THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT A SELECTIVE LITERATURE REVIEW OF AFFECTED CONCERNS

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PASSING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT THROUGH THE EYE OF THE NEEDLE: A LITERATURE REVIEW OF AFFECTED CONCERNS

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I. INTRODUCTION TO NAGPRA

The *Native American Graves Protection and Repatriation Act* ("NAGPRA" or "the Act") was enacted into United States law on November 23, 1990.[1] It provides repatriation, ownership and control rights over Native American cultural items and rights in regard to burial sites on federal and tribal lands to federally recognized Indian tribes, Native Hawaiian organizations and descendants of deceased individuals. Ownership of Native American cultural items[2] excavated or discovered on Federal or tribal lands after November 16, 1990 is vested in Native Hawaiian organizations, descendants of the deceased, and Indian tribes. Lineal descendants have first priority to ownership

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[1] 25 U.S.C. §§ 3001-3013 (West Supp. 1991). Native American means "of, or relating to, a tribe, people, or culture indigenous to the United States" and includes Native Hawaiians. See 25 U.S.C. § 3001(9) and (10). There have been a number of proposed amendments. See *e.g.* U.S., Bill H.R. 4084, *To amend the Native American Graves Protection and Repatriation Act to provide for Native Hawaiian organizations, and for other purposes*, 104th Cong., 1996; U.S., Bill S. 1983, *A bill to amend the Native American Graves Protection and Repatriation Act to provide for Native Hawaiian organizations, and for other purposes*, 104thCong., 1996; U.S., Bill H.R. 749, *To amend the Native American Graves Protection and Repatriation Act to provide for improved notification and consent, and for other* purposes, 105th Cong., 1997; U.S., Bill S. 110, *To amend the Native American Graves Protection and Repatriation Act to provide for improved notification and consent, and for other purposes*, 105th Cong., 1997; U.S., Bill H.R. 2893, *To amend the Native American Graves Protection and Repatriation Act to provide for appropriate study and repatriation of remains for which a cultural affiliation is not readily ascertainable*, 105th Cong., 1997; U.S., Bill H.R. 3575, *To preserve the integrity of the Kennewick Man remains for scientific study, and for other purposes*, 105th Cong., 1998; U.S., Bill H.R. 2643, *To amend the Native American Graves Protection and Repatriation Act to provide for appropriate study and repatriation of remains for which a cultural affiliation is not* readily ascertainable, 106th Cong., 1999. All the proposed amendments have not been enacted into law. At the time of compiling this review, there were no amendments pending before the present Congress (108th: 2003-2004). To confirm the current status of amendments to NAGPRA, refer online: The Library of Congress <http://thomas.loc.gov/bss/d108query.html> (enter "Native American Graves Protection and Repatriation Act" in the "Word/Phrase" search window) (last visited 28 April 2004).

[2] "Cultural items" are defined in § 3001(3) A-D of the Act and include "human remains", "associated funerary objects", "unassociated funerary objects", "sacred objects", and "cultural patrimony." "Human remains" is not defined. Associated funerary objects, unassociated funerary objects and cultural patrimony are defined and discussed in section (i) of this paper.

and control of human remains and funerary objects. If lineal descendants cannot be ascertained, and in the case of other cultural items, ownership and control is in the tribe or Native Hawaiian organization based on the location of the discovery, and cultural affiliation.[3] NAGPRA also establishes procedures for excavation and prevents intentional excavation and removal of cultural items from Federal and tribal lands without notice to, and consultation with, the appropriate Indian tribe or Native Hawaiian organization. If tribal lands are involved, consent is required. The Act also creates a process for Indian tribes and Native Hawaiian organizations to claim and protect cultural

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[3] 25 U.S.C. § 3002(a) also provides for ownership and control of items located on Federal land subject to Aboriginal land claims where cultural affiliation cannot be established. The section reads as follows:

(a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

- (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
- (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
- (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—
  - (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
  - (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

Tribal lands include lands administered for the benefit of Native Hawaiians (25 U.S.C. 3001 (15)). Lineal descent can be proved based on "traditional kinship" systems. See Jack F. Trope, "Native American Graves Protection and Repatriation Act: Implementation Regulations (And 1996 Museum Act Amendments)" in Barbara Meister, *Mending the Circle: A Native American Repatriation Guide* (New York: American Indian Ritual Object Repatriation Foundation, 1997) 205 at 205 quoting NAGPRA Regulations 43 C.F.R. §§ 10.2(b) 1 and 10.14(b) part 10 published at 60 Fed. Reg. 62133-62169 (1995).

items inadvertently discovered on these lands as a result of development (e.g. construction, logging) through a system of mandatory notification and temporary suspension of activity.[4]

NAGPRA is predominantly concerned with establishing standards and procedures for repatriation of cultural items in the possession of Federal agencies and museums that receive Federal funds to Native American claimants.[5] To facilitate this process, Federal agencies and museums were required to compile itemized inventories of human remains and associated funerary objects within five years after enactment of NAGPRA; where possible, identify geographical and cultural affiliation of each item; provide notice to culturally affiliated tribes and Native Hawaiian organizations, and; complete inventories in consultation with officials and religious leaders of affected Indian tribes and Native Hawaiian organizations.[6] Within three years of enactment, summaries of unassociated funerary objects, sacred objects, and cultural patrimony were to be provided and followed by consultations.[7] Upon request of a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization, human remains and unassociated funerary objects must be expeditiously returned unless items requested are "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States" or, in the event of competing

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[4] 25 U.S.C. § 3002 (c) and (d).

[5] 25 U.S.C. § 3005 and 3001(4) and (8). The Smithsonian Institution is not covered by the Act. However it is required to prepare similar inventories under the *National Museum of the American Indian Act, 1989*, 20 U.S.C. 80q. It is not required to prepare summaries of other cultural items. See Jack F. Trope, "The Native American Graves Protection and Repatriation Act" in Meister, *supra* note 3 at 11-12 and 14. The collection of the National Museum of the American Indian absorbed by the Smithsonian Institute is also covered by the "NMAI Repatriation Policy Statement" reproduced in Meister, *supra* note 3 at 129-133. This policy sets out standards and procedures for repatriation of "human remains", "funerary objects", "communally-owned native property" which could not be alienated by an individual, "ceremonial and religious objects" and "objects acquired illegally." It also mandates preparation of an inventory of all items covered by the policy and provision of inventories to affected American tribes and Native Hawaiian organizations. However as Trope points out at 19 (his note 60) this does not apply to collections in the Smithsonian itself. See also Jacki Rand and Tamara Bray, "Repatriation Policies and Procedures of the Smithsonian Institute" in Meister, *supra* note 3 at 47.

[6] 25 U.S.C. § 3003(a) (b) and (d). Notice is to include information on circumstances of acquisition and items whose affiliation is not clearly identifiable but are believed to be of a particular origin.

[7] 25 U.S.C. § 3004(a) and (b) where "readily ascertainable" summaries are also to include information on cultural affiliation, geographical location and circumstances of acquisition.

claims, a Federal agency or museum cannot determine the appropriate claimant.[8] In the former scenario cultural items are to be repatriated within ninety days of completion of the study and in the latter, upon resolution of the dispute under provisions of the Act, by agreement of the parties or decision of the court.[9]

Cultural affiliation is determined through the inventory and summary process or by the claimant "by a preponderance of evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral, traditional, historical or other relevant information or expert opinion."[10] In claims for unassociated funerary objects, scared objects and cultural patrimony, the claimant must establish that an item falls within the definition under the Act; prove cultural affiliation or, in the case of sacred items and cultural patrimony, cultural affiliation or prior ownership or control; and provide evidence that the Federal agency did not have a "right of possession" through the voluntary consent of an individual or group that has the right to alienate the object in issue."[11] In most cases, the validity of a disposition is governed by tribal law or custom.[12] Unless a right of possession can be proven through contrary evidence, museums must return requested items, subject to the two exceptions of scientific study and competing claims outlined above and constitutional guarantees relating to protection of private property.[13] The NAGPRA

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8 25 U.S.C. § 3005(a)(1), (b) and (e).

9 *Ibid.* Trope, *supra* note 5 at 19 (his note 44) the NAGPRA Review Committee created under 25 U.S.C. 3006 can facilitate resolution of disputes but the decisions of the Committee are not binding.

10 25 U.S.C. § 3005(a)(4). See also discussion *infra* note 131 and 133 and accompanying text.

11 25 U.S.C. § 3001(13) and (c) and Trope, *supra* note 5 at 13-14. Repatriation procedures and other provisions of the Act are detailed and clarified in the NAGPRA Regulations, *supra* note 3. Additional regulations concerning civil penalties were issued in 1997. See 43 C.F.R. § 10.12 published at 62 Fed. Reg. 1819-1823 (1997). The regulations are also reproduced in Meister, *supra* note 3 at 169.

12 Trope, *ibid.* at 11. See also Walter R. Echo-Hawk, "Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources" (1986) 14 N.Y.U. Rev. L. & Soc. Change 437.

13 As Trope explains, *supra* note 5 at 13-14, an additional exception is if a court determines return without compensation to be a "taking" of private property contrary to the 5th Amendment of the American Constitution. This exception is contained in NAGPRA Regulations 43 C.F.R. § 10.10(c)3.

Review Committee ("NRC") is established to monitor repatriation under the Act[14] and general administration of the Act has been delegated by the Secretary of the Interior to the National Parks Service ("NPS").

NAGPRA has been described as "historic, landmark legislation for Native Americans."[15] "It represents fundamental changes in basic social attitudes toward Native peoples by the museum and scientific communities and the public at large"[16] with regard to a long and painful history of acquisition, display and use of human remains and cultural items now considered illegal, unethical or contrary to the human and religious rights of Native Americans. The Act defines and sets standards for a new relationship. The history of this relationship and its relevance to the Act, as well as the impact of NAGPRA on a "wide array of complex, and sometimes competing, social interests, including human rights, race relations, religion, science, education, ethics, and law", has been explored by numerous writers.[17] For example, James Riding In, in reviewing the history of archaeology as it relates to American Indians, has concluded that

> white America has a long and inglorious history of desecrating Indian burial rights. Despite the façade of intellectualism and rhetoric of scientific righteousness used to justify archaeological research involving human remains, American Indian academics, activists, legal firms, and others have uncovered a wealth of information that reveals the dark side of research with dead natives. Clearly the data show that perhaps as many as two million Indians have been denied a right to a lasting burial. A growing number of remains have been returned, but many archaeologists, museum curators, and others whose livelihoods, careers, and reputations hinge on their ability to gain

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14 25 U.S.C. § 3006.

15 Jack F. Trope and Walter R. Echo-Hawk, *"The Native American Graves Protection and Repatriation Act"* (1992) 24 Ariz. St. L.J. 35 at 36.

16 *Ibid.* at 36-37.

17 *Ibid.* at 37. See *e.g.* Rayna Green, ed., *American Indian Sacred Objects, Skeletal Remains, Repatriation and Reburial: A Resource Guide* (Washington, D.C.: American Indian Program, National Museum of American History, Smithsonian Institution, 1994); Barbara Meister, ed., *Mending the Circle: A Native American Repatriation Guide: Understanding and Implementing NAGPRA and the Official Smithsonian and Other Repatriation Policies* (New York: American Indian Ritual Object Repatriation Foundation, 1996). For a useful electronic bibliography, see online: Faculty of Anthropology, University of Iowa <http://www.uiowa.edu/~anthro/reburial/repat.htm> (last visited 28 April 2004).

> access to Indian remains oppose the objectives of the Indian reburial movement."[18]

Riding In writes that Thomas Jefferson "took a lead in opening Indian graves in the name of science" excavating, "merely for the sake of curiosity, an Indian burial mound located near his Virginia estate of Monticello."[19] Following his lead, "[b]y the 1780s, a growing list of individuals and organizations... had entered the business of acquiring collections of Indian remains."[20] Grave desecrations continued to rise in number throughout the 1800s as a result of civilian and military research into Indian crania, treasure hunters, and the introduction of university studies in archaeology.[21] As a result, "[g]rave looting has caused Indians a great deal of suffering, mental anguish, and distress."[22] "Museum and scientists", however, argue "that Native human remains have scientific and educational value and, therefore, should be preserved for these important purposes."[23] NAGPRA represents a compromise intended to reconcile these divergent views and interests.

James Trope and Walter Echo-Hawk observe that a "pattern that defines Indian-white relations is the one-way transfer of Indian property to non-Indian ownership", a pattern which "shifted from real estate to personalty and continued until most of the material culture of Native people had been transferred to white hands."[24] The "massive property transfer invariably included some stolen or improperly acquired Native sacred objects and cultural patrimony."[25] NAGPRA acknowledges past injustices and the centrality of such items to cultural continuity and identity by establishing national guidelines for repatriation.

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18 James Riding In, "Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians" (1992) 24:1 Ariz. St. L .J. 11 at 33 [footnotes omitted].

19 *Ibid.* at 15.

20 *Ibid.* at 17.

21 *Ibid.* at 17-23.

22 *Ibid.* at 24.

23 *Supra* note 15 at 37.

24 *Ibid.* at 43.

25 *Ibid.*

It is not our concern here to add to the library of debates and commentaries on the rationale for NAGPRA or to review its repatriation procedures and standards in any detail. Rather, our purpose is to compile and review some of the existing literature on the concerns of those most affected; namely, the Native American, museum and scientific communities. Our primary objectives are to identify issues arising in the implementation of the Act, and to learn from the lessons of NAGPRA in our work on Canadian law reform. Our approach therefore focuses on possible interpretations of the wording of the Act, the impact these interpretations may have on the relationships created by NAGPRA, and the actual implementation of the Act. We do not expand, debate, render opinions or critique the viewpoints and concerns raised except where necessary to provide amplification or clarification.

The review is divided into two principal sections. The first outlines Native American concerns and the second, concerns of the scientific and museum communities. The arrangement of concerns in each section is structured according to dominant themes in the literature and is not intended to suggest any order of importance.

A. NATIVE AMERICAN CONCERNS

Supporters of NAGPRA and Native American interests in the repatriation debate generally regard NAGPRA as landmark human rights legislation and a turning point for recognition and restoration of Native American cultural sovereignty. NAGPRA is seen to facilitate respect for indigenous customary laws concerning human remains, funerary objects, sacred objects and cultural patrimony and restore tribal and Native Hawaiian control over important aspects of their cultural heritage. As Rosita Worl explains, it also provides legal affirmation and recognition of Native American concepts of property:

> NAGPRA is an acknowledgment of Indian ideologies that affirm that Indian people have both a tangible and spiritual relationship to objects. It inherently accepts Indian beliefs that sacred and cultural objects themselves symbolize the social relations among tribal members and the spiritual bonds between present day Indian[s] and their ancestors. It is a recognition that present day Indians have a

> concrete link to future generations of Indians through our sacred and cultural objects, and that these symbols are necessary for our cultural survival. NAGPRA, indeed, represents a great victory for Indian people.[26]

However, Native Americans and other NAGPRA supporters have expressed a number of concerns arising from the wording and implementation of its provisions. These concerns are reviewed below.

(a) Replicas and Virtual Representations

Kathryn Milun addresses the growing practice by museums of creating virtual archives, by digital assembly, of Native American skeletal remains that are in the process of being repatriated or are the subject of controversy.[27] Milun notes that "[l]ike the Native American skeletons that were, in pre-NAGPRA America, displayed in small and large museums across the country, these virtual indigenous remains are also being hung in the public commons."[28] She argues that "these computer images... are reconstructed in mainstream venues as visual evidence for arguments that are often at odds with NAGPRA's task of furthering decolonization of American Indians."[29] In addition, the exclusion of virtual collections of indigenous remains from the operation of NAGPRA has "a significant effect on the repatriation of actual remains and on the logics of property enabled by new power relations formed within the virtually real."[30]

To illustrate the nature of this concern, Milun considers a virtual copy of a 9,000 year old mummy, popularly known as the Spirit Caveman.[31] The remains were uncovered in a 1940 salvage

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[26] Rosita Worl, "The Treaty of NAGPRA and Religious Renewal" (Address to the Keepers of the Treasures-Alaska), online: Smithsonian National Museum of National History, Arctic Studies Centre <http://www.mnh.si.edu/arctic/html/repatrw.html> at para. 8 (last visited 28 April 2004).

[27] See generally Kathryn Milun, "Keeping-While-Giving-Back: Computer Imaging and Native American Repatriation" (2001) 24:2 Political and Legal Anthropology Review 39.

[28] *Ibid.* at 39.

[29] *Ibid.*

[30] *Ibid.* at 40.

[31] *Ibid.* at 40-41.

archaeology project in Nevada and were eventually repatriated to the Northern Paiute tribes in November 2001 after a costly case before the NAGPRA review committee. In 1994, the Nevada State Museum, fully aware that NAGPRA was in force and prohibited the display of actual indigenous remains, planned an exhibit of a replica bust of the Spirit Caveman "reconstructed with simulated facial muscles and outer skin" from a virtual representation.[32] Though the exhibition was postponed, following protests by Native American groups, the photograph of the reconstructed bust found its way to the cover of *Newsweek*[33] under the caption "Who were the **First** Americans?" Milun argues that the emphasis on the word 'First' (in a different colour print) and the tone of the accompanying article[34] suggested that the virtual Spirit Caveman was "visual evidence for the politically outrageous argument that Europeans may be more indigenous to the Americas than Native Americans."[35] Following the *Newsweek* article, and despite the museum's regrets about how the replica was used, the museum agreed to let a company that makes children's activity books include the image in 75,000 copies of an atlas.[36] A charcoal drawing of the Spirit Caveman also appeared in the *New York Times* accompanying a report that the Nevada State Museum had just "unearthed the oldest known mummy in America…right on their own shelves."[37]

Tribes have also complained that replicas and virtual representations can have negative spiritual consequences. At the 1999 spring meeting of the NAGPRA Review Committee ("NRC"), Mr. Alvin Moyle, Chairman of the Fallon Paiute Shoshoni Tribe, on behalf of all Northern Paiute tribes, raised this concern about the *Newsweek* article discussed above.

> They [the *Newsweek* article] say our tribe is unrelated to older ones, but this goes against our stories about when we came here. We do not believe this is a New World. This is an Old World to us…. These remains are part of the things our tribal culture gives us that tells us

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[32] *Ibid.* at 41.

[33] 133:17 (26 April 1999).

[34] Sharon Begley & Andrew Murr, "The First Americans" *Newsweek, ibid.* at 50.

[35] *Supra* note 27 at 42.

[36] *Ibid.* [footnote omitted].

[37] *Ibid.*

> how to live our lives everyday…. These remains are listening to me while they are above the ground. I am responsible to them for things I say about them. They [*Newsweek*] call him "Spirit Caveman." ...We say his journey has been interrupted and there are spiritual consequences for our tribe.[38]

Replicas and virtual representations also raise issues concerning ownership and control of intellectual property. For example, the physical anthropologist hired by the Nevada State Museum to create the bust of Spirit Caveman, made a duplicate of the replica bust without the museum's knowledge and claimed that the bust and all copies were her intellectual property. This was strongly protested by the Fallon Paiute-Shoshone Tribe who asserted that she had no right to reproduce or display the busts.[39] As a result of pressure from the North Dakota tribes, North Dakota law now prohibits the taking of photographs of human remains and burial goods except for the limited purpose of visual recording and research.[40] It also prohibits publication of photographs except for close-up photographs of physical anomalies.[41] Milun links the desire by tribes to control associated intellectual property to cultural sovereignty and the exercise of tribal authority over representations of Indian identity.[42] However, she notes that some legal scholars have advised Native Americans to avoid making claims to associated intellectual property as this could lead to "further commodification of Native culture" and undermine "Native cultural concepts of belonging, either traditional or newly emergent."[43]

Creating replicas of cultural items other than human remains may also violate customary laws concerning transmission of knowledge, traditional ceremonies, and proper use. This point is illustrated in the Zuni Pueblo repatriation of replicas of Zuni religious items from the Museum of

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[38] *Ibid.* at 46.

[39] *Ibid.* at 42 [footnotes omitted].

[40] N.D. ADMIN. CODE § 40-02-03-01(7)(c) (1990) (effective Dec. 1, 1984; amended effective Dec. 1, 1990).

[41] *Ibid.*

[42] *Supra* note 27 at 44-45.

[43] *Ibid.* at 44 [footnote omitted].

New Mexico. The replicas were produced by non-Zuni individuals in the 1930s. When the museum requested reasons why the Zuni leaders wanted to repatriate poorly made replicas, Zuni Governor Robert E. Lewis offered the following explanation:

1. Information is power; the replicas embody powerful information that belongs to the Zuni people that should not be revealed to uninitiated people;
2. The "replica" artifacts are sensitive objects intended only for use of the Zuni people;
3. The display of these artifacts in your museum would be disruptive to our traditional methods of teaching our young people about the Zuni religion;
4. As replicas, the artifacts have very little artistic value from the Zuni perspective and are highly offensive to Zuni cultural values;
5. There is no valid educational purpose in your retaining the artifacts. Any display or exhibit of the replicas would likely mislead the public because they would be presented outside of their proper context; similarly, museum storage is also an improper context for these items.[44]

However, where appropriate, providing replicas of cultural items in exchange for the return of sacred or communally owned objects may facilitate repatriations from private collections.[45] An example is the repatriation of objects taken from the Wounded Knee Massacre by the Wounded Knee Survivors Association. The small library in Barre, Massachusetts returned the items in exchange for replicas made by traditional Lakota artists.[46] Private collections are not covered by NAGPRA which only applies to federally funded institutions.

(b) Cultural Records and Intellectual Property

Closely related to the concerns over replicas is the treatment of cultural records including "photographs, sketches, audio tapes, inventories of ritual objects, anthropological field notes, and transcriptions of oral literature" and other kinds of cultural information collected by researchers,

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[44] Edmund J. Ladd, "A Zuni Perspective on Repatriation" in Tamara L. Bray, ed., *The Future of the Past: Archaeologists, Native Americans and Repatriation* (New York: Garland Publishing, 2001) 107 at 112-13.

[45] Kate Morris, "Strategies and Procedures for the Repatriation of Materials from the Private Sector" in Meister, *supra* note 3, 73 at 76-77.

[46] *Ibid.* at 76.

scientists, and members of the public.[47] NAGPRA, however, does not require institutions to repatriate cultural records. According to Michael Brown, there is considerable concern by Native Americans that unfettered dissemination of these records by museums, archives and others, offends protocols on information sharing and secrecy of certain cultural practices.[48] He notes that "[t]he social fabric of native nations often consists of reciprocal spheres of knowledge, the boundaries of which are zealously protected."[49] Often, Native American Elders "preserve information that they share only with those who demonstrate required wisdom."[50] An example offered by Brown concerns access to "the photographs and field notes of the Reverend H.R. Voth (1855-1931), a Mennonite missionary and ethnologist who lived among the Hopi for 20 years."[51] Voth's "photographs and first-hand observations of Hopi rituals are among the best ever recorded, and they figure importantly in most studies of Hopi culture published since the 1920's."[52] However, the Hopis are "bitter about Voth's success in penetrating their ritual life" and tribal leaders insist that the Voth material "continues to damage Hopi culture by making public a wealth of esoteric information that should be available only to authorized religious experts."[53]

Brown frames the Native concern thus:

> Today many native groups perceive themselves as less threatened by overt persecution than by the rapid circulation of images of their cultures - sometimes accurate, sometimes wildly distorted - via the popular media. Particularly upsetting to American Indians are religious seekers, many involved in the New Age movement, who insist on performing ersatz versions of Native American rites,

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47 Michael F. Brown, "Cultural Records in Question: Information and its Moral Dilemmas" (1998) 21:6 Culture Resource Management 18.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid.* at 19.

52 *Ibid.*

53 *Ibid.*

> including sweat-lodge ceremonies and Medicine Wheel rituals. **Seeing their religion parasitized by outsiders, Indians feel a powerful urge to re-establish control over information about their cultures and, in particular, about traditional ritual practices, pilgrimage, sites, and sacred stories**. Archives and other institutions that care for cultural records become lightning rods for this impulse because they, unlike the diffuse New Age movement and the culture from which it arises, are obliged to respond to criticism from members of the public.[54]

These concerns, however, must compete with the "high value [placed] on the unfettered exchange of information" in American society and the protection of free speech and freedom of information.[55] The ability to access such records has also operated to the benefit of Native Americans as "archival materials have played a major role in countless legal decisions that have restored tribal lands, led to the protection of sacred sites, and helped native peoples assert their cultural sovereignty."[56] Brown considers the opposing divides of the cultural records debate and concludes that courts and legislators must answer a number of difficult questions including:

> Are some cultural records so morally contaminated that they should be closed to the general public? Does a culture "own" its traditions, or do they properly belong to the individuals who create and transmit them? In the interests of preserving indigenous societies, should free speech and freedom of information be curtailed by government edict? Finally, should we recognize an inherent right to "cultural privacy"…?[57]

As James Nason notes, images portraying sacred objects may be considered sacred themselves.[58] For example, "in... reply to museum summaries generated by NAGPRA" the Hopi sought to block

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54 *Ibid.* [emphasis in original].

55 *Ibid.* at 18.

56 *Ibid.* at 19.

57 *Ibid.* at 20.

58 James D. Nason, "Native American Intellectual Property Rights: Issues in the Control of Esoteric Knowledge" in Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 237 at 250.

access to archival material on the basis that knowledge and sacred objects "are one."[59] Nason's 1992 survey of employees of tribal museums and cultural centres in the United States and Canada also supported tribal control over access to "culturally sensitive materials."[60] However, he agrees with Brown that repatriation and restriction of access to cultural records through law reform is a complicated task given competing legal and constitutional protections.

NAGPRA's coverage does not include intellectual property such as "intangible cultural heritage", *i.e.* : "traditional languages,…traditional religious lore and practice, traditional and detailed knowledge of the natural world, and all types of oral history, oral literature, and other knowledge that could generically be referred to as 'lore';"[61] "esoteric knowledge";[62] patenting of life forms; and "control of artistic designations, manufactures, and commercial applications…."[63] NAGPRA is also silent on protection of intellectual property "in the form of songs, chants, visual arts, and motifs, oral literature of all kinds, or the recorded versions of any of these in drawings, paintings, photographs, film, or sound recordings."[64]

This is so despite the fact that Native American intellectual property was acquired in much the same manner as other forms of cultural property which are covered by the Act. Nason notes that "[m]useums did acquire, from the 1800s onward, huge collections of Native material heritage as well as substantial records of specialized knowledge, most of it accompanying associated sacred and other culturally sensitive objects."[65] Also, "the legal and ethical activities of well-intentioned and dedicated scholars as well as the unscrupulous and illegal work of others did result in the transfer of

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59 *Ibid.* at 249; Nason is quoting Leigh Jenkins, director of the Hopi Tribal Office of Cultural Preservation.

60 *Ibid.*

61 *Ibid.* at 242.

62 Nason defines "esoteric knowledge" *ibid.*, as "traditional, valued knowledge that is intended for and is to be used by the specially initiated or trained and that is most often owned or held in trust and treated as private or secret by an individual, by a group within the community (such as a clan or society), or by the community as a whole."

63 *Ibid.* at 248.

64 *Ibid.* at 242.

65 *Ibid.* at 243.

considerable knowledge" which through "scholarly and commercial means have been disseminated widely throughout our society...."[66]

David B. Jordan has framed the concern over the lack of protection of Native American intellectual property within the context of U.S intellectual property legislation in its entirety and concluded that "U.S intellectual property law, because of its strong personal property and capitalist roots, is ill-equipped to address the unique cultural and economic interests of Native American tribes...."[67] Shortcomings include the absence of a regulated framework to reassess the under-valued inventory of Native American intellectual property in non-Native control, weak copyright protection of "'group rights' that lack either identification of any actual original author, or alternatively, the requisite intent to enter into a legal relationship to create a joint or collective work"[68] and the limited duration of copyright protection (life of the author plus 70 years)[69] which serves an economic purpose "not necessarily shared by Native American tribes."[70] Jordan advocate new federal legislation that would address these issues by: "recognizing communal intellectual property rights vested in Native American tribes;" "providing perpetual intellectual property protection for work created by Native American tribal artisans;" allowing "Native American tribes to 'recapture' intellectual property rights retrospectively for works that are part of the tribal heritage;" and, "creating, in Native American cultural and spiritual property, rights of attribution and integrity to be retained by Native American tribes for the existence of the tribes."[71]

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[66] *Ibid.* at 244.

[67] David B. Jordan, "Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?" (2000-1) 25 Am. Indian L. Rev. 93 at 114-15.

[68] *Ibid.* at 99. See Jordan's example of the difficulties experienced by the Hopi tribe in protecting the work of Hopi Kachina carvers, *ibid*.

[69] 17 U.S.C. § 302(a).

[70] *Supra* note 67 at 102.

[71] *Ibid.* at 114.

(c) Financial and Resource Burdens

According to Ernie Stevens, Jr., First Vice President of the National Congress of American Indians, "[o]ne of the most important and central issues of concern to tribes is having the resources to develop their own program or system that would assist them in the implementation of NAGPRA and help them meet their individual cultural and historic preservation goals."[72] Resources are needed to accomplish the following:

(A) provide an authoritative source of tribal law and customs;
(B) provide the expertise needed to analyze information such as summaries and inventories; in many cases, the information provided is often very vague;
(C) facilitate involvement by traditional religious leaders and other cultural authorities;
(D) hold consultations with governmental agencies, museums, and universities;
(E) conduct independent investigations;
(F) fully assert their claims to certain remains and objects;
(G) determine proper treatment of repatriated items;
(H) resolve intra-tribal disputes; and
(I) preserve and protect those remains and items still at rest.[73]

Although NAGPRA authorizes the Secretary to provide grants to museums and Native American tribes covered by the Act, "[t]he funds are usually divided equally between tribes and museums, but have proven to be inadequate."[74] As Anna Kiss notes, the NPS "receives about 100 grant applications a year, but it funds only 1 request in 3."[75] Since 1994, tribal requests for NAGPRA related funds have remained steady at 10 million dollars.[76] Congress, however, has allocated only $2.4 million, a funding level "far below the projected amount necessary to successfully comply with

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[72] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (testimony of Ernie Stevens, Jr., First Vice President, National Congress of American Indians), online: U.S. Senate Committee on Indian Affairs <http://www.indian.senate.gov/ 1999hrgs/nagpra4.20/smith.pdf> at 2 (last visited 28 April 2004) [Senate Committee (1999)].

[73] *Ibid.* at 3.

[74] *Ibid.* at 3-4.

[75] Anna Kiss, "A Repatriation Story from Alaska," online: In Spirit Productions: A Chicago Based Documentary Production Company <http://www.inspiritproductions. com/articles/kiss/kiss.pdf> at 3 (last visited 01 December 2003).

[76] *Supra* note 72 at 4.

the provisions of the Act and well below the $10 million level."[77] Similarly, in the year 2000, many projects judged worthwhile could not be recommended for funding because of the limited funds available. "The [National] Park Service received 111 proposals requesting over $6 million but was able to fund only 42 with the $2.25 million available, plus a reserve amount to fund repatriation requests during FY2000 at smaller dollar amounts. The 42 awards were divided between 13 grants to 13 museums, totalling $617,210, and 29 grants to 26 tribes, totalling $1,574,250."[78]

Noting these figures, Richard West, Director of the National Museum of American Indian, emphasized in his statement to the Senate Committee on Indian Affairs and NAGPRA ("Senate Committee") that "[w]ithout increased funding to support projects judged worthy, both museums and tribes are hindered in their efforts to make timely progress in the repatriation process and to deal with issues that arise...."[79] According to Kiss, between 1994 and 1999, museums and tribes received only $8.1 million in grants, and about 60 percent of this went to museums.[80] The necessity of Congressional funding to implement NAGPRA is underscored by Rosita Worl, who puts the issue in perspective:

> [o]ur tribal institutions must meet the basic and immediate needs of our tribal members in addition to addressing a myriad of political and economic issues continuously threatening our communities and our rights. More often, repatriation, understandably, takes a secondary priority to housing, education, and the basic physical welfare of our members.[81]

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77 *Ibid.*

78 *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (2000) (statement of W. Richard West, Director, National Museum of the American Indian, and Past President, American Association of Museums), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/2000hrgs/nagpra_0725/west.pdf> at 5 (last visited 28 April 2004).

79 *Ibid.*

80 *Supra* note 75 at 3.

81 *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (2000) (testimony of Rosita Worl, President, Sealaska Heritage Foundation, Juneau, Alaska), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/2000hrgs/ nagpra_0725/worl.pdf> at 9 (last visited 28 April 2004).

Keith Kintigh, President of the Society for American Archaeology, identifies another aspect of the funding problem. "There is a complete lack of federal [financial] support for tribal implementation of Section 3 repatriation issues (new excavations and inadvertent discoveries)."[82] In the Southwest, and probably throughout the West, these issues take precedence over repatriation of human remains from museum or agency collections because of the ongoing excavations and developments. Funding is also needed to pay scholars to determine cultural affiliation of items classified as culturally unidentifiable.[83] Funding for such research is not available through NAGPRA grants, which only cover assistance for repatriation. Kiss offers other examples of insufficient funding and the dependency of tribal repatriation programs on federal funds. For example, the Tlingit and Haida Central Council had to temporarily close its repatriation program in 1999 and 2000 because they did not receive federal grants. Similarly, the repatriation program of the Bering Straits Foundation, a non-profit Eskimo organization in Nome, Alaska is strictly dependent on receipt of federal funds. In many cases, travel expenses alone, especially in states like Alaska, prevent the initiation of consultations with museums necessary to initiate the repatriation process.[84]

Tribes also lack experience and other resource requirements for the efficient administration of repatriation programs. As Andrew Gulliford notes, "Indians have been overwhelmed with paperwork from museums, and few tribes have adequate staff or facilities to process the immense flow of formal letters and computer-generated inventories, which may weigh several pounds."[85]

Given the above, most writers agree that inadequate resources undermine the practical purpose and effectiveness of NAGPRA. According to Worl,

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[82] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (2000) (testimony of Keith Kintigh, President of the Society for American Archaeology), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/2000hrgs/nagpra_0725/kintigh.pdf> at para. 21 (last visited 28 April 2004). He is referring here to 25 U.S.C.§ 3002(c) & (d).

[83] Roger Echo-Hawk argues that research into Native American traditional histories, which can help establish cultural affiliation, is a legitimate and productive subject of scholarship. See generally Roger Echo-Hawk, "Ancient History in the New World: Integrating Oral Records and the Archaeological Record in Deep Time" (2000) 65:2 American Antiquity 267.

[84] *Supra* note 75 at 2-4.

[85] Andrew Gulliford, *Sacred Objects and Sacred Places: Preserving Tribal Traditions* (Colorado: University of Colorado Press, 2000) at 29.

> as Indian people celebrate this momentous occasion, they are also beginning to gain an appreciation of the complexity of the innumerable tasks and financial costs that will be required as they move to reclaim their heritage. Choosing to implement NAGPRA places a tremendous burden and responsibility on tribes.[86]

(d) Conflict of Interest Issues

The Secretary and the NAGPRA Review Committee ("NRC") are responsible for the oversight and implementation of NAGPRA. The Secretary has delegated most of his duties to the Department Consulting Archaeologist ("DCA") of the National Parks Service ("NPS") and the NPS.[87] Native Americans have expressed ongoing concerns about the DCA and NPS implementing NAGPRA. Vesting powers of administration in the DCA raises issues of conflict of interest and apprehension of bias. However, according to Suzan Shown Harjo, President of the Morning Star Institute, some of the blame for the apparent conflict lies with Native negotiators. In a statement to the Senate Committee on Indian Affairs and NAGPRA (2000), she explained:

> Primary implementation of NAGPRA was assigned to the Secretary of the Interior. The Secretary assigned it to the National Park Service, as recommended by the negotiators of NAGPRA. We Native negotiators, in particular, can be blamed for this. We observed the way in which the Smithsonian Institution was implementing the 1989 repatriation law, was disregarding the spirit of the policy and had stacked its repatriation committee against the Native interest. We insisted that implementation of NAGPRA be housed elsewhere.
>
> The National Park Service was being widely commended in Indian country at the time for its Native American cultural initiatives and their promise of new relationship with Native Peoples. We bought it, the museum negotiators agreed, Congress embraced our recommendation and NPS became the lead agency under NAGPRA.

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[86] *Supra* note 26.

[87] On October 16 1991, Secretary Manuel Lujan issued Secretarial Order 3149 thereby delegating some of his responsibilities under NAGPRA to the DCA. See also NAGPRA Regulations 43 C.F.R. § 10.2(c) 3.

> We ignored the lengthy history of NPS's institutionalized racism against Native Peoples and its conflicts of interest with repatriation, naively believing that it was a new day in Interior and NPS. The past ten years have provided numerous examples of NPS's repatriation conflicts and its inherent conflict of interest in implementing a law that specifically benefits Native Peoples.[88]

Alan Downer, Director of the Navajo Nation Historic Preservation Department, explained the conflict of interest as follows:

> From the time of the initial consideration of NAGPRA, the Navajo Nation has been concerned with the conflict of interest apparent in the assignment of principal responsibility for NAGPRA program development and oversight to the Secretary of the Interior. The apparent conflict arises because NPS is charged with providing guidance and oversight for NAGPRA implementation, yet at the same time NPS holds considerable collections of archaeological and ethnographic materials, some which are subject to repatriation under NAGPRA. This problem is exacerbated by the fact that day-to-day administration of the program within NPS has been assigned to the Departmental Consulting Archaeologist (DCA), in effect the chief archaeologist of NPS and the Secretary's principal advisor on archaeological matters. The Navajo Nation believes that NPS's NAGPRA program administration and oversight, no matter how evenhanded, will always be tainted by this apparent conflict of interest.
>
> Although there may be ways to minimize this appearance of conflict, because many Interior agencies besides NPS hold archaeological collections that include human remains and items of cultural patrimony, the delegation of NAGPRA program responsibility will be problematic as long as Congress chooses to assign principal responsibility for NAGPRA to the Interior Department.[89]

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[88] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (2000) (statement of Suzan Shown Harjo, President, The Morning Star Institute, Washington, D.C.), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/ 2000hrgs/nagpra_0725/harjo.pdf> at para. 9-11 (last visited 28 April 2004).

[89] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (2000) (testimony of Alan Downer, Director, Navajo Nation Historic Preservation Department, The Navajo Nation, Window Rock, Arizona), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/2000hrgs/nagpra_0725/downer.pdf> at para. 8-9 (last visited 28 April 2004).

In his testimony before an earlier Senate Committee (1999), Ernie Stevens, Jr. suggested that NAGPRA requires an administrative institution that mediates museum and scientific interests with Native American interests.[90] In his view, "keeping the NAGPRA Program within the National Park Service unbalances the delicate compromise originally struck during the drafting of NAGPRA; thereby, subjecting tribes to undue pressure in the name of science, based on the needs of the museums, the agencies, and the states."[91] Judge Hutt of the Maricopa County Superior Court, added conflicts of interest in the duties of the NPS are "due to the fault of no one person, but rather due to the irreconcilable differences of interests to be represented."[92] However, "[t]his conflict of interest may only be resolved by placing NAGPRA compliance, including NAGPRA grants administration and staff support to the Review Committee, in an area of the Department of Interior which is not also in a position to advocate for tribes or the interests of science."[93]

Related questions are "whether the statute's administration…is set up in a way that serves the federal government's trust responsibility to the tribes"[94] and "whether the intensive involvement of archaeologists within the National Park Service, at the highest administrative levels, has in fact skewed the implementation of the statute to the **disadvantage** of the tribes."[95] In her testimony before the Senate Committee (2000), Professor Tsosie answered these questions by referring to concerns of NPS control over the "TallBull Forum", a proposed three-day meeting of Native American, museum, and scientific community representatives to discuss the disposition of culturally

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90 *Supra* note 72 at 4.

91 *Ibid.*

92 *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (testimony of Sherry Hutt, Judge, Maricopa County Superior Court, Phoenix, Arizona), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/ NAGPRA4.20/hutt.pdf> at para 17 (last visited 28 April 2004).

93 *Ibid.*

94 *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (2000) (testimony of Rebecca Tsosie, Professor of Law, Arizona State University), online: U.S. Senate Committee on Indian Affairs <http://www.indian.senate.gov/2000hrgs/ nagpra_0725/tsosie.pdf> at 5 (last visited 28 April 2004).

95 *Ibid.* [emphasis in original].

unidentifiable Native American human remains.[96] The original grant proposal for the forum was put together by the Heard Museum, but later dropped. The Arizona State University Indian Legal Program (ASUILP) later agreed to assume responsibility for the grant, but only after the NPS accepted significant restructuring of the terms of the grant.[97] "In the original grant proposal, the managers of the National Park Service's Archaeology and Ethnography Program retained authority to approve the final participant list and to prepare an agenda for the meeting."[98] According to Tsosie, "this level of supervision and control by archaeologists seemed completely inconsistent with the nature of the NAGPRA process as one designed to serve the federal government's trust responsibility to Native people."[99]

Harjo addresses similar issues in a long list of concerns reproduced below:

> The NPS has refused to publish some *Federal Register* notices for sacred objects, effectively vetoing agreements made between Indian tribes and museums or agencies, and requiring the parties, such as the Pueblo of Cochiti and the Cheyenne River Sioux Tribe, to appeal for relief to the Review Committee.
>
> In determining the ownership of human remains found along the banks of the Columbia River near the town of Kennewick, Washington, the NPS has interpreted the meaning of aboriginal territory in an overly narrow fashion, not only refusing to recognize the binding Treaty between the Umatilla Tribe and the United States, but actually using a vacated decision by the Indian Claims Commission to determine that the remains did not come from Umatilla aboriginal territory.
>
> NPS's top representative has made the pronouncement, in the context of the federal agencies developing their position in the Kennewick case, that NAGPRA is not a law enacted to benefit Native Americans.
>
> The NPS has consistently pushed for additional scientific study of the remains of our dead, including techniques that destroy parts of their

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[96] *Ibid.* at 1-2.

[97] *Ibid.* at 2.

[98] *Ibid.* at 5-6.

[99] *Ibid.* at 6.

bodies, in contradiction of NAGPRA, as well as the standard rules of informed consent required of legitimate research of human remains.

The NPS has delayed publication of the annual report of the Review Committee that was highly critical of federal agency compliance with NAGPRA.

The NPS, which is delegated to provide staff support to the Review Committee, has failed after ten years to complete the inventory of cultural unidentifiable human remains required by the law.

The NPS has captured an increasingly larger portion of the monies appropriated for grants to Indian tribes, Native Hawaiian organizations and museums for "administrative costs," despite the fact that Congress appropriated a separate line item to cover such costs.

The NPS included language in its regulations forbidding federal agencies and museums from repatriating culturally unidentifiable human remains, despite the clear language in Section 11 (1) that nothing in the Act shall be construed to limit the authority of any federal agency or museum to return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations or individuals.

Implementation of NAGPRA was initially assigned to the Departmental Consulting Archaeologist, the senior federal representative of one of the primary constituencies impacted by the Act. More recently, it is reported that implementation has been moved to the Assistant Director for Cultural Resource Stewardship and Partnerships.

There is a saying in the Cheyenne language that, roughly translated, means "the fox is in the hen house." The conflict of interest in having the NPS implement NAGPRA is quite real. The record of the NPS shows that it has actively and knowingly frustrated the will of Congress. The NPS is thwarting the law we worked so hard to put in place for the protection of our dead relatives and our sacred, living beings and our cultural property. These are not archaeological or cultural "resources." They do not require NPS "stewardship."

The NAGPRA was an agreement on national policy and a compromise on process. Implementation of this policy and process has gotten off course. Our dead relatives are not "missing in action."

> Now, due to the many inventories completed by museums as required by NAGPRA, we know exactly where most of them are. However, they remain prisoners to a federal agency that values "science" over the rights of our dead people to rest in peace.
>
> We ask you today to get the fox out of the hen house. Actually, we ask you to move the hen house out of reach of the fox. Please allow us to honor our dead relatives in our own way.[100]

Testifying before the Senate Committee in 1999, Tex G. Hall, Chairman of the Mandan, Hidatsa and Arikara Nations of the Fort Berthold Reservation ("Three Affiliated Tribes") complained about the "many problems and frustrations"[101] shared by the tribes working with the DCA of the NPS. He spoke of a particular incident relating to the DCA's testimony before Congress in June of 1998 during a hearing regarding the Hastings Bill. The bill was introduced to amend NAGPRA to allow for scientific study of Native American remains. The DCA testified that the amendment was not necessary, since NAGPRA allows scientific study of tribally unaffiliated remains. In Hall's view, "[n]ot only is this untrue, but there is nothing in the Act to provide for this or any other type of study."[102] The DCA was "assigning himself powers and authorities he does not have, such as the power to reinterpret language in the Act."[103]

Downer also asserted, especially with regard to NPS action in the Kennewick Man case, that "NPS is developing NAGPRA policies and standards in an ad hoc fashion, without any input from Native Americans."[104] He gave as an example of the DCA's assertion that cultural affiliation research carried out on the Kennewick remains represents the standard that should be met any time there is a dispute. According to Downer:

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100 S*upra* note 88 at paras. 12-23.

101 *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (testimony of Tex G. Hall, Chairman, Three Affiliated Tribes, New Town, North Dakota), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/ NAGPRA4.20/texhall.pdf> at para. 17 (last visited 28 April 2004).

102 *Ibid.*

103 *Ibid.* at para. 18.

104 S*upra* note 89 at para. 22.

> This is disturbing for a number of reasons. First, these research-friendly precedents and standards are being set in the absence of any consultation with Native Americans in general or the tribes claiming cultural affiliation with the Kennewick remains in particular. [...] Second, that this research, much of it destructive, is being conducted at all at this juncture can only be justified by the assumption that other sources of information, such as tribal traditions, will not provide a sufficient basis for making a determination of affiliation.[105]
>
> [...]
>
> NAGPRA does address controversies over cultural affiliation. Nothing in the Act, however, suggests that archaeologists have a right to question issues of affiliation. These are questions the Act reserves to the Indian Tribes and the museums with which- they are dealing.[106]

In his view, "[t]he evolving ad hoc standards advance the anti-repatriation cause at the expense of Native Americans and our ancestors."[107]

Concerns have also been expressed about the Review Committee's relationship with Native American tribes. According to Hall, the tribes have

> closely monitored the activities of the NAGPRA Review Committee, spending thousands of precious dollars to send our representatives to meetings where our questions were not answered, our concerns ignored, minimized or manipulated, and where we watched as federal agencies, museums and universities were granted one extension after another with regard to NAGPRA deadlines. Members of the Review Committee were, at the same time, inventing repatriation requirements for tribes, such as requiring the Minnesota tribes to obtain written permission from a long list of tribes before they could repatriate remains.[108]

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105 *Ibid.* at para. 24.

106 *Ibid.* at para. 27.

107 *Ibid.*

108 *Supra* note 101 at para. 4.

In his opinion, "since 1990, our tribes have observed the steady erosion of protections to tribes granted by the law, and watched as federal, state and academic personnel circumvented the law to satisfy their personal, vested interests in our ancestors' remains."[109]

Some authors (mostly museum practitioners and scientists) find the role of the NPS satisfactory and argue that the NPS could do a better job if it was not underfunded and understaffed. Armand Minthorn, a member of the Board of Trustees of the Umatilla Indian Reservation noted in her testimony before the Senate Committee (1999) that the NPS "has instituted programs which have helped tribes implement NAGPRA including grants to tribes and museums."[110] Despite this,

> [t]here have been complaints by the tribes that the NPS is under funded, under staffed, and is currently unable to [bring] dozens of agencies and hundreds of museums into compliance with a law such as NAGPRA.Congress can assist the NPS solve this problem by increasing funding for NAGPRA implementation, and specifically to NAGPRA grants."[111]

Kintigh agrees. In his testimony before the Senate Committee he explained,

> [T]he most common and most serious complaints about the NAGPRA coordination function, including those voiced by the Review Committee, tribes, and museums, are a direct consequence of inadequate staffing and funding; they are not due to the location within NPS. Without additional funding, the DCA simply cannot satisfy all of the responsibilities assigned by the Secretary in a timely way. A move would not resolve the critical funding crisis.[112]

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[109] *Ibid.*

[110] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (testimony of Armand Minthorn, Member, Board of Trustees, Confederated Tribes of the Umatilla Reservation, Pendleton, Oregon), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/nagpra4.20/minthorn.pdf> at para. 5. (Last visited 28 April 2004).

[111] *Ibid.* at para. 6.

[112] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (testimony of Keith Kintigh, President of the Society for American Archaeology), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/ NAGPRA4.20/kintigh.pdf> at 2 (last visited 28 April 2004).

Reacting to the conflict of interest issue and the suggestion that the implementation of NAGPRA be vested in another agency, Kintigh also argued that any transfer of the NPS and DCA's responsibilities will foster uncertainties, delays and the possibility of not finding another administrative unit with the "expertise necessary to coordinate NAGPRA."[113] In his view, "[t]he argument that the DCA has an inherent conflict of interest is not as straightforward as it might seem" and similar to Native American views that their interests have not been adequately taken into account, within the scientific community there is also "a widespread conviction that scientific interests are routinely ignored."[114] He concluded, however, that "[t]he DCA has consistently attempted to maintain the critical balance that NAGPRA requires."[115] Donald Duckworth, President and CEO of the Bishop Museum, concurred stating: "museums have a general sense that the NPS has striven to be even-handed with all parties to the law."[116]

(e) Non-recognized Tribes

The repatriation provisions of NAGPRA apply only to federally recognized Indian tribes.[117] Presently there are about 245 non-recognized Indian tribes most of which are petitioning for federal

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[113] *Ibid.*

[114] *Ibid.*

[115] *Ibid.* at 3.

[116] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (statement of Donald Duckworth, President and CEO, Bishop Museum, Honolulu, Hawaii), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/ NAGPRA4.20/duckworth.pdf> at para. 19 (last visited 28 April 2004).

[117] 25 U.S.C. § 3001(7) defines an Indian tribe as follows:
"Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the *Alaska Native Claims Settlement Act*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Pursuant to NAGPRA Regulations, 43 C.F.R. § 10.2(b)(2) eligible tribes have been placed on a list issued by the Department Consulting Archeologist. There is at least one Circuit Court decision that interprets the definition to include "aggregates" of Indians that receive Federal funds other than those available to recognized tribes, but this has not influenced the DCA. See Trope, *supra* note 3 at 205 referring to *Abenaki Nation of Missiquoi Indians v. Hughes*, 805 F. Supp. 234 (D. Ct. 1992), aff'd 990 F. 2d 729 (2nd Circ. 1993).

recognition.[118] According to Kiss, Native Americans agree "that NAGPRA creates a bias by excluding these groups from the repatriation process."[119] In a letter to the NRC, Clark Spencer Larsen of the American Association of Physical Anthropologists also suggests that "the omission in the statute of non-recognized by the federal government tribes is an ethically problematic aspect of NAGPRA and inherent inequality in the law."[120] To illustrate this problem, Kiss writes of the experience of Rosa Miller, the leader of the Auk Kwaan Tlingit clan, a non-recognized Native American group, who tried to negotiate the return of ancestral remains from the Forest Service. The individuals she talked to "passed out a lot of papers and made a lot of promises but nothing happened."[121] Eventually, the Auk Kwaan clan asked the Tlingit and Haida Central Council, a recognized Indian government, to file the repatriation claim on their behalf. The Auk Kwaan remains were repatriated in September 1999, although officially to the Tlingit and Haida Central Council, not the Auk Kwaan. It is important to note that this repatriation only succeeded because the Auk Kwaan clan had recognized tribal representation through the Central Council, an option that is not available to many non-recognized tribes.[122]

In his book, *Indigenous Archeology: American Indian Values and Scientific Values*, Joe Watkins explains that Native American opinion is divided on the issue of repatriating human remains to non-recognized tribes.[123] Although "[m]any tribes feel that nonfederally recognized American Indian tribes are no less Indian than their federally recognized counterparts, ...others are afraid

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[118] For a complete list of non-recognized Indian tribes, see online: Access Genealogy <http://www.accessgenealogy.com/native/nofed.htm> (last visited 28 April 2004).

[119] *Supra* note 75 at 5.

[120] *Ibid.*

[121] *Ibid.* at 4.

[122] Trope explains *supra* note 3 at 205 that "[t]he commentary to the regulations indicates that bands, clans and other sub-groups should make claims through an Indian tribe, rather than directly". In this case, the required process conflicted with traditional forms of Tlingit social and political organization. Kiss explains, "[t]he term tribe used in reference to the whole Tlingit nation is misleading and bureaucratic" as Tlingit clans "were never united under a rule of one leader or governing body." *Ibid.* at 4-5.

[123] Joe Watkins, *Indigenous Archaeology: American Indian Values and Scientific Practice* (Walnut Creek, California: Alta Mira Press, 2000) at 65.

that…standing under NAGPRA would allow such groups to bypass the normally tedious process of federal recognition."[124] Watkins also provides examples of conflicting opinion. Tessie Naranjo, former chair of the NRC, suggests that Congress must find a way to "permit Native American groups not presently recognized…to repatriate their human remains, funerary objects, sacred objects, or objects of cultural patrimony."[125] The Keepers of the Treasures organization in Alaska has also called for congressional action. In the words of one Elder, "it didn't matter…when the human remains of nonfederally recognized Indian tribes were taken…it irks me that living human beings are technically not in existence merely because the U.S Government does not recognize them."[126] In contrast, seven Indian tribes from south-western Oklahoma expressed concern at the March 1997 NRC meeting that "[repatriating] human remains to nonfederally recognized tribes could potentially assign rights and authority to groups that have come into existence without a legitimate claim of continuity."[127]

Despite these divergent views, in 2000, the NRC published "Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains" ("the Recommendations")[128] which calls for repatriation of culturally unidentifiable Native American human remains "for which there is a relationship of shared group identity with a non-Federally recognized Native American group."[129] However, the recommendations permit repatriation to non-recognized tribes only when all the relevant parties have agreed, in writing, and other statutory

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124 *Ibid.*

125 *Ibid.*

126 *Ibid.* at 65-66.

127 *Ibid.* at 66.

128 65 Fed. Reg. 111, 36462 (2000) (to be codified at 43 C.F.R. § 10.11). The Recommendations conclude with a request that the Secretary come up with draft regulations and that the NRC be given an opportunity to review the draft regulations prior to publication in the *Federal Register*. See draft regulation on "Disposition of Culturally Unidentifiable Human Remains" presented to NRC at its 23rd meeting in Tulsa, Oklahoma from May 31-June 2, 2002, online: Friends of America's Past <http://www.friendsofpast.org/nagpra/proposed-disposition.html> (last visited 28 April 2004). The final regulation was not enacted or published in the *Federal Register* at the time of this review.

129 *Ibid.* at 111, 36463.

requirements under NAGPRA have been met.[130] In 2002, the NRC received 28 requests for repatriation of culturally unidentifiable remains. The Secretary recommended 11 repatriations to non-recognized tribes.[131]

Similar developments have not occurred to enable repatriation of cultural objects to non-recognized tribes. Further, NAGPRA does not cover repatriations to indigenous peoples from other countries. However, some Canadian First Nations whose traditional territories and social organization include lands and tribes in the United States have negotiated repatriations under NAGPRA with the assistance of American tribes. To the extent they are addressed, international repatriations are governed by museum policy. Consequently, Worl recommends that Congress expand NAGPRA repatriation objectives to include international repatriations. She also suggests providing federal financial assistance to participating nations, and cutting aid packets to countries that fail to implement repatriation laws similar to NAGPRA.[132]

(f) Deadlines and Extensions

As explained earlier in this paper, NAGPRA directs museums and federal agencies to compile inventories of human remains and associated funerary and summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony.[133] The purpose of both documents is to provide information on the cultural affiliation of these items to Native American individuals and tribes. Inventories and summaries were to be completed no later than 5 and 3 years

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[130] *Ibid.* Some members of the scientific community feel that by allowing repatriation to non-recognized tribes, the Recommendations go beyond the legislative intent of NAGPRA. See *e.g* Letter from Jeffrey H. Schwartz of the Department of Anthropology, University of Pittsburgh, to the NRC (4 August 1999), online: The Biological Anthropology Web <http://www.bioanth.org/nagpra/j-schwartz.htm> (last visited 28 April 2004); Letter from Tim White, Curator of Biological Anthropology, P.A. Hearst Museum of Anthropology, to the NRC (12 July 1999), online: The Biological Anthropology Web <http://www.bioanth.org/nagpra/t-white.htm> (last visited 28 April 2004).

[131] Online: Friends of America's Past, *supra* note 128.

[132] *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106thCong. (1999) (testimony of Rosita Worl, Interim Executive Director, Sealaska Heritage Foundation, Juneau, Alaska), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/nagpra4.20/worl.pdf> (last visited 28 April 2004).

[133] 25 U.S.C. § 3002(a). See also *supra* notes 6 and 7 and accompanying text.

respectively after the enactment of NAGPRA.[134] However, the Secretary could extend the inventory deadline "upon a finding of good faith effort" by a museum that is unable to complete the inventory process.[135] There is no provision for extension of the summary completion deadline.

On July 5th, 1996, the Secretary granted 58 extensions to various museums, institutions and agencies to complete their inventories. Other extensions have been granted beyond 1996 and some museums were still giving notices of completion of inventories in 2003.[136] To qualify for extensions Museums had to show they had begun "active consultation and documentation, and had developed plans to carry out their inventories prior to the legal deadlines."[137] According to Ernie Stevens, Jr., "[t]he continued granting of extensions raises concerns by our member tribes, leaving them wondering if [those]…in charge of providing the recommendations for extensions, are as serious as they should be about enforcement of the law."[138] On the other hand, the cost and human resources required to compile accurate inventories and the requirement of consultation with lineal descendants, officials, and religious leaders of Indian tribes and Native Hawaiian organizations likely to be culturally affiliated, requires some flexibility. Kintigh argues "it is appropriate…for the Department to set a relatively high standard for what constitutes a good-faith effort" but blanket denial of extension requests "is not a productive response to understandable Native American frustrations."[139] "When inventories are done with care and thorough consultation, museums are able to assign cultural affiliation to remains that, with a less intensive effort, would be deemed 'culturally

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[134] 25 U.S.C. §§ 3003(b)(1)(B) & 3004(b)(1)(C).

[135] 25 U.S.C. § 3003(c).

[136] The last published notice of inventory completion was given on 21 August 2003 by the Phoebe A. Hearst Museum of Anthropology, University of California. For updates on inventory completion, see the National NAGPRA Database: Notices of Inventory Completion, online: National NAGPRA Program <http://www.cast.uark.edu/other/nps/nagpra/nic.html> (last visited 28 April 2004). See also Trope, *supra* note 3 at 206 and his note 17 where he indicates "[i]t is unknown how many museums may have failed to comply with the requirement and never sought an extension."

[137] Trope, *ibid.* at 206 discussing NAGPRA Regulations 43. C.F.R. § 10.9.

[138] *Supra* note 72 at 5.

[139] *Supra* note 112 at 4.

unidentifiable.'"[140] Elaborating on the consequences of blanket denial before the Senate Committee (2000), Kintigh explained:

> The Department [of the Interior] directed the museums to complete their inventories based on information currently at hand, thus precluding adequate consultation for many collections. In many cases this has led to determinations that remains are culturally unidentifiable where the museums readily acknowledge that it may be possible, with more tribal consultation and more research, to make determinations of affiliation. Because of DOI's shortsightedness, a much larger burden now rests with tribes to pursue further consultation and to show that a preponderance of the evidence supports cultural affiliation.[141]

In 2002, the Office of the Secretary circulated a proposed regulation to clarify the applicability of the Act to museums and agencies after the expiration of statutory deadlines for completion of inventories and summaries. The proposed regulation seeks to establish new deadlines in the following circumstances not contemplated by NAGPRA: museums acquire new collections after the statutory deadlines; previously federally non-recognized tribes become recognized; institutions receive federal funds for the first time after statutory deadlines; and, where museums and agencies seek to amend previous notices of inventory completion or intent to repatriate.[142]

(g) Establishing Cultural Affiliation

NAGPRA requires museums and federal agencies to make a determination of cultural affiliation of Native American cultural items in their possession, based on information possessed by the museum or agency, as part of the inventory/summary process.[143] This determination is to be made

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[140] *Ibid.*

[141] *Supra* note 82 at para. 14.

[142] To be codified as 43 C.F.R. 10.13. See the proposed regulation on "Future Applicability of the Act" presented to the NRC at its 23rd meeting in Tulsa, Oklahoma from May 31-June 2, 2002, online: Friends of America's Past <http://www.friendsofpast.org/nagpra/proposed-future.html> (last visited 28 April 2004). The regulation is currently undergoing further review within the NPS.

[143] 25 U.S.C. §§ 3003(a) & 3004(a). Cultural affiliation is defined at §§ 10.8(d)(2) and 10.9(b)(c) as a "relationship of shared group identify which can reasonably be traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."

"in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders."[144] The NAGPRA Regulations provide criteria for inventory and summary consultations. Although consultations may be initiated by letter, they "should be followed up by telephone or face-to-face dialogue."[145] Inventory consultations are to commence "as early as possible" when cultural affiliation is being considered and completed within the time frames set by the Act.[146] Although summaries were to be completed in 1993 there are no time limits on the summary consultation process. Absent a determination of cultural affiliation through this process, NAGPRA requires claimants to prove cultural affiliation "by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."[147]

Some commentators have expressed concern that the cultural affiliation requirement enables museums and agencies to conduct additional scientific research on cultural items "under the guise of complying with NAGPRA."[148] "NAGPRA is unclear as to the intensity of research necessary to 'reasonably trace' and identify cultural affiliation."[149] Although NAGPRA specifically states that the Act is not to be construed so as to authorize "the initiation of new scientific studies on human remains and funerary objects"[150] it does not prevent such studies "when the museum deems it necessary for determining the cultural affiliation of a set of human remains."[151] Reacting to this

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See *infra* note 212 and accompanying text.

[144] 25 U.S.C. §§ 3003(b)(A) & 3004(b)(B).

[145] 43 C.F.R. §§ 10.8(d)(2) and 10.9(b)(2).

[146] 43 C.F.R. § 10.9(b)(2). See also *supra* note 132 and accompanying text.

[147] 25 U.S.C. § 3005(a)(4).

[148] S*upra* note 123 at 62.

[149] Thomas H. Boyd & Jonathan Haas, "The Native American Graves Protection and Repatriation Act: Prospects for New Partnerships Between Museums and Native American Groups" (1992) 24:1 Ariz. St. L.J. 253 at 267 [footnote omitted]. 25 U.S.C. § 3001(2) requires that continuity be "reasonably traced" between the claimant and the remains or cultural objects of an earlier group.

[150] 25 U.S.C. 3003(b)(2).

[151] *Supra* note 123 at 62.

concern, Kunani Nihipali, a leader of the Hui Malama I Na Kapuna 'O Hawai'I Nei asked the Senate Committee on Indian Affairs, at its 1995 oversight hearing on the implementation of NAGPRA, to clarify the role of scientific study. He asked that "where existing documentation establishes geographic location and cultural affiliation by clear, reasonable belief, or the preponderance standard of evidence, scientific studies of any kind on ancestral skeletal material remains [be] prohibited."[152] Kintigh agrees. "A critical problem in NAGPRA implementation is the widespread expansion, by both agencies and museums, of the statutory definition of cultural affiliation beyond legally defensible limits."[153] This is exacerbated by the tendency of museums and federal agencies to give insufficient weight to available evidence and oral traditions. In his comments to the Senate Committee (2000), Kintigh outlined the evidentiary problem as follows:

> While the law requires evidence demonstrating cultural affiliation, agencies and museums often offer little or no evidence or argument supporting their determinations. The evidentiary problem has three components: (1) insufficient consultation with tribes and consideration of traditional evidence they can offer; (2) inadequate attention to collecting readily available scientific evidence; and (3) a lack of thoughtful weighing of this evidence to arrive at a sound determination of cultural affiliation.[154]

Hall recalls an incident involving the Three Affiliated Tribes as an example of how the cultural affiliation requirement is used to facilitate scientific study. According to him,

> rather than follow state law and rebury a 4,000 year-old body which washed out of a creek on state lands in Nebraska, the remains were shipped to Douglas Owsley of the Smithsonian on the pretense that he would establish tribal affiliation of the remains for the State. Not only did Owsley predictably fail to do so, but in a letter reporting this speculative "finding," he added a request that the remains be transferred to the Smithsonian for accession into its collections, and included a form for this purpose. This was done post-NAGPRA, without the knowledge of affected tribes, and *the Nebraska Indian Affairs Commission was told that the remains were reburied*! We have not been able to ascertain where the remains are, if they were

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[152] *Ibid.*

[153] *Supra* note 82 at para. 24.

[154] *Ibid.*

> inventoried pursuant to state and federal law, nor if they were added to the Smithsonian's collections.[155]

Kiss suggests that the consultation process established by NAGPRA is also mired with problems of misunderstanding because "Native Americans and scientists apply their different perspectives to the examination of the remains" for the purpose of establishing cultural affiliation.[156] She explains:

> [F]rom an anthropological point of view, physical evidence found in bone material indicates the association. But Native Americans, who comprehend affiliation more on a spiritual level, say that all native remains belong to their big family of the indigenous people. Therefore, all the remains are identified. They also say that the term unaffiliated is simply offensive because it ignores their perspective on kinship.[157]

However, Hutt is of the view that an amendment to the law is unwarranted and may, in fact, "lead to imbalance in the law" because "determination of cultural affiliation is a fact intensive process which is best served by a law which is flexible."[158] As "[t]here is no quantitative threshold in the law...the standard [for determining cultural affiliation] would be within the bounds of reasonable discretion. The decision must not be arbitrary or capricious or emanate from an abuse of discretion."[159] This standard, she observes, is one "which applies generally to the deference given to the decisions of agency officials."[160] In support of the Native American viewpoint, she also adds that "[t]here is no requirement that proof be grounded in scientific study and be established to a 'scientific certainty'. Such an exacting level of proof is not required by NAGPRA and does not exist

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155 *Supra* note 101 at para. 11 [emphasis in original].

156 *Supra* note 75 at 10.

157 *Ibid*. at 10-11. This is so despite the fact that NAGPRA Regulations expressly provide lineal descent can be established through kinship. 43 C.F.A. §§ 10.2(b)(1).

158 *Supra* note 92 at para. 15.

159 *Ibid.*

160 *Ibid.*

in law or science, except as to those concepts so devoid of question that they have become laws of science."[161]

NAGPRA is silent on the status and disposition of culturally unidentifiable/unaffiliated remains and funerary objects associated with such remains. However, there is a provision which empowers the NRC to compile an inventory of such remains in the possession or control of museums and federal agencies and recommend specific actions for developing a process for disposition.[162] As discussed earlier, the NRC has developed recommendations to be codified as regulations.[163] But, as Kiss notes, Native Americans generally believe that all the remains are identifiable and the term 'unaffiliated' is offensive because it ignores their perspective on kinship.[164]

(h) Private Collections, State Collections and Lands Outside the Scope of NAGPRA

"NAGPRA will have no impact on current collections of Native American cultural property in the hands of private individuals, unless the materials were bought from a museum after November 16, 1990, or the items were discovered on federal or tribal lands."[165] The effect of non-inclusion of private collections is demonstrated in the 1991 auction by Sotheby's of Hopi and Navajo masks notwithstanding an outcry against the sale by the affected tribes.[166] According to Gene Marsh, "[i]n response to criticism and concern some auction houses have designated Native American foundations to receive a portion of the profits from the sale of Native American art."[167] "Native Americans, however, are not satisfied with these grants because they do not address the problem of

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[161] *Ibid.*

[162] 25 U.S.C. § 3006(c)(5).

[163] *Supra* note 128 and accompanying text.

[164] *Supra* note 75.

[165] Gene A. Marsh, "Walking the Spirit Trail" (1992) 24:1 Ariz. St. L.J. 79 at 102.

[166] Rita Reif "3 Indian Masks to Stay in Auction" *NY Times* (21 May 1991) B3.

[167] *Ibid.* at 103. Similarly, in 1993 Sotheby's refused to stop the sale of four False Face Masks. A silent protest by four representatives of the Haudenosunee attending the auction resulted in the Masks not selling and subsequent negotiation with the consigners to donate them to the American Repatriation with the intent of them being returned to the community of origin. *Supra* note 45 at 79.

trafficking in Native American Cultural items."[168] Though private collectors are not mandated to follow the Act, some collectors have voluntarily returned items in their possession to tribes or donated them to museums. Others "are reluctant to donate their collections to museums for fear that the items will be subject to NAGPRA."[169] In answer to this concern, Worl suggests an amendment to NAGPRA that "exempt[s] private collections donated to museums from repatriation claims."[170] Although she would like to see cultural items returned to their original owners, an amendment that encourages private collectors to donate them to museums would be better than the current situation and would at least allow the respective tribes to view them.[171]

According to James Riding In, NAGPRA's limited application to tribal and federal lands and entities that receive federal funding means "large scale acts of grave desecration may continue" in "states without both progressive burial legislation and a substantial Indian populace."[172] He offers Texas as an example: "[O]nly three relatively small Indian nations in Texas have federal recognition…and institutions that function without federal funds remain free to pursue the inflammatory practices that gave rise to the repatriation conflict."[173] Furthermore, "[u]pon entering the Union, Texas retained control over most of its lands… and about 2 percent of the state is public domain."[174] Thus, "[e]ven after NAGPRA became law, Dickson Mound, a state-funded museum and tourist attraction in Illinois that displayed over a hundred bodies, continued business as usual."[175] Brooks is of the view that burial protection laws in most states are not as elaborate as NAGPRA and the "difference between NAGPRA on federal land and state laws on state or private land will

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168 *Ibid*.

169 *Supra* note 132.

170 *Ibid*.

171 *Ibid*.

172 James Riding In, "Repatriation: A Pawnee's Perspective" in Devon A. Mihesuah , ed., *Repatriation Reader: Who Owns American Indian Remains?* (Lincoln: University of Nebraska Press, 2000) 106 at 112.

173 *Ibid*.

174 *Ibid*.

175 *Ibid*.

continue to be a problem until NAGPRA can be effectively used outside of Indian or federal land jurisdiction."[176]

Watkins notes that "many American Indian groups cannot understand why the graves protection portion of NAGPRA was not applied to all lands within the United States, rather than just to federal and tribal lands, since the entire continent was at one time Indian land."[177] The National Congress of American Indians has called for "amendatory language to the NAGPRA to extend protection of funerary remains and objects on all lands within the exterior boundaries of the United States wherever they may be situated."[178] Referring to Melinder Zeder's survey of American archaeologists, he also concludes that only about one half of American archaeologists are bound by the NAGPRA or NMAIA (*National Museum of the American Indian Act*).[179] In addition, "[a]cademic archaeologists, those more often participating in 'pure research', are less confined by federal regulations and…if their research is conducted on private land, they are less restrained."[180] The foregoing are troubling statistics for Native Americans.

Private lands are also exempt from NAGPRA. Federal intervention on private land could be seen as "a violation of the 'takings clause' of the U.S Constitution if the landowner is somehow denied access or free use of his or her property without adequate compensation"[181] However, some states have taken steps which attempt to balance the imperative need for private land archaeological site protection with the constitutional takings clause.[182] Some of the actions discussed in an article by Pamela D'Innocenzo are summarized below.

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[176] Robert L. Brooks, "Compliance, Preservation, and Native American Rights: Resource Management as a Cooperative Venture" in Nina Swidler *et al.*, eds., *Native Americans and Archaeologists: Stepping Stones to Common Ground*, (Walnut Creek, CA: AltaMira Press, 1997) 207 at 211.

[177] *Supra* note 123 at 63.

[178] *Ibid.*

[179] The survey states that approximately 49 percent of archaeologists work either within the government (23%), the private sector (18%), or within a museum setting (8%). *Ibid.* at 64.

[180] *Ibid.*

[181] *Ibid.*

[182] See generally Pamela D'Innocenzo, "Not in my Backyard!" Protecting Archaeological Sites on Private Lands" (1997) 21 Am. Indian L. Rev. 131.

1. State Approaches[183]

a) The State of Illinois *Human Skeletal Remains Protection Act*[184] seeks to avoid "interfer[ing] with legitimate scientific study or landowner use of private property" by requiring the coroner be notified of any human remains found on private property.[185] The coroner then informs the Historic Preservation Agency of the unregistered grave and the Agency makes arrangements regarding removal and/or reinterment.[186]

b) The *HSRPA* imposes serious penalties on parties "*knowing*[*ly*] disinter[ring]... human remains, burial artifacts or markers. Consequences may include fines of up to $10,000, imprisonment, forfeiture of all equipment, and costs of restoration and reinterment."[187]

c) Some states, while protecting artefacts on state-owned land, "merely 'discourage' excavation and destruction of those same artifacts situated on private land."[188] For example, in Oklahoma, private landowners "may give their consent to the excavation or removal of archaeological relics from their property - private excavations are simply to be discouraged by the State...."[189]

d) Kansas requires commercial fossil hunters to identify themselves as such to landowners and obtain their written consent prior to entering private land.[190]

e) D'Innocenzo suggests that the plundering of archaeological sites can be "curbed" by "prevent[ing] the financial gain sought by looters through statutory provisions regulating the inter- or intrastate traffic in illegally obtained cultural relics."[191] This could include

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183 *Ibid.* at 142.

184 20 Ill. Comp. Ann. Stat. §3440/16 (West 1993 & Supp. 1996) [*HSRPA*].

185 *Supra* note 182 at 143.

186 *Supra* note 184 at §3440/2.

187 *Supra* note 182.

188 *Ibid.* at 144.

189 *Ibid.*; 53 Okla. Stat. Ann. §361(K), (M) (West 1991).

190 D'Innocenzo, *ibid.*; Kan. Stat. Ann. §21 -3759 (1994).

191 D'Innocenzo *ibid.* at 145.

"broadening the scope of existing trespass or conversion laws and linking them to federal anti-trafficking provisions to restrict the removal of artifacts from private property."[192]

f) Several states have "permit requirement[s] for any disruption of archaeological resources" while others "now require permits... before excavations may begin on *any* site. Some states, such as Washington, require both...."[193]

g) Some states are choosing to work within the existing statutory regime and simply amend existing legislation to "expand their protection to cover state cultural resources."[194]

2. Individualized Approaches[195]

a) Registry and landmark classifications can be used to encourage preservation of significant sites. For example, "[u]nder the Kentucky registry, participating landowners receive special recognition in return for agreeing to avoid harming the site, allowing periodic inspections of the site, and notifying the registry of transfers of title."[196]

b) Voluntary conservation efforts, such as conservation easements, funding site preservation and even direct acquisition of historic properties can be effective means of protecting privately-held sites.[197]

c) A very effective means of protecting private archaeological sites, but one which "is bound to make a lot of Americans stand up and scream" is the concept of universal property.[198] For example, the State of Alabama "reserves the exclusive right of exploration and excavation of all sites within the state, subject to the rights of the

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[192] *Ibid.*; "NAGPRA contains anti-trafficking provisions as does ARPA. However, ARPA only prohibits *inter*-state trafficking. It does not prohibit purely *intra*-state trafficking." (her note 75) [emphasis in original].

[193] *Ibid.*; Wash. Rev. Code Ann. § 27.53.060 (West 1982 & Supp. 1996).

[194] *Ibid.* at 146. D'Innocenzo provides Indiana's *Historic Preservation and Archeology Act* (Ind. Code §14-3-3.4 (1989)) as an example of this at 146-47.

[195] *Ibid.* at 149.

[196] *Ibid.*

[197] *Ibid.* at 150-53.

[198] *Ibid.* at 154.

> owner for agricultural, domestic, or industrial purposes, and anything found belongs to the state."[199]

(i) Definitions and Ambiguities

Native Americans have complained that NAGPRA is replete with problematic definitions and ambiguities which obscure meaning and undermine the effectiveness of the Act in achieving its stated goals. Some of the controversial definitions and ambiguities are discussed below.

1. Cultural Items

Cultural Items are defined to include human remains and associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony.[200]

(i) Human Remains

NAGPRA covers all Native American human remains whether or not they came from a burial site.[201] Therefore, "isolated human bones, teeth, hair, or other kinds of bodily remains that may have been disturbed from a burial site are still subject to NAGPRA provisions."[202] However, as Trope explains:

> The regulations make it clear that body parts that were freely given or naturally shed by an individual (e.g. hair made into ropes) are not considered human remains. Furthermore, if human remains are incorporated into other cultural items covered by NAGPRA , it is the

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199 *Ibid.*; Ala. Code § 41-3-1 (1991).

200 25 U.S.C. § 3001(3).

201 Francis P. McManamon & Larry V. Nordby, "Implementing the Native American Graves Protection and Repatriation Act" (1992) 24:1 Ariz. St. L.J. 217 at 232; *Ibid.*

202 McManamon, *ibid.*; 25 U.S.C. § 3001(1), (3).

cultural affiliation of the non-human item, not that of the human remains, which governs repatriation.[203]

(ii) Sacred objects

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."[204] This definition is elaborated in the NAGPRA Regulations as follows:

> While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term traditional religious leader means a person who is recognized by members if an Indian tribe or Native Hawaiian organization as:
>
> (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or
> (ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices.[205]

Jonathan Haas is of the view that the notion of sacred in the Act and NAGPRA regulations "does not correspond to the more common, everyday uses of the term."[206] He points out that use of the word "needed" in the NAGPRA definition is ambiguous and intended to "reduce the number of objects potentially affected by the law to a comparatively small subset of the full range of ceremonial

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203 *Supra* note 3 at 205, citing 43 C.F.R. 10.2(d)(1).

204 25 U.S.C. § 3001(3)(c).

205 43 C.F.R. § 10.2(d)(3).

206 Jonathan Haas, "Sacred under the Law: Repatriation and Religion Under the Native American Graves Protection and Repatriation Act (NAGPRA)" in Bray, ed., *supra* note 44, 117 at 118.

and religious material held by museums."[207] He questions, "[i]f a tribe has been actively practicing their traditional religion without an object that has been lying in a museum for 100 years, how can that object be "needed" for the practice of that religion?"[208] In his opinion, ceremonial objects are "uniquely necessary for the practice of any particular ritual."[209] Instead, "new ceremonial objects are made as they are needed."[210] The return and proper care of such items is vital to many Native Americans. However, Native tribes remain undaunted by these ambiguities and assert repatriation rights based on claims that the sacred objects are spiritually alive or needed to renew ceremonies.[211]

Boyd and Haas observe that "the definition of sacred objects begs the question" because "[t]he fact that there are 'present day adherents' indicates that these individuals already have those objects that are necessary to practice their religious beliefs."[212] Haas also suggests that limiting the definition of sacred objects to those needed by traditional religious leaders also "effectively reduce[s] the number of individuals who would have the standing to assert the sacredness of any given object for a tribe"and "reduces the scope of affected objects, limiting them to items clearly devoted to religious activities."[213] Because sacred objects can only be claimed by the affiliated individual or tribe, *NAGPRA* also places a "structural intermediary between the religious leaders of the tribe and the museums and federal agencies from whom the objects would be requested" thereby "imposing a cumbersome, Western pattern on the great diversity of social, political, and ceremonial relationships found in Native American communities."[214] The term "traditional" may also be

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207 *Ibid.*

208 *Ibid.*

209 *Ibid.*

210 *Ibid.* at 119.

211 See *ibid.*

212 *Supra* note 149 at 265, n. 65.

213 S*upra* note 206 at 119-120.

214 *Ibid.* at 119.

interpreted as "the way things were"by those who "fail to recognize that just as cultures grow, develop and change over time, so, too, do traditions."[215]

Worl is concerned that the return of sacred objects may have far-reaching implications for religious renewal in Native American communities. Definitions and ambiguities notwithstanding, "reintegration of objects into these societies and the renewal of cultural and religious rites can be complex and perhaps even painful."[216] Tribes "may have an additional burden: they may have to address potential conflicts generated among those who have assimilated western views and ways or who may have accepted the Christian faith and be adverse to the renewal of traditional religious practices."[217] She adds that "Elders and religious leaders have the enormous task of reconciling these differences and tensions among their tribal members. They will be faced with the enormous task of educating their young and tribal members who do not understand the ancient religions and the significance of sacred objects."[218] Haas notes that repatriation of sacred objects also raises spiritual concerns "for which there is no corresponding mechanism in the formal language of the law."[219] For example, during the course of the repatriation of the Arapaho Sun Dance Wheel by the Northern Arapaho Tribe of Wyoming, other Arapaho tribes in Wyoming and Oklahoma wrote to the Federal Museum of National History (from where the wheel was repatriated) expressing concerns that the Arapaho people "already had a Sun Dance Wheel that was danced every year and had been appropriately initiated in proper ceremonies."[220] They were concerned "about the authenticity of the Wheel as well as general spiritual concerns about whether the Wheel should be returned."[221]

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[215] *Ibid*. at 120.

[216] *Supra* note 26 at para. 23.

[217] *Ibid.*

[218] *Ibid.*

[219] *Supra* note 206 at 124.

[220] *Ibid.* at 123.

[221] *Ibid.*

(iii) Cultural Patrimony

"Cultural patrimony" means

> an object 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, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.[222]

The NAGPRA Regulations explains that "[t]hese objects are of such central importance that they may not be alienated, appropriated, or conveyed by an individual tribal or organization member" and gives as examples Zuni War Gods and the Confederacy Wampum Belts of the Iroquois.[223]

Boyd and Haas point out that the definition of cultural patrimony implies communal ownership of property, and thus "poses problems with respect to the many Native American groups who, at the time the possession of a particular cultural item was transferred, did not accept or even appreciate such concepts."[224] Therefore, "identifying cultural patrimony may require extensive inquiry into both the circumstances surrounding the alienation and the state of traditions and customs as they existed at the time of transfer" as well as the "expenditure of substantial resources."[225] Further, the definition does not anticipate the centrality and inalienability of items which may be both individually and communally owned or limited rights of individual alienation (e.g. according to certain ceremonies or within a particular group).

NAGPRA vests "ownership or control of Native American cultural items... excavated or discovered on Federal or tribal lands after November 16, 1990" in "lineal descendants...", "the Indian

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[222] 25 U.S.C. § 3001(3)(d).

[223] 43 C.F.R. § 10.2(d)(4).

[224] *Supra* note 149 at 266.

[225] *Ibid.*

tribe... on whose land" the object was discovered, and the tribe "which has the closest cultural affiliation with [the item] and which, upon notice, states a claim for [the item]" in a descending order of priority.[226] Objects of unknown cultural affiliation discovered on Federal land that is legally recognized as "the aboriginal land of some Indian tribe" vests in the tribe "recognized as aboriginally occupying" the area in which the objects were discovered if the tribe "states a claim" for the objects.[227] If a different tribe can demonstrate "a stronger cultural relationship" with the object, then that tribe's claim will take precedence.[228] Hutt suggests an amendment is required to "allow lands ceded via ratified treaties to be considered as a tribe's aboriginal territory along with those lands identified by decisions of the United States Court of Claims or the Indian Claims Commission…when determining priority of claims under Section 3."[229]

(iv) Associated and Unassociated Funerary objects

Associated funerary objects means

> "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, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects."[230]

Unassociated funerary objects means

> "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human

[226] 25 U.S.C. § 3002(a).

[227] 25 U.S.C. § 3002(a)(2)(c)(1).

[228] 25 U.S.C. § 3002(a)(2)(c)(2).

[229] *Supra* note 92 at para. 19.

[230] 25 U.S.C. 3001(3)(A).

> remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.[231]

The NAGPRA Regulations make it clear that funerary objects include those "made exclusively for burial purposes or to contain human remains"[232] such as rock cairns and funeral pyres which "may not fall within the ordinary definition of gravesite."[233] They also include items "placed intentionally" near human remains.[234] Unassociated funerary objects do not include items "subsequently returned and distributed according to traditional custom to living descendants or other individuals."[235]

Boyd and Haas explain that these definitions require certain subjective determinations. Both refer to "objects that, as part of the death rite or ceremony of a culture, are *reasonably believed* to have been placed with individual remains either at the time of death or later."[236] Accordingly, "the categorization of cultural items as 'funerary objects' requires a minimum level of certainty of the factual circumstances surrounding the initial discovery of the objects or the traditional burial practices of related or potentially-related cultures at the time of the burial."[237] "These facts will assist museums in substantiating the 'reasonable belief'" requirement, but "it is not clear whose 'reasonable belief' shall control the process."[238] Gary D. Stumpf makes a similar observation about terms such

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231 25 U.S.C. 3001(3)(B).

232 43 C.F.R. § 10.2(d)(2)(i).

233 Trope, *supra* note 3 at 206.

234 43 C.F.R. § 10.2(d)(2)(i).

235 43 C.F.R. § 10.2(d)(2)(ii).

236 *Supra* note 149 at 264 [emphasis in original].

237 *Ibid.*; *Supra* notes 230-31.

238 *Ibid.*

as "sacred", "patrimony" and "inalienable" which are "necessarily subjective because they reflect the values ascribed to objects" and will "present challenges for agency field office personnel responsible for ensuring compliance with the law."[239]

2. Cultural Affiliation

Cultural affiliation means "that there is 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."[240] The term "is a cornerstone for successful repatriation requests"[241] which is used to establish "[t]he ownership or control of Native American cultural items [recovered] on federal or tribal lands after November 16, 1990."[242] McManamon and Nordby note however, that the definition "implies that a group of Native Americans of diverse backgrounds who voluntarily associate together for some purpose or purposes are not viewed as proper claimants under NAGPRA's provisions."[243] Tamara Bray argues likewise that the cultural affiliation provision "codifies ethnicity as an objective fact, and culture groups as discrete and timeless units" when in fact "[r]ecent theories of cultural identity construe ethnicity as a subjective process in which individuals and groups identify themselves and others within the framework of specific social and political situations for specific purposes."[244] In addition, "[m]any concerns have been raised about the passage of time and its effect on the establishment of cultural affiliation."[245] McManamon and Nordby suggest "NAGPRA does not address the issue of ancient cultures,

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[239] Gary D. Stumpf, "Federal Land Management Perspective on Repatriation" (1992) 24:1 Ariz. St. L.J. 303 at 307-08.

[240] 25 U.S.C. § 3001(2).

[241] McManamon, *supra* note 201 at 223-24.

[242] 25 U.S.C. § 3002(a).

[243] McManamon, *supra* note 201 at 223.

[244] Tamara Bray, "Repatriation, Power Relations and the Politics of the Past" (1996) 70:268 Antiquity 440 at 443.

[245] McManamon, *supra* note 201 at 225.

chronology, time depth and regional variations."[246] They raise the following questions to illustrate this concern:

> [C]an properly affiliated claimants exist for human remains or cultural items excavated from archaeological sites thousands or tens-of-thousands of years ago, such as those assigned to Paleoindian or Archaic culture? Similarly, in considering a repatriation request, should a limit exist on the number of generations, centuries, or years that may elapse since the cultural item was deposited? Finally, how should the occupation of the same geographical area by different aboriginal cultures at different times in the historic or prehistoric past be resolved?[247]

(j) Reburial of Repatriated Remains

The question of where to rebury repatriated human remains is identified by several writers as a problem that Indian tribes have to deal with in the repatriation process. NAGPRA "does not specify how these remains…should be treated after they are repatriated"[248] leaving tribes to deal with the issue of what to do when the original burial site no longer belongs to the tribe or appropriate lineal descendant. Kiss quotes Eldermar, a former repatriation coordinator with the Tlingit and Haida Central Council, as saying that "every clan that we [the Council] have worked with wants the ancestral remains to go back where they came from",[249] a desire that cannot always be met as most of these sites now belong to the federal government. For example, Kiss records that the Auk Kwaan Clan of Alaska could not rebury their ancestors at the original burial site, which now belongs to the Forest Service and is a heavily used picnic and camp ground."[250] Richard Dalton, Sr., of the Takdeintaan Clan of Hoonah, Alaska and respected Tlingit leader, is said to "have reburied a part of his relative's body on the current U.S Forest territory…illegally without the consent of the

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[246] *Ibid.* [footnote omitted].

[247] *Ibid.*

[248] *Supra* note 239 at 313.

[249] *Supra* note 75 at 6.

[250] *Ibid.* at 5.

agency"[251] because he felt that his late relative would "feel comfortable...where he lived and hand trailed fish…."[252] Thus, Dalton suggests "an amendment to [NAGPRA] to allow reburial on federal lands that used to be ours."[253]

(k) Health Concerns over Pesticide Residues on Repatriated Remains and Items

This concern was discussed extensively at the Fall 2000 Working Conference on "The Contamination of Museum Materials and the Repatriation Process for Native California" ("San Francisco Conference") and at the symposium on "Contaminated Collections: Preservation, Access and Use" held at the National Conservation Training Centre in Shepherdstown, West Virginia in April 2001 and hosted by the Society for the Preservation of Natural History Collections (SPNHC), the National Museum of the American Indian (NMAI) and the NPS.[254] The thrust of this concern is captured in the following excerpt from an abstract of a paper written by Nancy Odegaard and Alyce Sadongei.

> As a result of the *Native American Graves Protection and Repatriation Act* (NAGPRA), federally recognized American Indian tribes have begun to claim and receive certain cultural objects previously held with museums and federal agencies. Unfortunately, a wide range of pesticide substances [have] been applied to museum collections for the purpose of preserving them. It is the actual repatriation or the transfer of pesticide contaminated cultural objects from museums to tribes for culturally appropriate use, storage, retirement, or disposal that has brought this concern to an urgent level.[255]

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[251] *Ibid.*

[252] *Ibid*. at 6.

[253] *Ibid.*

[254] The proceedings and papers of both conferences are contained in the *Collection Forum* (2001) 16:1-2 and 17:1-2 a bi-annual peer reviewed journal published by The Society for the Preservation of Natural History Collections.

[255] Nancy Odegaard & Alyce Sadongei, "The Issue of Pesticides on Native American Cultural Objects: A Report on Conservation and Education Activities at the University of Arizona" (2001) 16:1-2 Collection Forum 12.

To appreciate the health issues faced by Native Americans, several works by researchers on the "wide range of possible pesticide contaminants"[256] used by museums for preservation purposes are pertinent. Odegaard and Sadongei refer to the book *A Guide to Museum Pest Control*[257] which provides lists, descriptions and discussions of pesticide products, and the institutionally focused research of Lisa Goldberg.[258] David Goldsmith lists the pesticides of concern to include "arsenic, mercuric chloride, DDT, strychnine, naphthalene mothballs, paradichlorobenzene mothballs, and dichlorvos (DDVP)."[259] According to him, "[a]rsenic is a well known poison and preservative. Strychnine is also a very serious hazard to children and may have been used in the past to protect artifacts from rodents"[260] and "[t]he routes and targets of exposure for conservators are inhalation, dermal and indirect contamination. This could also be a serious problem for children if they are exposed to parents who work in repatriation or museum programs."[261] Odegaard and Sadongei amplify the point thus:

> [U]se of chemicals may cause unpredictable, disfiguring, and irreversible changes to the objects treated, and second, that the actual access, examination, and handling of these treated objects may pose ongoing and serious health hazards to individuals. While discussions of both concerns have been widely reported, some examples referring to the human health hazard of preservative residues on objects include: (a) sources of toxic particles that may be ingested or inhaled through the nose or mouth such as biocidal treatments to objects of feather, fur, buckskin or textile with commercial pesticides; fungicidal treatments to the backs of paintings, documents, and textiles;

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256 *Ibid.* at 14.

257 Lynda A. Zycherman & John Richard Schrock, eds., (Washington, DC: Foundation of the American Institute for Conservation of Historic and Artistic Works: Association of Systematic Collections, 1988).

258 Lisa Goldberg, "A History of Pest Control Measures in the Anthropology Collections, National Museum of Natural History, Smithsonian Institution" (1996) 35:1 Journal of the American Institute for Conservation 23. See also Catherine Hawks, "Historical Survey of the Sources of Contamination of Ethnographic Materials in Museum" (2001) 16:1-2 Collection Forum 2.

259 David Goldsmith, "Occupational Health Information on Pesticide Contamination (Summary)" (2001) 16:1-2 Collection Forum 63 at 64.

260 *Ibid.*

261 *Ibid.*

> syberizing (use of an arsenic-based mothproofer); and ancient biocidal treatments including copper or lead pigments; or (b) sources of toxic vapors from pesticide repellants and fumigants that may be inhaled through the nose or mouth, or irritate the eyes such as residues.[262]

Micah Loma'omvaya is of the view that museums are not acting as responsibly as they should in forestalling the apparent dangers to unsuspecting tribe members involved in repatriation work.[263] Speaking on the risk of repatriation contamination to the Hopi tribe, Loma'omavaya states that "[m]ore than 60 items have been returned to the tribe prior to notification of potential contamination. Few tribal members were ever warned of contamination by museum staff."[264] G. Peter Jemison, NAGPRA representative for the Seneca Nation of Indians and former chair of the Haudenosaunee (otherwise known as the Iroquois Confederacy, or the Six Nations) Standing Committee on Burial Rules and Regulations, writes of the Haudenosaunee experience with repatriation contamination:

> To the Haudenosaunee, the sacred medicine masks are our helpers, and in English, we may refer to them as our ''grandfathers.'' On 14 November 1998 four hundred and fifty-five (455) medicine masks were returned to the Onondaga Longhouse at Nedrow, New York. The Onondaga Nation is the Keeper of the Central Fire, the place where the Grand Council of the Haudenosaunee meets. The joy of the return of our sacred objects was overshadowed on that day when we learned that out of fifty-seven (57) ''grandfathers,'' seven percent tested positively for the presence of arsenic. The knowledge that contamination was even an *issue* only came to the Standing Committee approximately three months before the return of the sacred masks.[265]

A host of writers agree that the legal response to the problem of repatriation contamination is meagre and presents a lot of implementation problems. According to Odergaard and Sadongei:

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[262] *Supra* note 255 at 13.

[263] Micah Loma'omvaya, "NAGPRA Artifact Repatriation and Pesticides Contamination: Human Exposure to Pesticide Residue Through Hopi Cultural Use" (2001) 16:1-2 Collection Forum 63.

[264] *Ibid.*

[265] G. Peter Jameson, "Poisoning the Sacred" (2001) 17:1-2 Collection Forum 38 [emphasis in original]. Even where tribes are informed of the presence of contaminants in returned artefacts, repatriation is still viewed as a loss. See Ian Simple, "Sacred Heirlooms Tarnished" *New Scientist* 177:2384 (1 March 2003) 8.

> From a legal standpoint, it appears that the degree of potential health hazard due to historic pesticide residues remaining on an object claimed through the repatriation process was not fully recognized when NAGPRA was signed into law. A reference to pesticides occurs only once in the regulations implementing the statute. The NAGPRA regulations...indicate that: *The museum official or Federal agency official must inform the recipients of repatriations of any presently known treatment of human remains, funerary objects, sacred objects or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling objects*.[266]

Tsosie is of the view that the inventory requirements in NAGPRA are solely intended to document cultural affiliation of objects caught by the Act and do not require "information regarding the treatment of these items by pesticides and other chemicals while in the custody of museums and agencies."[267] She suggests "[i]t is likely that Congress did not consider the issue because it was not until fairly recently that certain Indian Nations who had received contaminated objects discovered the contamination and brought the issue to public attention."[268] Under the NAGPRA *Regulations* "the custodian of the objects apparently has a duty to notify the Native claimants if (1) the custodian *knows* that the objects were treated; and (2) if the treatment represents a '*potential hazard*' either to the objects themselves or to persons handling the objects."[269] However, "[i]t is unclear whether the language requires the custodian to have *actual* knowledge, or whether such knowledge may be implied based on the industry pattern or practice of such treatments."[270] Tsosie suggests that "[i]t is likely that the custodian is held to have knowledge of treatments to the extent that the museum or agency itself keeps records of treatments or has had regulations in place requiring treatments of

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266 *Supra* note 255 at 13 [emphasis in original]; 43 C.F.L. 10.10(e).

267 Rebecca Tsosie, "Contaminated Collections: An Overview of the Legal, Ethical and Regulatory Issues" (2001) 17:1-2 Collection Forum 14 at 16.

268 *Ibid.*

269 *Ibid.* [emphasis in original].

270 *Ibid.* [emphasis in original].

specific categories of objects (e.g., those containing feathers, fiber, or hair)."[271] The dependence on record keeping is, however, problematic in light of the fact that with regard to past practices of museums, "the record keeping of pesticide use was poor…."[272]

Odergaard and Sadongei agree that from a practical standpoint, the NAGPRA Regulations present difficulties for museums and Federal agencies.

> Informing tribal recipients of *any* known treatments that may have occurred during an object's museum history is, indeed, a difficult task for most museums and federal agencies. The research necessary to fulfill the NAGPRA regulation requirement involves more than a simple checking of the museum records. Rather, a thorough review of many museum documents, archives, conservation correspondence and reports, and letters to earlier staff members that may be on file must be conducted.[273]

Regarding the issue of liability and compensation for exposure, after reviewing the NAGPRA *Regulations*, other statutes on pesticide and chemical regulation and tort law, Tsosie concluded that these issues are not adequately addressed. She believes that what is required is a "restructuring of existing law and policy directives to achieve a coherent legal solution."[274]

Sadongei identifies the contamination problem as one which poses significant risks and implications on tribal concepts of object use.[275] These uses are *physical* ("practitioners physically come in contact with, or physically use the object"),[276] *symbolic* ("the physical presence of the object symbolically represents a connection to tribal ancestors and cultural legacies"),[277] and/or *life-ending* ("practitioners engage in the act of ritually disposing of an object thereby nullifying and ending its

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[271] *Ibid.*

[272] *Supra* note 259.

[273] *Supra* note 255 at 14 [emphasis in original].

[274] *Supra* note 267 at 28.

[275] See Alyce Sadongei, "American Indian Concepts of Object Use" (2001) 17:1-2 Collection Forum 113.

[276] *Ibid.* at 114.

[277] *Ibid.* at 114-15.

sanctified attributes”).[278] “Tribal religious leaders and cultural practitioners are not only subject to health risks...” but cultural and spiritual risks. “Cultural risk occurs when individuals with special knowledge, acting on behalf of the larger tribal community, arbitrarily encounter the life forces or sources of power that reside in culturally sensitive objects and/or ancestral human remains, and funerary objects.”[279] It is “inherent when tribes interact with sacred objects in any of the three categories [of use] previously described.”[280] For example, a request by the Hopi tribe to test and analyze contaminated sacred objects at the University of Arizona meant that “it was necessary for religious leaders to confer on where the sample should be taken from the object.”[281]

Tsosie suggests any changes to the law to address contamination issues must “examine the legal and ethical dimensions of the problem through an intercultural lens. The nature of the problem is one that threatens human health and safety, requiring scientific study of the health effects of such contamination given the patterns of use employed by Native people.”[282] Any law reform must also include the “recognition of cultural harm and the inadequacy of existing tort law to quantify the damages that are being suffered by Native people.”[283]

Finally, Lee Davis, Niccolo Caldararo and Peter Palmer recommend the following measures to address contamination: testing for pesticide contamination, removal/reduction of contaminants from artefacts, educational programs for tribes to explain risks of pesticide exposure, collaboration with museums, financing to help meet the costs associated with testing, and amendment of NAGPRA and its guidelines to address artefact contamination.[284]

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[278] *Ibid.* at 115.

[279] *Ibid.*

[280] *Ibid.*

[281] *Ibid.*

[282] *Supra* note 267 at 28.

[283] *Ibid.*

[284] See generally Lee Davis, Niccolo Caldararo & Peter Palmer, “Recommended Actions Regarding the Pesticide Contamination of Museum Materials” (2001) 16:1-2 Collection Forum 96.

(l) Other Concerns

NAGPRA provides that cultural items imbedded in Federal or tribal lands can only be excavated pursuant to a permit under the *Archaeological Resources Protection Act* ("ARPA").[285] However, as Johnson and Haensly point out, there are inconsistencies between these statutes. For example, "ARPA's jurisdiction…extends only to Indian lands held in trust or subject to a restriction or alienation; whereas NAGPRA's jurisdiction extends to *all* lands within exterior reservation boundaries."[286] The items covered in both statutes also differ. NAGPRA thus requires the ARPA permit to be consistent with its provisions "but fails to expressly amend ARPA's coverage of items and lands."[287]

Tribal consent is required where excavation is to be carried out on tribal lands. In the case of excavation on federal lands, only consultation with the appropriate tribe is required by NAGPRA.[288] Watkins sees no reason for this distinction and is of the view that the consent distinction is one example of NAGPRA's inadequacies in this area.[289]

Complaints of non-compliance and compliance delays by museums and agencies are also being raised in the literature. Kiss records that between 1994 and 1998, the Tlingit and Haida Central Council submitted about 115 repatriation claims and only less than a dozen were fulfilled.[290] The process is cumbersome and slow, "lacks the teeth [to] force museums to honor the wishes of clans and tribes, and museums have the final word...."[291] Gough offers the example of Washington College

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[285] 25 U.S.C. § 3002(c)(1) referring to *Archeological Resources Protection Act of 1979* 16 U.S.C. § 477 aa et. seq.

[286] Ralph W. Johnson & Sharon I. Haensly, "Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act" (1992) 24:1 Ariz. St. L.J 151 at 154 [emphasis in original, footnote omitted].

[287] *Ibid.* at 155 [footnotes omitted].

[288] 25 U.S.C. § 3002(c)(2).

[289] *Supra* note 123 at 66-67.

[290] *Supra* note 75 at 11.

[291] *Ibid.*

which, fully aware that it was required under NAGPRA to file a summary or inventory of the "Albee Collection" in its possession, sold the collection on May 21, 1996, despite efforts of the Native American claimants to examine the artefacts.[292] In his opinion, Washington College chose not to follow the law, claiming, incorrectly, based on "privately obtained expert advice, undisclosed legal opinions" and "financial determinations made at the sole discretion of that institution's board of directors" that the College and the collection were outside the scope of NAGPRA.[293] He suggests further that there is a compliance loophole in NAGPRA which cannot be addressed by merely requiring consultation with tribes, and recommended to the Senate Committee (1999) an amendment that "no sale of any objects or artifacts which may be subject to the provisions of NAGPRA can occur without a written certification of compliance with the summary and inventory provisions of NAGPRA from the applicable federal agency."[294]

Judge Hutt suggests that a practical solution to the problem of compliance would be "for Congress to consider funding the position of a prosecutor to evaluate and pursue sanctions for violations of the act under the civil penalties provision."[295] She advised the Senate Committee (1999) that "[o]ne method of funding would be an amendment to the law which would allow the Secretary of Interior to retain the proceeds from an action to assist in funding the administration of NAGPRA compliance."[296] Regarding compliance delays, Worl recommended that Congress "implement an oversight process that ensures that museums and other entities act on repatriation claims on a timely basis."[297] This would avoid situations such as that experienced in the "[Tlingit] repatriation claim for over 40 objects of cultural patrimony from the University of Pennsylvania Museum of Archaeology

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[292] See *Oversight Hearing before the Senate Committee on Indian Affairs on the Native American Graves Protection and Repatriation Act*, 106th Cong. (1999) (testimony of Robert P. Gough, Attorney-at-law and Member, Rosebud Sioux Tribe, Rosebud, SD), online: U.S. Senate Committee on Indian Affairs <http://indian.senate.gov/1999hrgs/ NAGPRA4.20/gough.pdf> (last visited 28 April 2004).

[293] *Ibid.* at 9.

[294] *Ibid.*

[295] *Supra* note 92 at para. 14; 25 U.S.C. § 3007.

[296] *Ibid.*

[297] *Supra* note 132 at 2.

and Anthropology that was initially submitted in September 26, 1995."[298] According to Worl, "the clan submitted information to validate its claim" and the "repatriation petition was modeled on similar information that other museums have accepted and honored in their return of objects to clans."[299] The University of Pennsylvania Museum, however, "continued to request further information including the 'use and origin' of the objects. They then wanted tapes from the clan elders."[300] Given that "this collection is the centerpiece of University of Pennsylvania exhibits... the clan views the Museum's continuing questions and lack of action over a four-year period as a delaying tactic."[301]

B. The Scientific Community

NAGPRA has had far reaching implications on the various professions and scientific methods affected by its provisions. According to Tamara Bray:

> Embedded within the repatriation mandate are a number of issues that fundamentally challenge the archaeological profession's views and treatment of Native American peoples, call into question the 'absolute' values of science, and force critical rethinking of the role of archaeology, anthropology, and museums in contemporary society.[302]

The Act created a rift in opinion among members of the scientific community. Some scientists support NAGPRA's call to redress injustices against Indian tribes and implement its provisions "through collaborative efforts" with Indian tribes.[303] Others "are opposed to any and all

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298 *Ibid.* at 3.

299 *Ibid.*

300 *Ibid.*

301 *Ibid.*

302 Tamara L. Bray, "American Archaeology and Native Americans: A Relationship Under Construction" in Bray, ed., *supra* note 44 at 1.

303 *Supra* note 85 at 27.

reburials"[304] and argue that NAGPRA has consigned research "to the jurisdiction of political and religious restrictions."[305] Concerns of the former group relate to working with the provisions of NAGPRA, the latter dismiss NAGPRA and the rationale behind it. The following concerns and observations reflect these divergent positions.

(a) Detrimental Impact on Scientific Research

The principal concern with repatriation legislation is the potential stifling of scientific research. For example, "in the repatriation hearings the scientific community came forward to reinforce its dependence on human remains for scientific study, stressing the need for future generations to learn from the past."[306] Olwick Grose uses the term "provenance" to describe the enduring value of an artefact or human remains as a source of study and analysis.[307] However, as Alan Schneider argues, "[g]overnment restrictions [such as NAGPRA] are making it progressively more difficult for researchers to gather new data and to formulate new concepts about American prehistory."[308] For example, NAGPRA prohibits the refusal to return culturally affiliated Native American cultural items subject to valid repatriation claims, except where the "items are indispensable for completion of a scientific study, the outcome of which would be of major benefit to the United States."[309] Archaeologists argue the 'major benefit' requirement is too restrictive and "does not allow important studies on remains excavated since the passage of NAGPRA because

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[304] *Ibid.*

[305] *Ibid.*

[306] See Lisa M. Sharamitaro, "Association Involvement across the Policy Process: The American Association of Museums and the Native American Graves Protection and Repatriation Act" (2001) 31:2 Journal of Arts Management, Law, and Society 123 at 127.

[307] Teresa Olwick Grose, "Reading the Bones: Information Content, Value, and Ownership Issues Raised by the Native American Graves Protection and Repatriation Act" (1996) 47:8 Journal of the American Society for Information Science and Technology 624 at 628.

[308] Alan L Schneider, "The Future of Public Policy: Lawyers/Scientist's Perspective" (Paper presented at the Clovis and Beyond Conference, October 1999), online: Friends of America's Past <http://www.friendsofpast.org/earliest-americans/conf99-01.html> (last visited 28 April 2004).

[309] 25 U.S.C. § 3005(b).

clearly these items could not be considered items of ongoing research for the purpose of the statute."[310] According to Schneider:

- Restrictions on the study of skeletal remains include not only so-called "invasive" tests (such as DNA and radiocarbon dating). They are also being extended to skeletal measurements and other noninvasive studies.
- Researchers are being denied access to utilitarian objects held in federal and state collections. Examples include projectile points and nonburial pottery.
- Graduate students are being forced to change thesis and dissertation topics (sometimes twice or more) due to lack of access to research materials.
- Restrictions are being imposed on the dissemination of data about collections and new discoveries, even extending in some cases to basic research reports.
- Skeletal remains and other items are being given to tribes or coalitions of tribes that have no demonstrated relationship to the materials in question. Prominent examples include: Buhl Woman; Hourglass Cave; Minnesota Woman; Brown's Valley; and Sauk Valley.[311]

Take for example the Kennewick Man skeleton, which was excavated near a river in Oregon.[312] Archaeologists contend that study of the Kennewick Man "could provide a crucial link in [the]…understanding of the geographic origin of the first Americans."[313] Such study could also settle controversies between scientists and Native Americans over the routes traveled by first Americans, "and whether the initial settlement of this continent involved a single group or multiple

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310 Michelle Hibbert, "Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment" (1999) 23:2 Am. Indian L. Rev. 425 at 438 [footnote omitted].

311 *Supra* note 308.

312 For details on the Kennewick Man, including useful links to background information on the court case, and articles, see online: Clovis and Beyond Conference <http://www.clovisandbeyond.org/conference.html> (last visited 28 April 2004) (click on the 'Kennewick Man' link).

313 Renee M. Kosslak, "The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?" (1999-2000) 24:1 Am. Indian L. Rev. 129 at 144 citing Douglas Preston, "The Lost Man" *New Yorker* (16 June 1997) at 74.

waves of immigration."[314] Scientific study of the Kennewick Man could also change the predominant view that first Americans were descendants of Northeast Asian populations.[315] According to this view, the Clovis tribe was the first to settle in America and "they came in a single migration by a relatively small band from Asia across the Bering land bridge."[316] The Kennewick Man and similar discoveries hint at a very complex early history of the Americas which is far from clear and needs a great deal of unraveling work which will be hampered by repatriation.

Scientists contend that benefits flowing from scientific study of human remains such as knowledge of health and dietary patterns, diseases and epidemics, and the relationship between daily activities and health "ultimately benefits living Native groups most of all."[317] For example, the results of research have provided evidence for Native Americans in land claims before the Indian Claims Commission.[318] Devon Mihesuah, however, questions the benefits justification of scientific research on human remains, noting that "the garnered scientific information has not been used to decrease alcoholism or suicide rates, nor has it influenced legislative bodies to return tribal lands, or to recognize the sad fact that Indians are still stereotyped, ridiculed, and looked upon as novelties."[319]

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314 *Ibid.*, citing David J. Meltzer, *The Search for the First Americans* (Wash. D.C.: Smithsonian Books, 1993) at 15. For a discussion of anthropologists' and Native American views on the origin of North American people, see Robert W. Lannan, "Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Remains" (1998) 22:2 Harv. Envtl. L. Rev. 369 at 383-88.

315 See Kosslak, i*bid.*, citing Meltzer at 159.

316 Douglas W. Owsley & Richard L. Jantz, "Archaeological Politics and Public Interest in Paleoamerican Studies: Lessons from Gordon Creek Woman and Kennewick Man" (2001) 66:4 American Antiquity 565 at 566.

317 Mary Tivy, "Past the Point of No Return", (1993) 93:3 Museums Journal 25 at 26. For a detailed discussion of the benefits of scientific study of human remains, see Patricia M. Landau & D. Gentry Steele, "Why Anthropologists Study Human Remains" (1996) 20:2 American Indian Quarterly 209.

318 Alan S. Downer, "Archaeologists-Native American Relations" in Swidler *et al.*, *supra* note 176, 23 at 28.

319 See Devon A. Mihesuah, "American Indians, Anthropologists, Pothunters, and Repatriation: Ethical, Religious and Political Differences" (1996) 20:2 American Indian Quarterly 229 at 231.

Implementing repatriation legislation could also disrupt research projects that are in progress.[320] For example, during his year of studying Omaha remains, anthropologist Karl Reinhard discovered a lot of information involving diet, demographics, style of dress, daily activities, migratory patterns, disease, trade cycles, and physical characteristics. He also discovered a significant amount of lead poisoning in many of the remains. Unfortunately, the Omaha tribe interred the remains at the end of the year before he could pinpoint the source of poisoning, leaving him with incomplete tests.[321]

For these reasons, NAGPRA has been described as being "[m]otivated by political expediency" and an anti-science political climate where "mysticism, religious fundamentalism, creationism, and belief in the paranormal combine with post-modernist academics to attack the critical realism and mitigated objectivity that are the central epistemological biases of the scientific worldview."[322] It "strikes at the very core of a 'science-like' archaeology. Political considerations take precedence over disinterested evaluation of knowledge claims about the human past, with tragic and irreversible results."[323]

One aspect of NAGPRA which has enjoyed some success, and which partially alleviates the concerns of the scientific community, is the consultation process which encourages both sides to work together.[324] Indeed, forcing museums and scientists to engage in dialogue and negotiation was an explicit agenda for Senator Inouye, a key supporter of the legislation.[325] As one writer notes, "California Indians often value the opportunity to consult [with scientists] in the determination of

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[320] *Supra* note 310.

[321] Fergus M. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* (New York: Doubleday, 1996) at 175-203.

[322] Geoffrey A. Clark, "NAGPRA and the Demon-Haunted World" (March 1996) 14:5 Society for American Archaeology Bulletin 3.

[323] *Ibid.*

[324] James A.R. Nafziger & Rebecca J. Dobkins, "The Native American Graves Protection and Repatriation Act in its First Decade" (1999) 8:1 Int'l J. Cult. Prop. 77 at 89-91.

[325] Fred A. Morris, "Law and Identity: Negotiating Meaning in the Native American Graves Protection and Repatriation Act" (1997) 6:2 Int'l J. Cult. Prop. 199 at 217.

cultural affiliation because it gives them an opportunity to 'do science' on equal terms with those in the academy."[326] Consultation and cooperation may also facilitate scientific study of Native American cultural items and sites that are otherwise unavailable. For example, following extensive consultation and dialogue in July 1991, the Hopi tribe agreed to a request made by the Office of Contract Archaeology, University of New Mexico for "more detailed, nondestructive laboratory analysis of skeletal" remains from two Hopi ancestral sites.[327] Another example relates to the discovery of buried items at the Ozette Indian Reservation, home of the Makah tribe. 500 years ago, a clay slide spilled over and sealed at least six wooden houses at the site, preserving everything within. Upon its discovery, government agencies and archaeologists entered into an excavation and curation agreement with the Makah Indians. The agencies and archaeologists provided funds for and undertook the excavation of the site, and all excavated items were kept on the reservation in a museum staffed by trained Makah.[328]

John Terrell contends that NAGPRA creates opportunities for mutually beneficial collaborative research, curatorship and collections management. Using the image of a "cultural theatre" he suggests:

> an exhibit would be like a 'stage' on which a cultural performance is given to the museum visitor….[N]ative people [will serve] as the equivalent of principal director and scriptwriter. Museum curators would…serve as their liaison with the museum as a working institution. Educators and designers would help with the incredibly difficult task of turning ideas and objectives into a workable presentation. And museum collections would play the role of leading actors in the drama presented.[329]

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326 Diane Drake Wilson, "California Indian Participation in Repatriation: Working Toward Recognition" (1997) 21:3 American Indian Culture and Research Journal 191 at 204.

327 See Kurt E. Dongoske, "The Native American Graves Protection and Repatriation Act: A New Beginning, Not the End, For Osteological Analysis-A Hopi Perspective" (1996) 20:2 American Indian Quarterly 287 at 292.

328 See George E. Stuart & Francis P. Mcmanamon, eds., *Archaeology and You*, (Washington, DC: Society for American Archaeology, 1996) at 26.

329 John Terrell, "We Want Our Treasures Back" (1993) 93:3 Museums Journal 34 at 36. Similarly, Rubie Watson prescribes "collaborative curatorship, joint ownership, extensive loan programs [and]… locally organized tribal museums" as avenues other than repatriation "open to indigenous peoples or museums

He admits his "vision of the museum as a cultural theatre is a challenging one" and it "may not always be easy for museums as institutions, and for museum employees as individuals, to share responsibility and power with native peoples."[330] However, the idea would "foster cultural understanding and respect for the world's many and varied peoples."[331] An example is the relationship between the Tohono O'odham Nation and the Arizona State Museum. The tribe allowed the museum to keep some of their objects on display, and children of the nation often go on tours of the museum to learn about their past.[332] Similarly, the Sioux tribe and the Witte Museum have an agreement over the use of a recovered Ghost Dance Shirt.[333]

Some Native Americans also support scientific research that helps clarify their history. For example, the Monacan tribe of Virginia acknowledges scientific research can correct "the biases and limited insights of colonial narratives" on tribal history and foster a more accurate understanding.[334] For example, notwithstanding that the University of Nebraska had agreed to repatriate Omaha remains, the Omaha tribe permitted scientists from the University to study the remains for a period of one year on the condition that the remains were reburied forever thereafter. Dennis Hastings explains that "[i]n the end, we [the Omaha tribe] felt that maybe science could help us. Maybe it

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who wish to find new ways to address cultural property issues." See Rubie Watson, "Museums and Indigenous Cultures: The Power of Local Knowledge" (1997) 21:1 Cultural Survival Quarterly 24 at 24.

330 Terrell, *ibid.*

331 *Ibid.* Tribal museums have a similar mission. According to Sharri Clark, "local tribal museums strive to represent a tribal viewpoint while educating others about their tribe's history and traditions." Sharri Clark, "Representing Native Society: The Trial of Tears and the Cherokee Heritage Centre in Oklahoma" (1997) 21:1 Cultural Survival Quarterly 36 at 36. An example of such tribal museum is the Navajo Cultural Resources Management Program. For details of the program, see Watkins, *supra* note 123 at 93-104.

332 See Lynn S. Teague, Joseph T. Joaquin & Hartman H. Lomawaima, "A Coming Together: The Norton Allen Collection, the Tohono O'odham Nation, and the Arizona State Museum" in Ziff and Rao, eds., *supra* note 58, 313 at 313.

333 *Supra* note 307 at 630.

334 Jeffrey L. Hantman, Karenne Wood & Diane Shields, "Writing Collaborative History" (2000) 53:5 Archaeology 56 at 59.

could give us a vision of who they were and how they died. Without it, we'd never know."[335] Consultation between Native tribes and scientists does not, however, always result in tribal consent to scientific research.[336] Native consent may depend on whether the tribal site which scientists seek to excavate is a burial site or some other archaeological site. Native Americans regard the former as sacred repositories of their ancestors which should not be disturbed. Native Americans are more likely to support scientific research on the latter because scientific knowledge could further Native understanding of their history.[337] Further, the consultation requirements have been criticized as creating a "more formal, more rigorous, more institutionalized" relationship between Native Americans and archaeologists.[338]

(b) Permanency

When a Native group buries a skeleton or an object, it amounts to a permanent denial to science. After burial, new scientific methods may be developed which cannot be utilized. Thus James Hanson, Executive Director of the Nebraska Society of Historical Science, exclaims "[a] bone is like a book, ... and I don't believe in burning books!"[339] For example, new methods of study have either been tried out or suggested for use on the Kennewick Man, including accelerator mass spectrometry, use of powerful computers to run statistical analyses of skeletal measurements, and study of modern

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335 *Supra* note 321 at 170.

336 For example, the Hopi, Zuni and Acoma tribes met in February 1991 to discuss the proper treatment and level of osteological analysis of human remains. The Hopis were willing to allow the production of casts of the remains for curation and subsequent genetic study, but the Zuni Pueblos and Acomas disagreed. The Hopis, out of respect for the other tribes, agreed to their position. See, s*upra* note 327 at 294.

337 See Rose Kluth & Kathy Munnell, "The Integration of Tradition and Scientific Knowledge on the Leech Lake Reservation" in Swidler *et al*., eds., *supra* note 176, 112 at 117.

338 Joe Watkins, "Native American Archaeology or Archaeology of Native Americans?" (Paper presented at the Clovis and Beyond Conference, October 1999), online: Friends of America's Past <http://www.friendsofpast.org/earliest-americans/conf99-04.html> (last visited 28 April 2004).

339 See Robert M. Peregoy, "Nebraska's Landmark Repatriation Law: A Study of Cross Cultural Conflict and Resolution" (1992) 16:2 American Indian Culture and Research Journal 139 at 141 [footnote omitted].

and ancient genetics (mitochondrial DNA).[340] Schneider notes that the government's initial study protocol on the Kennewick Man, which "consisted of five individuals who examined the skeleton in a single 4 ½ day session at the end of February 1999" demonstrated a "profound misunderstanding of the scientific process."[341] This process includes gathering data not considered in the government's study "verification and assessment of data by independent observers" and "unfettered peer review" by "the general scientific community."[342] The implication for science was that the effectiveness of these methods might not be realised if the Kennewick Man remains were given up for reburial.

The permanency issue also raises another concern. Science is constantly skeptical of even its own findings and discoveries. The re-evaluation of old hypotheses through re-examination of previous studies "is critical for physical anthropology, as it is for any science, because it [allows scientists the means]…to discard erroneous conclusions and outdated ideas and to identify ineffective methods and practices."[343] Bordewich adds "[w]ays of learning from the bones will continue to grow as computer technology and new microscopic and chemical techniques open up fresh ways of asking questions about the Indian past."[344] An example of re-evaluative study is the emerging field in archaeology known as "archaeogenetics", which involves using DNA to gain archaeological information.

In an attempt to address the issue of permanent loss, John Kappelman, an anthropologist at the University of Texas, led a project that developed a method for laser scanning of skeletal remains and other objects, and then storing and archiving the data into CD-ROMs. However, the process, and similar data collection processes, involves considerable expense.[345] Also, as discussed earlier, some

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340 See "Kennewick Man and the Peopling of the Americas," online: Clovis and Beyond Conference <http://www.clovisandbeyond.org/symposium.html> (last visited 01 May 2004).

341 *Supra* note 308.

342 *Ibid.*

343 Landau & Steele, *supra* note 317 at 218.

344 *Supra* note 321 at 198.

345 According to Bruce Bower, "[t]his unusual union of anthropology and advanced technology… may… prove too expensive to make a major impact." See Bruce Bower, "Fossils on File" *Science News* 145:12 (March 19 1994) 186.

Native Americans are opposed to the idea of virtual or digital replication of human remains.[346] It seems therefore that no system can seamlessly accommodate both science and Native tradition. "[N]o blanket policy can be created that covers every situation for every tribe...."[347]

In any event, the inventory requirement of NAGPRA creates some benefit since it leaves behind a permanent record available to both scientists and Natives.

(c) Impact on Work Environment

Scientists and museums are also concerned about the consequences of repatriation legislation for their work environment. Some scientists are afraid that academic censorship is likely to result from NAGPRA. One way this might arise is by requiring the submission of reports and articles to Native groups for approval. For example, as part of an agreement between the Virginia Department of Transportation and a committee representing Native interests over the treatment of remains unearthed during road construction near a Native American site, a group of Indian activists were empowered to monitor the excavations and scientific work, and to edit objectionable material from the final report.[348] Pressure can also come from outside the affected Native American community. For example, when the Omaha tribe permitted University of Nebraska scientists to study their remains, this produced a very politically charged atmosphere on campus. Scientists engaged in the project, some of whom were against any burial at all, were frequently the targets of student protest. As a result, they had to bring in Karl Reinhard, an outsider fresh from his PhD defence, to head the project. Reinhard was convinced to sign on by the Omaha tribal delegation that traveled to meet him.[349]

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[346] See *supra* notes 27-46 and accompanying text.

[347] William L. Merrill, Edmund J. Ladd & T.J. Ferguson, "The Return of the Ahayu: da: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution" (1993) 34:5 Current Anthropology 523 at 547.

[348] See Clement Meighan, "Burying American Archaeology" (1994) 47:6 Archaeology 64.

[349] *Supra* note 317 at 175-76.

Scientists and museums may feel threatened by legislation such as NAGPRA because their livelihoods depend upon adequate opportunities to utilize their particular training. Nicholas and Andrews observe that "[s]ome American archaeologists will no longer work in situations where they have to deal with band politics, while others have moved on to other professions entirely."[350]

(d) Lack of Adequate Consultation in the Legislative Process

Museum and scientific communities also express concern about the lack of adequate consultation and consideration of their interests in law reform. Following NAGPRA, several states passed repatriation laws which, unlike NAGPRA, made no provision for scientific study. In justifying the restrictions on research policy under NAGPRA, "government decision makers argue[d] that scientists have no legal right to study federal collections or sites on federal land" and that "access to such collection and sites is only a 'privilege' that can be withheld by the government at its absolute discretion."[351]

(e) Vagueness of Legislation

Some members of the scientific community see NAGPRA as vague and contradictory legislation which creates legal battles and confrontation. "It leaves enough ambiguities for the stubbornest of people to find a claim which is contrary to the Act's intent and also strong enough to get them into the courtroom," wrote June Camille Bush Raines.[352] It is argued, for example, that the meaning of NAGPRA terms such as "major benefit to the United States" and "cultural patrimony"

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[350] George P. Nicholas & Thomas D. Andrews, "Indigenous Archaeology in the Post-Modern World" in George P. Nicholas & Thomas D. Andrews, eds., *At a Crossroads: Archaeology and First Peoples in Canada* (Burnaby, B.C.: Archaeology Press, 1997) 1 at 2.

[351] *Supra* note 308.

[352] June Camille Bush Raines, "One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis" (1992) 17:2 Am. Indian L. Rev. 17 639 at 663-64.

are unclear.[353] Some scientists also feel NAGPRA is generously worded in favour of Native American groups and claims. James Chatters notes that "NAGPRA's most flawed component is the clause that allows tribes that are culturally unaffiliated with ancient remains and cultural objects to lay claim strictly on the basis of their recent land holdings [i.e geography]" because "[a]rchaeological and anthropological evidence and even oral histories from before NAGPRA" show that in some cases, "earlier people were displaced or even annihilated by the ancestors of the people now making claims under NAGPRA's geography clause."[354] In Bradley Lepper's view, the scientific understanding of "biological and cultural evolution [also] calls into question the validity of any claim to a relationship of direct descent between any particular modern person or group and human remains older than four or five hundred years; and claims based on 'spiritual' grounds should not be subject to legislation in a non-sectarian society."[355] A solution proposed by scientists is that rather than allow Native Americans an assortment of unrelated grounds to establish cultural affiliation, claims should be decided by arbitration on a case-by-case basis where each side has an equal voice.[356]

Some of these issues are underscored in the case of the Kennewick Man. Chatters, the archaeologist who first studied the Kennewick Man, initially thought that he was studying the remains of a 17th century settler because the facial features of the skull were reminiscent of a Caucasian. It was when radiocarbon tests came back that he discovered to his surprise that the

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353 See generally Dawn Elyse Goldman, "The Native American Graves Protection Repatriation Act: A Benefit and a Burden, Refining NAGPRA's Cultural Patrimony Definition" (1999) 8:1 Int'l J. Cult. Prop. 229. See also *supra* note 310 and accompanying text.

354 *Bill to amend the Native American Graves Protection and Repatriation Act to provide for appropriate study and repatriation of remains for which a cultural affiliation is not readily ascertainable*: *Hearing on H.R. 2893 Before the House Comm. on Resources*, 105thCong. (1998) (testimony of James C. Chatters, Ph.D., Applied Paleoscience), online: U.S House Committee on Resources <http://resourcescommittee.house.gov/105cong/fullcomm/98june10/chatters.htm> (last visited 01 December 2003).

355 Bradley T. Lepper, "Public Policy and Academic Archaeology" (Paper presented at the Clovis and Beyond Conference, October 1999), online: Friends of America's Past <http://www.friendsofpast.org/earliest-americans/conf99-02.html> (last visited 01 May 2004).

356 *Supra* note 310.

skeleton was over 9,000 years old.[357] Regardless, the Confederated Tribes of the Umatilla Reservation in Oregon claimed the skeleton for reburial on the basis that the tribe has "an oral history going back 10,000 years."[358] Following Chatters' study, archaeologists and anthropologists questioned or flat out denied the possibility that Kennewick Man was an ancestor of today's Native Americans. Several alternative pictures have been painted including arguments that he "was related to Polynesians"[359] or from the Ainu in Japan.[360] The Asatru Assembly, a group devoted to Norse mythology, "also lay claim to the bones of Kennewick man based on their belief that he might be a wayward Viking."[361] In light of these varied claims, eight archaeologists filed a lawsuit against repatriation and reburial of the Kennewick Man on the basis that the Umatilla did not have sufficient cultural affiliation under NAGPRA to claim the remains.[362]

Fred Morris suggests that a certain amount of textual ambiguity is desirable for legislation like NAGPRA. In his view, NAGPRA encourages both sides to sit down, talk, and negotiate with each other. He cites other forces that encourage co-operation as an alternative to litigation. For Native Americans, dialogue should be favoured because litigation has not been favourable to them. In the case of museums and scientists, they are wary of being tarnished in public eyes by litigation, which can come across as insensitivity towards Native concerns.[363] He also notes that controversy may also indirectly benefit scientists by providing opportunities for further study. For example,

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357 For an account of Chatters' investigation of the Kennewick Man, see James C. Chatters, "The Recovery and First Analysis of an Early Holocene Human Skeleton from Kennewick, Washington" (2000) 65:2 American Antiquity 291. See also Andrew L. Slayman, "A Battle over Bones" (1997) 50:1 Archaeology 16.

358 See "Boneheaded" *The Economist* 356:8190 (30 September 2000) 84.

359 See *ibid*.

360 See Tom Paulson, "Kennewick Man Bones Seem to be of Asian Type" *Seattle Post-Intelligencer* (15 October 1999) online: Seattle Post-Intelligencer <http://seattlepi.nwsource.com/local/kman15.shtml?searchpagefrom=1&searchdiff=1494> (last visited 01 May 2004).

361 *Ibid*. See also Constance Holden, "Kennewick Man Still in Play" *Science* 275:5305 (7 March 1997) 1423.

362 Paulson, *ibid.*

363 *Supra* note 325 at 209.

controversy surrounding the Kennewick Man fostered scientific study of the Kennewick Man remains and multiple ownership or affiliation claims among Native tribes can necessitate scientific study for the purpose of establishing the rightful claimant.

(f) Museums and Trusteeship

"Museum boards stand as fiduciaries with respect to the maintenance of collections for the benefit of the public."[364] According to Boyd and Haas, "[m]useums must both preserve and, to a certain extent, consume collections as part of their research and educational programs. Museums must therefore manage collections in ways that best meet these purposes."[365] Museum authorities also point out that determining legal title or ownership of items can prove immensely complicated, with "multiple claimants and indistinct trails of ownership."[366] Museums are therefore faced with the additional duty of ensuring that accession requests are granted only to claimants with superior interest, as "indiscriminate deaccessioning of objects may result in a museum's liability to parties whose interests and legal rights in the objects may be superior to the party who authored the initial request."[367]

Even where Native ownership is more or less settled, some museums are still reluctant to repatriate. Underlying their reluctance is concern that Natives may not properly care for cultural items.[368] Often, museums are quick to point out that remains and artefacts were sold to them willingly by Natives, or entrusted to them in order to preserve them, when Native individuals and communities were unsure of their capacity to do the same.

Notwithstanding the objections to repatriation by some members of the scientific and museum communities, it is clear that NAGPRA has compelled Americans to inquire into

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[364] *Supra* note 149 at 257.

[365] *Ibid*. at 258.

[366] *Supra* note 306 at 128.

[367] *Supra* note 149 at 258.

[368] *Supra* note 307 at 629.

fundamental issues concerning trusteeship and ownership of culture, such as who has the right to represent what, who has the right to keep what, and who has the right to control cultural information about culture.[369]

(g) Depletion of Museum Collections and Exhibits

Depletion of museum and federal agency collections can affect scientific study. For example, Landau argues that physical anthropologists require a large sample of remains to work with in order to ensure that they are representative of the population being studied and not merely "idiosyncratic of the few individuals studied."[370] Haas, however, is of the view that the continued emphasis on material collections may be alienating museum anthropology from other fields of anthropology, especially the academic branch.[371] He strongly recommends that museums "relinquish their steadfast devotion to material culture, objects and increasingly obsolete collections"[372] and instead "exploit the full range of available resources" including the educational use of popular technology such as computers and high-tech imagery, in the achievement of their public education mission.[373] Another solution is to create replicas before repatriation, with the consent of the rightful claimants. For example, in negotiating the return of artefacts to the Sioux, the Woods Museum is requesting permission to make replicas of them. However, this may not be a complete solution, since "Native Americans would not allow... duplication of items with religious value - pipes, for instance, or anything with eagle feathers (since the bird is seen as a messenger between god and the people)."[374]

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[369] See generally Robert H. McLaughlin, "The American Archaeological Record: Authority to Dig, Power to Interpret" (1998) 7:2 Int'l J. Cult. Prop. 342.

[370] See Landau & Steele, *supra* note 317 at 218-20.

[371] See Jonathan Haas, "Power, Objects, and a Voice For Anthropology" (1996) 37 (Supp.) Current Anthropology S1.

[372] *Ibid*. at S12.

[373] *Ibid*. at S11.

[374] See Jack Rosenberger, "Returning Native American Artifacts" (1993) 81:6 Art in America 31.

(h) Financial and Administrative Issues

Considerable funds are required by museums for documentation, compiling inventories, consultation with Natives, and procuring staff to tackle these additional responsibilities.[375] Meighan suggests that certain lacunae in NAGPRA contribute to the financial burden on museums implementing the Act. For example, "no line has been drawn [in NAGPRA] at [repatriation of] remains over a certain age, despite the obvious impossibility of establishing a familial relationship spanning 20 or more generations of unrecorded history."[376] As a result of this, "[m]illions of dollars have now been spent to inventory collections, including those containing items thousands of years old, and to add a corps of bureaucrats to interpret and administer the legislation."[377]

Implementing NAGPRA also creates logistical and practical difficulties for museums.[378] For example, the inventory process at Williamette University involved rigorous detective work because of numerous documentary gaps concerning the origins of items. Many of those gaps were filled by relying on an old article published in the American Antiquities periodical.[379] Willamette is hardly alone in facing such practical challenges. Of the 58 extensions granted to institutions that could not meet the NPS deadline for fulfilling NAGPRA's requirements, six institutions, including the Peabody Museum of Harvard, could not meet the extended deadlines.[380]

The scientific community, much like Native Americans, is also concerned about the role of the NPS in the implementation of NAGPRA. Schneider asserts that "[agency] officials are actually instituting their own notions of what policy should be" and that the "law merely provides a cover for

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375 As Dan Monroe puts it, "[t]he cost of complying with the provisions of any repatriation bill would be monumental." Dan L. Monroe, "Repatriation: A New Dawn" (1993) 93:3 Museums Journal 29.

376 *Supra* note 348 at 66.

377 *Ibid.*

378 *Supra* note 58 at 243.

379 *Supra* note 324 at 83-86.

380 See Barbara Isaac, "Implementation of NAGPRA: The Peabody Museum of Archaeology and Ethnology, Harvard" in Cressida Fforde, Jane Hubert & Paul Turnbull, eds., *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice* (London: Routledge, 2002) 160.

their decisions."[381] As an example, he discusses the study of new discoveries. NAGPRA neither prohibits scientific study of new discoveries nor requires tribal approval for such studies. Despite the fact that government representatives "conceded this point in open court and in testimony before a Congressional Committee... the government invokes NAGPRA as a justification for denying access to even very ancient skeletal remains that cannot be linked to any modern tribe."[382] Rather, "skeletal remains that predate documented European arrival are automatically Native American for purposes of NAGPRA."[383] Agency officials insist that this position is implied by NAGPRA. Responding to this contention, Schneider counters that it is "disturbing that government officials would go looking for an 'implied' definition when NAGPRA already contains an express definition of the term Native American."[384]

(i) NAGPRA Challenges Scientific Thought

One example of a provision in NAGPRA that challenges scientific thought is the listing of oral traditions as evidence of cultural affiliation.[385] Many people trained in the western scientific system find it difficult to accept oral history as a legitimate basis of knowledge, often referring to it as "pseudo-history" which falls within the purview of cultural rather than historical scholarship.[386] Museums and federal agency officials engaged in the determination of cultural affiliation prefer to rely upon archaeological evidence. However, many Native Americans oppose scientific research conducted for the purpose of investigating or verifying their history because they "have their own

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[381] *Supra* note 308.

[382] *Ibid.*

[383] *Ibid.*

[384] *Ibid.*

[385] See 25 U.S.C. § 3005(4). For a detailed analysis of the use of oral traditions in the determination of cultural affiliation, and the responsibilities of the scientific community in evaluating the historicity in verbal records of the ancient past, see generally Roger Echo-Hawk, *supra* note 77.

[386] *Ibid.* at 274.

genesis stories... [and] are not terribly interested in what science has to tell them."[387] Echo-Hawk suggests that oral traditions should be included as an additional category in the archaeological record and be "fairly critiqued on its own terms"[388] notwithstanding "how much it may anchor a specific cultural pattern."[389] He maintains that oral traditions and scientific record can compliment each other by filling the gaps or shortcomings of the other.[390] For example, the Smithsonian accepted Pawnee oral tradition as evidence to substantiate a repatriation claim.[391] Forsman, however, suggests that some scientists may be opposed to the complimentary approach because the nature of scientific training encourages rigidity in thinking, and makes scientists skeptical towards such ideas.[392]

Scientists and museum personnel also point to examples of claims made contrary to the purpose of NAGPRA which highlight problems with the legislation.[393] For example, Robson Bonnichsen found 10,000 year old stray hairs while working at a site in Montana. The hairs were an invaluable source of genetic material because hairs do not decompose with nearly the same rapidity as other biological materials. The Confederated Salish-Kootenai & Shoshone-Bannock, however, claimed the hairs. Bonnichsen argued that under NAGPRA naturally shed hairs are not 'remains'. The NAGPRA regulations were later amended to exclude naturally shed hair.[394]

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[387] *Supra* note 280.

[388] *Supra* note 83 at 288.

[389] *Ibid.* at 287.

[390] See *e.g.* *ibid.* at 274-85 where Echo-Hawk discusses specific examples of Caddoan oral traditions which have great potential to enrich the archaeological record.

[391] See Roger Echo-Hawk, "Forging a New Ancient History for Native America" in Swidler *et al.,* eds., *supra* note 176, 88 at 96.

[392] Leonard A. Forsman, "Straddling the Current: A View from the Bridge Over Clear Salt Water" in Swidler *et al.,* eds., *ibid.* at 105.

[393] See Roger W. Moeller, "A Post-apocalyptic View of Archaeology" (2000) 21:4 North American Archaeologist 351 at 358.

[394] See Jace Weaver, "Indian Presence with no Indians Present: NAGPRA and Its Discontents" (1997) 12:2 Wicazo Sa Review 13 at 17. The amendment reads as follows: "Human remains means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets." 43 C.F.R. §10.2(d)(1).

(j) Scientists and Repatriation

Not all scientists are opposed to repatriation *per se*. The reason for this, Fred Morris suggests, is that within the museum and scientific community, professional roles and cultures vary and this can lead to divided opinions.[395] Larry Zimmerman is of the view that NAGPRA accelerates "syncretism", that is, the "coalescence or reconciliation of differing beliefs"[396] between archaeology and Native tribes, "but with archaeology changing the most, making it seem more sympathetic to Indian concerns."[397] "[A]rchaeology must change the most because it has the most to lose if it doesn't."[398] One of the benefits of syncretism is that Native Americans and scientists now engage in "the process of *remythologizing*" whereby each side "makes their belief systems seem as if they were not exactly what they earlier seemed to be [for example, scientists see themselves as public educators working for the benefit of society as opposed to seekers of truth for its own sake]."[399] Remythologizing has produced "startling" results in the relationship between Native Americans and scientists in the United States.[400] For example, various scientific bodies such as the Plains Anthropological Society and the Society for American Archaeology (SAA) offer annual scholarships and awards to encourage Native participation in their fields.[401]

In 1990, the World Archaeology Congress held its first Inter-Congress in Vermillion, South Dakota where it adopted a new Code of Ethics which mandates respect for human remains and the wishes of the dead or their relatives concerning treatment.[402] Many dedicated scientists are not so

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395 See Morris, *supra* note 325 at 213.

396 Larry J. Zimmerman, "Remythologizing the Relationship Between Indians and Archaeologists" in Swidler *et al.*, eds., *supra* note 176, 44 at 45.

397 *Ibid.* at 56.

398 *Ibid.*

399 *Ibid.* at 49 [emphasis in original].

400 Larry J. Zimmerman, "A Decade after the Vermillion Accord: What has Changed and What has Not?" in Fforde *et al.*, eds., *supra* note 380, 91 at 94.

401 See *ibid.*

402 For details of the Vermillion Inter-Congress and its impact on the relationship between Native Americans and the archaeological community, see *ibid.* at 91-98.

intransigent as to champion science over and above absolutely everything else. For example, when the National Museum of Natural History made a substantial transfer of its collection over to the Cheyenne, there was little if any opposition. The reason was that the remains were known to be those of Cheyenne massacred near Fort Robinson in the 19th century.[403] The Field Museum, despite advice from counsel that they enjoyed a strong legal position with regard to objects in the museum's possession, chose to repatriate many of them anyway.[404]

II. CONCLUSION

Our main tasks in this review were to facilitate an understanding of the issues raised by the coming into force and implementation of NAGPRA and to provide a reference tool for Canadian law reform. We have done this by outlining a variety of concerns and opinions of Native Americans, scientists and the museum community. Our outline is not intended to be exhaustive but reflects the general proposition that despite its faults, NAGPRA is important human rights legislation that enhances the cultural sovereignty of federally recognized Indian tribes. However, in the opinion of some, NAGPRA operates to the detriment of scientific research and preservation of important cultural items. Fundamental concerns arising from its implementation include:

1. exclusion of cultural records, intellectual property, non-recognized tribes, private and state lands from its operation;
2. financial and resource burdens incurred by all parties affected;
3. ambiguities in definitions and interpretation of legal standards that result in disagreement over entitlements and lengthy, expensive consultation processes;
4. dissatisfaction with the process to establish cultural affiliation and weight given to non-conventional forms of evidence;
5. inability of some tribes to comply with traditional burial protocols given changes in land ownership;

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[403] Russell Thornton, "Repatriation as Healing the Wounds of the Trauma of History: Cases of Native Americans in the United States of America" in Fforde *et al.*, *supra* note 380, 17 at 17-18.

[404] Morris, *supra* note 325 at 213.

6. exposure to chemicals and pesticides used in the preservation of cultural items;
7. perceived conflict of interest and bias in the administration of the Act;
8. lengthy extensions and delays in the repatriation process;
9. detrimental impact on meaningful scientific research;
10. loss of data through the permanency of return and reburial;
11. stress on the scientific work environment; and
12. depletion of collections held for the benefit of a larger public, compliance with legal and ethical obligations to the public and potential liability.

NAGPRA challenges conventional scientific thought and concepts of preservation, conservation, and public service held by many museum officials. It has fostered new relationships with Native Americans despite its numerous flaws. Although it is impossible to address all affected interests in creating new laws, NAGPRA underscores the importance of extensive consultation before enactment of repatriation legislation and the importance of taking the time to involve those most effected in drafting definitions and standards. It also reminds us that there is no single "Native", "scientific" or "museum" view and that caution must be taken in balancing different interests not to obscure the fundamental objective of addressing past and present injustices against Native people.

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