Repatriation Stories from a Far Away Land:
Progress and obstacles in the repatriation of Indigenous human remains in the USA

C. Timothy McKeown, Ph.D.
National Centre for Indigenous Studies
Return, Reconcile, Renew Project: understanding the history, effects and opportunities of repatriation and building an evidence base for the future
The Struggle for National Repatriation Legislation
1986-1990

Chapter 1

- Introduced bills
  - House/Senate bill number (date introduced) Bill title

- Enacted bills
  - Public Law number (date enacted) Statute title
  - Parallel House/Senate bills
National Museum of the American Indian Act  
20 U.S.C. § 80q et seq.  
- Enacted Nov. 28, 1989; Pub.L. 101-185; 103 Stat. 1336  
- Amended Oct. 9, 1996; Pub.L. 104-278; 110 Stat. 3355  

Native American Graves Protection and Repatriation Act  
- Enacted Nov. 16, 1990; Pub.L. 101-601; 104 Stat. 3048  
- Regulations promulgated Dec. 4, 1995; 60 FR 62158
<table>
<thead>
<tr>
<th>Statute</th>
<th>Excavations &amp; Discoveries</th>
<th>Collections</th>
<th>Trafficking</th>
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<tbody>
<tr>
<td>NAGPRA</td>
<td>Lineal descendants Indian tribes Native Hawaiian organizations</td>
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<td>NAGPRA</td>
<td>Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony</td>
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<td>NAGPRA</td>
<td>Indian and Native Hawaiian human remains and associated funerary objects.</td>
<td>Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony</td>
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<th>Standing: who may claim?</th>
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<tr>
<th>Purview: what objects are covered?</th>
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<tr>
<td>Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony</td>
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<td>Indian and Native Hawaiian human remains and associated funerary objects.</td>
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<thead>
<tr>
<th>Jurisdiction: who must/may comply?</th>
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<tr>
<td>Federal land managers must comply.</td>
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<tr>
<td>Tribal land managers may also comply</td>
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<td>Federal agencies Museums</td>
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<tr>
<td>Smithsonian Institution</td>
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<tr>
<td>U.S. Department of Justice may prosecute</td>
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<tr>
<th>Process: what activities are required?</th>
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<tr>
<td>Inadvertent discoveries Planned excavation Disposition</td>
</tr>
<tr>
<td>Summaries Inventories Notices Repatriation or disposition</td>
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<tr>
<td>Summaries Inventories Repatriation</td>
</tr>
<tr>
<td>Summaries Inventories Notices Repatriation as NAGPRA collection</td>
</tr>
</tbody>
</table>
Almost 30% of the United States is Federal or tribal land.
Notices of Intended Disposition

• 149 pairs of notices published (1 rescinded)

• Notices account for:
  – Human remains of 1,072 individuals
  – 10,964 associated funerary objects
  – 64 unassociated funerary objects
  – 4 objects of cultural patrimony
  – no sacred objects

Draft FY2014 National NAGPRA Program Report
Excavation & Discovery Litigation


Bonnichsen v. United States, Dep't of the Army, D. Or. (2002), 9th Cir. (2003)


Hawk v. Danforth, E.D.Wis. (2006)


Kawaiisu Tribe v. Salazar, E.D.Cal. (2011)


Museum and Federal Agency Collections

Summaries

Inventories

Repatriation
Summaries

NAGPRA

Collections that may include unassociated funerary objects, sacred objects, and objects of cultural patrimony

Due November 16, 1993

or

6 months of receipt of a new collection or notification of a new Indian tribe

or

3 years of first receipt of Federal funds

NMAI Act

Unassociated funerary objects, sacred objects, and objects of cultural patrimony

Due December 31, 1996
Summaries

NAGPRA
Summaries have been completed by 1,131 museums and Federal agencies.
676 Notices of Intent to Repatriate have been published (FY13):
• 219,156 unassociated funerary objects
• 4,941 sacred objects
• 8,118 objects of cultural patrimony
• 1,624 sacred objects/objects of cultural patrimony
• 237 unspecific “cultural items”

NMAI Act
NMAI provided summaries of all its collections. NMNH prepared 171 summaries.
No notices published. GAO reports that by December 31, 2010, the Smithsonian offered for repatriation:
• 212,220 funerary objects
• 1,240 sacred objects and objects of cultural patrimony

Draft FY2014 National NAGPRA Program Report
Inventories

**NAGPRA**

Simple itemized list of Native American human remains and associated funerary objects

Must be completed in consultation with tribal officials and traditional religious leaders

Due November 16, 1995, or 2 years of receipt of a new collection or notification of a new Indian tribe, or 5 years of first receipt of Federal funds

The Secretary may grant deadline extensions

**NMAI Act**

A simple, itemized list that, to the extent practicable, identifies, based upon available information held by the Smithsonian Institution, the geographic and cultural affiliation of the remains and objects

Must be completed in consultation and cooperation with traditional Indian religious leaders and government officials of Indian Tribes

Due June 1, 1998
## Inventories

### NAGPRA

Inventories have been completed by 1,321 museums and Federal agencies.

1,884 Notices of Inventory Completion have been published, accounting for:

- Remains of 50,518 individuals
- 1,185,948 associated funerary objects

Human remains of 129,219 individuals and 971,119 associated funerary objects have been identified as “culturally unidentifiable.”

### NMAI Act

Inventories have been completed by the NMAI and NMNH.

No notices published. GAO reports the following have been repatriated:

- Remains of 4,330 individuals
- 99,500 funerary objects.

Human remains of 340 individuals have determined to be “culturally unidentifiable.” The cultural affiliation of another 14,160 has not been determined.
Upon request by an Indian tribe or Native Hawaiian organization ... a museum or Federal agency shall supply additional available documentation to supplement the inventory information. [Documentation] does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.
Cultural affiliation

A relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

All the following requirements must be met:

• Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing; and

• Evidence of the existence of an identifiable earlier group based on identity and cultural characteristics, distinct patterns of material cultural manufacture and distribution; or existence as a biologically distinct population; and

• Evidence of the existence of a shared group identity establishing that a present-day Indian tribe or Native Hawaiian organization descended from the earlier group.

Must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.
Right of Possession

possession obtained with the voluntary consent of an individual or group that had authority of alienation
Exceptions

Where the cultural items are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States.

Where there are multiple requests for repatriation and the museum or Federal agency cannot determine by a preponderance of the evidence which is the most appropriate claimant.

Where a court of competent jurisdiction had determined that the repatriation would result in a taking of property without compensation within the meaning of the Fifth Amendment of the Constitution.
Collections Litigation


Board of Trustees of the California State University v. U.S. Dept. of Interior, C.D.Cal. (1996)


Kumeyaay Cultural Repatriation Committee v. University of California, S.D.Cal. (2012)


Rosales v. United States, S.D.Cal. (2007)


White v. University of California, N.D. Cal. (2012), 9th Cir (2014)
Review Committee

- Specialized fact finding body
- Able to make recommendations
- Non-binding
<table>
<thead>
<tr>
<th>Notice</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Recommendation</th>
<th>Repatriated</th>
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<tr>
<td>1993</td>
<td>Hui Malama</td>
<td>Hearst Museum</td>
<td>7-0: revise inventory</td>
<td>Yes</td>
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<tr>
<td>1993</td>
<td>Hui Malama</td>
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<td>7-0: transfer</td>
<td>Yes</td>
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<td>Field Museum/Oneida of NY</td>
<td>Withdrawn</td>
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<td>1997</td>
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<td>City of Providence</td>
<td>7-0: revise determination</td>
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<td>2000</td>
<td>Hopi Tribe</td>
<td>Chaco NHP</td>
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<td>2002</td>
<td>Fallon Paiute Shoshoni</td>
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<td>2002</td>
<td>Western Apache</td>
<td>Denver Art Museum</td>
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<td>2003</td>
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<td>Univ. of PA Museum</td>
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<td>No</td>
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<td>2013</td>
<td>Sealaska/Wrangell Coop. Ass.</td>
<td>Alaska State Museum</td>
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</table>
Currently unrepatriated Native American human remains
n=146,793 MNI

- Smithsonian-culturally unidentifiable, 340
- Smithsonian-undetermined, 14,160
- Federal agencies-undetermined, 2,381
- Federal Agencies-culturally unidentifiable, 14,196
- Museums-undetermined, 12,716
- Museums-culturally unidentifiable, 103,000

Smithsonian data from GAO-11-515 (May 2011).
Aboriginal Occupation

May be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by a treaty, Act of Congress, or Executive Order.
Enforcement

Civil penalties

Criminal trafficking
<table>
<thead>
<tr>
<th>Museum</th>
<th>Submitted by</th>
<th>Failure to Comply</th>
<th>Transfer</th>
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<th>No Consult</th>
<th>No Inventory</th>
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<td>University of Massachusetts</td>
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| | | | | | | | | $42,240.00 |
Criminal Trafficking

18 U.S.C. 1170 (a): Sale, purchase, use for profit, or transport for sale or profit Native American human remains without right of possession

18 U.S.C. 1170 (b): Sale, purchase, use for profit, or transport for sale or profit Native American cultural items obtained in violation of the Act


U.S. v. Hicks, D.N.M. (1998)


Progress made:

• Documentation of nearly 200,000 Native American individuals has been provided to Indian tribes and Native Hawaiian organizations.

• Consultation with Indian tribes and Native Hawaiian organizations has become standard practice for museums and Federal land managers.

• Museums and agencies are prepared to repatriate claims based on either “cultural affiliation” or “aboriginal occupation.”

• Repatriation has had a positive impact on the rights of Native American individuals and families, the continuation or renewal of religious practices, and the strengthening of tribal culture and sovereignty.
Obstacles encountered:

- Lack of staff and funding has slowed implementation, compliance, and enforcement activities.
- Imposition of strict deadlines means that some decisions are based on incomplete or ambiguous information.
- Lack of appropriate and protected locations for reburial of human remains and cultural items once repatriation or disposition has taken place.