes. 103 This recognition allows American Indians to partake in the repatriation process under NAGPRA. 104 However, there are more than 200 tribes that are not federally recognized by the U.S. government. 105 Therefore, more than 200 tribes cannot use NAGPRA to repatriate cultural items and remains of their ancestors. 106

In Muwekma Tribe v. Babbitt, the Muwekma tribe resided in present-day San Francisco Bay area. 107 The Tribal Council petitioned the Department

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97 Id.
98 Smith, supra note 75, at 229 (analyzing Bonnichsen, 367 F.3d at 881–82).
99 See id.
105 O’Neill, supra note 104.
107 Id. at 42.
of the Interior (DOI) for federal acknowledgment. They commissioned historians, anthropologists, and genealogists to help prepare a history of the tribe which was submitted in 1995. In 1996, the tribe met with a member of the Branch of Acknowledgment and Research to go over their petition and decide what else they needed to do. After a few years of hearing nothing from the DOI, the tribe filed a complaint in 1999 seeking to compel the DOI to review its petition within a year. While the court agreed it was not fair for the Muwekma Tribe to wait so long for their petition to be reviewed, the court stated compelling the DOI to review its petition within a year may harm other tribes who are also waiting for review. The court ordered the agency to “make a final determination on [the Tribe’s] status as an Indian tribe no later than March 11, 2002.”

After the court’s order, members of the Muwekma tribe continued to lobby for federal recognition. They have since petitioned the DOI many times, with eighteen petitions being acknowledged but not accepted, and thirty-four petitions being denied. The Muwekma tribe is not federally acknowledged as of writing this Comment. This lack of recognition prevents tribal members from practicing their religious beliefs, including proper treatment of their dead, because they cannot gain access to their repatriated objects. By statute, NAGPRA does not apply to them since they are not federally recognized. Even though museums and other institutions possess Muwekma remains and cultural items, the tribe cannot

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109 Muwekma Tribe, 133 F. Supp. 2d at 43.
110 Id. at 44–45.
112 Id. at 48.
113 Id. at 51.
demand repatriation.\textsuperscript{119} This is a gap under NAGPRA’s protection, preventing some tribes from being able to practice their religion while others have the freedom to repatriate.\textsuperscript{120}


City-owned or privately-owned land does not fall under the reach of NAGPRA, which defines federal lands as “any land other than tribal lands which are controlled or owned by the United States.”\textsuperscript{121} Under its plain meaning, NAGPRA is limited to federal and tribal lands.\textsuperscript{122} However, to the issue of land subject to NAGPRA was litigated several times.\textsuperscript{123} In 1999, the Western Mohegan Tribe commenced an action against the State of New York to prevent the Corps from turning a state park into a recreational area.\textsuperscript{124} The Tribe claimed its ancestors had lived in a village on the island, believing remains were buried under the soil, which had been used for religious ceremonies.\textsuperscript{125} The district court denied the Tribe’s claim as the park project received no federal funds, stating this situation fell out of the purview of NAGPRA.\textsuperscript{126}

This issue was litigated again when Universal City, Texas, received a gift of land through private landowners and began building a golf course.\textsuperscript{127} As the Corps began digging, they discovered human remains, which were discovered on alleged burial grounds of the Lipan Apache.\textsuperscript{128} Daniel Castro Romero, claiming he was a lineal descendant of a Lipan Apache chief, sent a letter to the Corps demanding the return of the remains.\textsuperscript{129} When the Corps did not return the remains, Castro filed suit seeking damages for alleged injuries the golf course caused during its construction.\textsuperscript{130}

The district court held Castro’s claim for repatriation did not fall under NAGPRA, because the human remains were found on municipal land

\textsuperscript{119} See Muwekma Tribe, 133 F. Supp. 2d at 44.
\textsuperscript{120} Id.
\textsuperscript{121} 25 U.S.C. § 3001(d).
\textsuperscript{122} Id. § 3002(a).
\textsuperscript{123} See Cryne, supra note 8, at 117.
\textsuperscript{125} See W. Mohegan Tribe and Nation of N. Y., 100 F. Supp. 2d at 128; W. Mohegan Tribe and Nation of N. Y., 246 F.3d at 232.
\textsuperscript{126} W. Mohegan Tribe and Nation of N. Y., 100 F. Supp. 2d at 125–29.
\textsuperscript{127} Castro Romero v. Becken, 256 F.3d 349, 352 (5th Cir. 2001).
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 352–53.
\textsuperscript{130} Id. at 353.
rather than federal or tribal. By its explicit terms, NAGPRA is limited to federal or tribal lands. The remains were found on land owned by Universal City and even though the Corps was involved, neither federal lands nor funds were used.

D. Yankton Sioux Tribe v. United States Army Corps of Engineers

A major issue of NAGPRA is the lack of an enforcement mechanism. The Act states that “[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.” NAGPRA does not have any punishments clearly stated for museums or federal agencies that fail to finish an inventory or fail to reach out to a tribe when remains or cultural objects are found among their possessions.

The Yankton Sioux Tribe, a federally recognized tribe, filed a complaint against the Corps for failing to comply with NAGPRA. The State of South Dakota was building campsites when workers discovered bones and other artifacts. A worker called the Corps and asked it to send someone to look at the remains. The Corps told the construction workers they could continue working but had to stop excavation about 100 feet around the remains. While the State controlled the land, the Corps was the federal agency responsible and they failed to participate in the immediate steps required under NAGPRA, which included stopping excavation, protecting the remains, and notifying the tribes. While the Corps notified the Yankton Sioux Tribe, the tribe was not told where the remains had been taken or what had happened to the m.

The court issued a preliminary injunction to halt construction. The court ordered the Corps to start complying with NAGPRA for every

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133 See Castro Romero v. Becken, 256 F.3d 349, 354 (5th Cir. 2001).
134 Cryne, supra note 8, at 109.
136 See id. §§ 3003–3013.
138 Id. at 1011–12.
139 Id. at 1011.
140 Id. at 1011–12.
141 Id. at 1017–19.
143 Id. at 1022.
remain and object they discovered.\textsuperscript{144} To the Yankton Sioux Tribe, the Corps received nothing more than a warning and the fact that the remains were not protected from the construction work seemed to be ignored.\textsuperscript{145} Without NAGPRA giving any guidance for enforcement, it is up to individual courts to remedy failure to follow the requirements provided under the Act.\textsuperscript{146} Without a meaningful enforcement mechanism, agencies and museums are failing in their legal obligations under NAGPRA.\textsuperscript{147}

IV. PROPOSED 2023 REGULATIONS AND IMPROVEMENTS TO NAGPRA

On October 18, 2022, after years of talking, planning, and litigation, the DOI has announced proposed regulations to improve the implementation of NAGPRA to help more American Indian tribes.\textsuperscript{148} Originally NAGPRA only applied to museums and federal agencies but, under these proposed regulations, it will now be applicable to all institutions who receive federal funding.\textsuperscript{149}

These improvements started with a library in Massachusetts.\textsuperscript{150} The library held an auction in 2018, where it planned to auction off seven American Indian artifacts donated to the library in 1880.\textsuperscript{151} There were many who believed the library was violating NAGPRA.\textsuperscript{152} Skinner Auctioneers and Appraisers, the party auctioning off the artifacts, pointed out that NAGPRA does not apply to libraries or items for sales.\textsuperscript{153} This

\textsuperscript{144} Id. at 1026–27.
\textsuperscript{145} Cryne, supra note 8, at 120.
\textsuperscript{146} 25 U.S.C. § 3013.
\textsuperscript{147} Cryne, supra note 8, at 103–04, 119.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
situation prompted a resolution to NAGPRA regarding places which are receiving federal funds:

[A]n institution or agency of a State or local government (including an institution of higher learning) directly or indirectly receives Federal financial assistance after November 16, 1990, including any grant; cooperative agreement; loan; contract; use of Federal facilities, property, or services; or other arrangement involving the transfer of anything of value for a public purpose authorized by a law of the United States Government.\(^{154}\)

This interpretation leads many to believe the new resolution will include educational buildings, such as libraries.\(^{155}\)

A second proposed change deals with a tribe’s traditional knowledge.\(^{156}\) Under NAGPRA, tribes can show cultural affiliation “by a preponderance of the evidence,” using geography, kinship, oral tradition, and other forms of evidence.\(^{157}\) As the Kennewick Man controversy shows, tribes may be limited in what evidence they can use to prove cultural affiliation.\(^{158}\) The proposed rule explicitly states “museums and Federal agencies must defer to the customs, traditions, and Native American traditional knowledge.”\(^{159}\) This will encourage museums and other institutions to include American Indian tribes early in the NAGPRA process, allowing them to provide information to help identify items effectively.\(^{160}\) American Indians will be able to identify and take back sacred objects instead of relying on people outside of the tribe to make decisions for them.\(^{161}\)

Under NAGPRA’s original language, “‘cultural affiliation’ means that there is a relationship of shared group identity which can be reasonably traced . . . between a present day . . . tribe . . . and an identifiable earlier

\(^{154}\) NAGPRA Systematic Process, supra note 148, at 63240; NAGPRA Major Changes, supra note 148.
\(^{155}\) NAGPRA Systematic Process, supra note 148, at 63214; NAGPRA Major Changes, supra note 148.
\(^{156}\) NAGPRA Systematic Process, supra note 148, at 63215; NAGPRA Major Changes, supra note 148.
\(^{158}\) See Bonnichsen v. United States, 367 F.3d 864, 881–82 (9th Cir. 2004).
\(^{159}\) NAGPRA Systematic Process, supra note 148, at 63215; NAGPRA Major Changes, supra note 148.
Identifying cultural affiliation might not always be possible due to the lack of evidence or the length of time, so the proposed rules will replace “culturally unidentifiable” items with “geographical affiliation” items. Geographical affiliation items are those found near the lands of existing tribes. When human remains or cultural items cannot be identified, geographical affiliation will allow agencies to notify any tribe who lives near the found item. This gives more tribes a chance to make claims or to use their traditional knowledge to figure out if the item belongs to their tribe. There is an argument against changing the definition of “cultural affiliation.” Some argue the items could end up with tribes who have no cultural affiliation with the found item at all. This could cause tension between tribes as the change would deprive the actual tribes from being able to repatriate human remains or objects which belong to their tribe.

Finally, there are a few smaller changes to NAGPRA dealing with definitions, including the definition of sacred objects. Currently, NAGPRA states, “sacred objects,’ which shall mean specific ceremonial objects which are needed by traditional American Indian religious leaders for the practice of traditional American Indian religions by their present day adherents.” The proposed definition of “sacred objects” will include a provision which states the “identification of a sacred object is according to a lineal descendant, Indian Tribe . . . based on customs, traditions, or Native American traditional knowledge.” This will allow tribes to rely on their culture instead of historical or scientific evidence they may not be able to find.

While there is no date for when DOI’s proposed rules will be implemented, American Indian tribes are excited to see what these changes

164 NAGPRA Systematic Process, supra note 148, at 63216; NAGPRA Major Changes, supra note 148.
165 See NAGPRA Systematic Process, supra note 148, at 63216; NAGPRA Major Changes, supra note 148.
166 NAGPRA Systematic Process, supra note 148, at 63216; NAGPRA Major Changes, supra note 148.
167 NAGPRA Major Changes, supra note 148.
168 Id.
169 See id.
170 See NAGPRA Systematic Process, supra note 148, at 63215; NAGPRA Major Changes, supra note 148.
172 NAGPRA Systematic Process, supra note 148, at 63215; NAGPRA Major Changes, supra note 148.
will bring.\textsuperscript{174} Hopefully, these changes will help fix some of the issues of NAGPRA, allowing the repatriation of cultural items and human remains to become easier for tribes.

V. APPLICATION OF NAGPRA TO THE UNIVERSITY OF WYOMING

In 1974, human remains were removed from Bell Cave, which is located eighteen miles north of Laramie, Wyoming, by members of the Wyoming State Archaeology Survey office (WSAS).\textsuperscript{175} The remains were of an American Indian individual between twenty-one and twenty-four years old.\textsuperscript{176} There were two associated funerary objects found with the remains, including small blue and white glass seed trade beads and red, blue, and white lamp-wound glass trade beads.\textsuperscript{177}

Likewise, in 1974, human remains of an American Indian female between the ages of sixty and seventy, were discovered near Platte County, Wyoming, where they remained at the Glendo Museum before being transferred to the University of Wyoming in 1996.\textsuperscript{178} No associated funerary objects were present.\textsuperscript{179}

In 1986, the Wyoming Archaeological Survey Office (WASO) and UWAD removed the remains of an American Indian male from a site located ten miles south of Laramie, Wyoming.\textsuperscript{180} Along with these remains, members of the WASO and UWAD found nine associated funerary objects.\textsuperscript{181}

Under the new DOI rule, each federal agency, museum, university, or any institution that receives federal funding must comply with NAGPRA.\textsuperscript{182} This could potentially include the University of Wyoming if it receives federal funding.\textsuperscript{183} At the end of 2022, UWAD reported it had the 84th largest collection of unrepatriated American Indian remains in the

\footnotesize{\textsuperscript{174} See Interior Takes Steps, supra note 161.  
\textsuperscript{176} Id. at 20613.  
\textsuperscript{177} Id. at 20613.  
\textsuperscript{178} Id. at 20614.  
\textsuperscript{179} Id.  
\textsuperscript{180} Id. at 20613.  
\textsuperscript{181} Id.  
\textsuperscript{183} See id.}
With more than 200 Native remains in its collection to date, 40% are available for repatriation.\textsuperscript{185}

Each university in “possession or control . . . of Native American human remains and associated funerary objects shall compile an inventory of such items and . . . identify the geographical and cultural affiliation of such item.” After the inventory is complete, UWAD will need to notify the affected American Indian tribe by providing a memorandum which identifies each item, where it found the item, which tribe it is affiliated with, and which items it reasonably believes are connected to the tribe.\textsuperscript{187} UWAD is working on an inventory and has published notices to the affected tribes about the remains and objects in its collection.\textsuperscript{188} UWAD made a detailed assessment of the human remains in its collection with the help of the Wind River tribe.\textsuperscript{189} The remains range from young children to adults and the associated objects range from pendants to trade beads.\textsuperscript{190} The published notices go into detail about how the remains ended up with UWAD, keeping track of the history and how UWAD took care of the items.\textsuperscript{191}

Any objects which are ready to be repatriated will be transferred to the lineal American Indian descendants or to the American Indian tribe which has affiliation with the remains and items.\textsuperscript{192} If UWAD cannot identify any of the remains or cultural objects, UWAD will present what they have found to a review committee to make findings related to the identity and return of those items.\textsuperscript{193} The review committee will consist of seven members: three submitted by American Indian and/or Native Hawaiian tribes, three submitted by scientific organizations and national museums, and one appointed by the Secretary of the Interior.\textsuperscript{194}

While 60% of the remains are not ready for repatriation, UWAD is following the process of NAGPRA.\textsuperscript{195} While time consuming, the
Department is trying to return human remains and cultural objects home where they belong.  

VI. IS IT ENOUGH?

While it appears that UWAD is complying with NAGPRA, only 40% of the remains are ready for return. UWAD still has “the 84th largest collection of unrepatriated Native American remains in the U.S.” When the items and remains were discovered, their resting place was disturbed as they were taken into the custody of UWAD. UWAD is not the only agency doing this. It has been estimated that there are up to two million American Indian remains, which have been dug up and put on display by universities, museums, and tourist attractions.

For years, American Indians have not been in control of how or when remains are repatriated. The “[l]ack of control over their ancestors’ remains and burial objects hinders the practice of religious beliefs and constitutes a bitter reminder of past discrimination and injustices.” For many American Indians, repatriation reminds them of continuing discrimination against their people by not allowing them to have the remains and burial objects that belong to their people, making repatriation nothing more than another uphill battle they will lose.

There have been proposed implementations to the regulations of NAGPRA, which might seem like the answer, but there has been no date for when these changes will be implemented. Additionally, the proposed NAGPRA changes alter definitions and who will have to follow the act, but nothing more.

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196 See id.
197 Id.
198 Id.
199 Notice of Inventory Completion: Human Remains Repository, Department of Anthropology, University of Wyoming, Laramie, WY, 82 Fed. Reg. at 20612–15; see John B. Winski, Note, There Are Skeletons in the Closet: The Repatriation of Native American Humans Remains and Burial Objects, 34 ARIZ. L. REV. 187, 188 (1992) (explaining that American Indians believe that when remains are taken from their burial place, the spirits are unable to rest).
201 Id. at 119.
202 Winski, supra note 199, at 189.
203 Id.
204 Id.
206 See id.; see NAGPRA Systematic Process, supra note 148, at 63202–60.
The proposed changes also do not add any enforcement mechanisms.\textsuperscript{207} NAGPRA has an enforcement mechanism, but many agencies and museums who have not complied do not seem to get any penalties.\textsuperscript{208} Many agencies have failed to implement NAGPRA, arguing they lack the resources to carry through what is required of them.\textsuperscript{209} Yet, this excuse is not enough, and cannot continue to be used, because identifying remains and repatriating them should be a higher priority than some agencies and museums currently see it.\textsuperscript{210} There has to be some sort of enforcement mechanism for NAGPRA to be successful and for it to be the answer.\textsuperscript{211}

\section*{VII. Conclusion}

For American Indian tribes, ancestral remains and funeral objects are more than just objects.\textsuperscript{212} An American Indian man once told his son:

Inside is the home of my people—the man may take the land outside. Inside this boundary all our people were born. It circles around the graves of our fathers, and we will never give up these graves to any man . . . . My son, never forget my dying words. This country holds your father’s body. Never sell the bones of your father and your mother.\textsuperscript{213}

While NAGPRA has faced issues and setbacks since its passing, the overall purpose has not changed: return remains and cultural items home to the American Indian tribes and organizations who want to “maintain, protect, and develop the past, present, and future manifestations of their cultures.”\textsuperscript{214} NAGPRA has helped tribes to break the silence after years of mistreatment, giving them a say in how their ancestors and objects of their religious beliefs are to be treated.\textsuperscript{215}

When graves are discovered and disturbed, the spirit of those remains are released and cannot rest again until the remains are reburied.\textsuperscript{216}

\textsuperscript{207} See NAGPRA Systematic Process, \textit{supra} note 148, at 63202; \textit{NAGPRA Major Changes, supra} note 151.
\textsuperscript{208} See 25 U.S.C. § 3007; Cryne, \textit{supra} note 8, at 109.
\textsuperscript{209} Cryne, \textit{supra} note 8, at 109.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.} at 109.
\textsuperscript{212} See \textit{FINE-DARE, supra} note 1, at 1.
\textsuperscript{213} \textit{Id.} (quoting Peter Nabokov, \textit{Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492–2000} 129–33 (1999)).
\textsuperscript{214} \textit{Id.} at 173.
\textsuperscript{215} \textit{Id.} at 175.
\textsuperscript{216} Winski, \textit{supra} note 199, at 188.
NAGPRA will allow these spirits to finally find peace when they are returned home and reburied by their descendants or others who care about them.\textsuperscript{217} NAGPRA was the beginning of a victory for American Indian tribes and could continue to help with repatriation.\textsuperscript{218} However, if changes are not implemented to help NAGPRA, then it might not be enough and the small success they have will be ripped from their hands.\textsuperscript{219} 

\textsuperscript{217} Id.  
\textsuperscript{218} Murphy, supra note 3, at 523.  
\textsuperscript{219} Winski, supra note 199, at 189.