

WHAT IS NAGPRA?

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The Native American Graves Protection and Repatriation Act (NAGPRA) was passed in 1990 to help correct archaeology's dark history of looting Native American graves and selling Native American sacred objects to museums and collectors without regard to their history. NAGPRA also allows Native Americans to file for repatriation of bodies, funerary objects, sacred objects, and other objects of significance for the tribe, meaning that a group of Native Americans can file a NAGPRA claim for a certain object or a body and the museum will return the object.

WHAT HAPPENS WHEN A TRIBE FILES A NAGPRA CLAIM?

Establishing "cultural affiliation"

If a tribe wants a sacred object or a certian set of human remains to be repatriated, they must first establish that their tribe is affiliated with the object. In the case of human remains, anthropologists and osteologists will often use DNA and other physical evidence to see if the body has a genetic link to the NAGPRA claimants. Other times, Native American leaders will present oral history, artwork, or tribal practices as evidence to prove that their tribe uses or once used the object[1]

Cases of "competing claims"

Sometimes more than one Native American group or tribe will file for repatriation of the same object. In this case, both groups make a case in court and the judge must decide which group presents a stronger case for cultural affiliation[1]

What happens after the NAGPRA claim is accepted?

Generally, when a NAGPRA claim is accepted, museums are expected to repatriate the concerned bodies or objects immediately. In some cases, scientists or institutions will claim that they need to keep the body or object to study it further. If the study is believed to be beneficial, the scientists will be allowed to keep the body or object to finsih their study. Once the study is completed, they have 90 days to repatriate it[1]

[1] "Chapter 32-Native American Graves Protection and Repatriation." *United States Code*, Office of the Law Revision Council, uscode.house.gov

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PERSPECTIVES ON NAGPRA

NATIVE AMERICANS

Before NAGPRA, many Native Americans shared a common fear that their relatives' graves would be desecrated and that their bodies would be exhumed and sold. Kim Tallbear, Associated professor of Native Studies at the University of Alberta, knows this anxiety well. Her great great great grandfather, Chief Little Crow, was killed by a Minnesota farmer in 1863. His dead body was dragged through the street and decapitated before white settlers found him. His bones sat in the Minnesota Historical Society's archives for over 100 years. In 1971, his family finally got the remains back and were able to have a funeral for him and reburial [1]. Kim's experience is not uncommon for Native Americans; before NAGPRA, there was almost no legislation protecting Native American graves, leading white settlers and archaeologists to dig up graves and sell Native American bodies and funeral objects.

In addition to their painful history with archaeology, Native Americans also object to exhumation and archaeological study because many Native religions believe that these processes disturb the deceased person's spirit. While Native American religions are by no means a monolith, many Native American religions believe that life is a circular process consisting of birth, life, death, and the afterlife. When archaeologists exhume Native American bodies and funeral objects from their graves, the circular process is interrupted and the spirit cannot progress into the next stage [2]. Understanding Native American religions and burial customs makes it clear that exhumation and reburial are urgent topics for Native Americans. If their ancestor is excavated and taken into a lab for scientific study, then their spirit is disturbed and they cannot enter into or remain in their afterlife.

Even with NAGPRA protections in place, scientific institutions and individual scientists must listen to Native Americans who object to excavation and scientific study of their sacred spaces, ancestors, and sacred objects. Native Americans' distrust of scientific institutions is hundreds of years old and is still perpetuated by archaeologists who do not listen to Native Americans or try to minimize their concerns. NAGPRA could provide a powerful framework for collaboration between Native Americans and scientists, but that collaboration must be built on respect and understanding the historical and religious context of Native Americans' concerns.

[1] Pat Walters, "The Ancient One." *Undone*, episode 2, Gimlet Media, 2016

[2] Michelle Hibbert, "Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment", *American Indian Law Review*, 1998

SCIENTISTS

While many anthropologists, osteologists, and archaeologists support NAGPRA and are willing to work with Native American consultants when excavating or will honor NAGPRA requests to repatriate remains, many scientists feel differently. Some researchers feel that NAGPRA threatens their ability to study human remains, leads to a drastic change in their collections, or even brings about an end for osteological analysis.

Dr. Robson Bonnichsen is perhaps the most famous scientist to speak out against NAGPRA and repatriation. He sued the Army Corps of Engineers in 1994 in an attempt to gain ownership of Kennewick Man for further study after the Army Corps of Engineers initially repatriated Kennewick Man to local Native American tribes (see Kennewick Man Case). He has battled against NAGPRA further in an interview with the New York Times in which he recalls local tribes stopping an excavation. During this archaeological dig Bonnichsen found a human skeleton with hair still on the skull, a rare find and a unique opportunity to biological anthropologists to study DNA from the hair. When they announced the discovery of the hair, local tribes filed a NAGPRA claim saying that the hair belonged to their ancestors and that the hairs should be repatriated to them and that further study on the remains was disrespectful to the body. In response, Bonnichsen said "Repatriation has taken on a life of its own and is about to put us out of business as a profession" [1].

Although not all anthropologists would use those words, many have similar worries that NAGPRA will threaten their ability to study human remains. A common issue scientists have with repatriation is that once the body is reburied, it cannot be excavated again. This means that once scientists give back a set of remains, they will not have another chance to study the same set of remains to build a new thesis or to examine the remains with new technology. For osteologists, the process of reviewing

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remains is vital in a profession where theories about human evolution and human history as well as technology used to study human remains can change rapidly [2].

However, NAGPRA also gives scientists a valuable alliance with Native Americans; under NAGPRA, many Native American tribes will collaborate with osteologists or help fund studies concerning ancestral remains. For example, Hopi tribal representatives often act as on site consultants during archaeological projects in the Southwest. During large development projects including road and building construction, Hopi burial sites have been disturbed. In response, archaeologists and Hopi consultants will work together in excavating the remains. This partnership allows the Hopi to voice their concerns about excavation to help archaeologists deal with the remains in a way that honors Hopi beliefs. It also allows the archaeologists and other scientists to explain how studying these remains could benefit living Hopi [3].

Another case of collaboration occurred in 1994 when the Omaha tribe requested that osteologists study human remains to examine the effect of European contact on the health of Omaha ancestors between 1780 and 1890. These osteological studies were able to construct the Omaha diet during this time period and could assess skeletal trauma and disease that occurred as a result of colonialism [4]. Both of these cases provide examples of successful collaboration under NAGPRA where osteologists can study Native American remains and living Native Americans can learn about their ancestors while being certain that studies of their ancestral remains are being conducted respectfully and knowing that they will be repatriated the remains at the end of the study.

The scientific community remains divided over NAGPRA; some--like Bonnicksen--remain firmly against repatriation and fear that NAGPRA means an end to osteological analysis while others value collaboration with Native Americans and value repatriation as a part of ethical scientific study. Regardless of their personal opinions on NAGPRA, scientists recognize that NAGPRA and repatriation are now a part of scientific study and that they must change their practices to fit these regulations.

[1] George Johnson, "Indian Tribes' Creationists Thwart Archaeologists" (New York: New York Times, 1996)

[2] Patricia Landau and D Steele, "Why Do Anthropologists Study Human Remains?" *American Indian Quarterly*, 1996

[3] Kurt Dongoske, "The Native American Graves Protection and Repatriation Act: A New Beginning, Not an End, for Osteological Analysis--A Hopi Perspective", *American Indian Quarterly*, 1996

[4] Gerome Rose, "NAGPRA is Forever: Osteology and the Repatriation of Skeletons", *Annual Review of Anthropology*, 1996

MUSEUMS

Many museums and research facilities--including the National Park Service, and most museums, archives, or archaeology labs associated with universities--use federal grants or taxpayer money to fund their research and exhibits. When institutions use federal money, they are subject to NAGPRA regulation, are required to take NAGPRA claims, and in many cases must repatriate human remains and artifacts [1]

In most cases, museums are willing to comply with NAGPRA regulations, citing their obligation act ethically in choosing what items they keep and display. National Park Service director John Jarvis says "The National Park Service tells America's story, including the shameful chapters. While history cannot be un-done, these NAGPRA grants help to right some of the wrongs suffered by native peoples and cultures" [2].

[1] "The Native American Graves Protection and Repatriation Act", *Penn Museum*, www.penn.museum

[2] "National Park Service Helping Tribes and Museums Repatriate Native American Remains and Sacred Objects." *National Park Service*, www.nps.gov

REPATRIATION CASE STUDIES

ISHI'S BRAIN

During his life, Ishi himself was a museum exhibit. Ishi was captured in 1911 after his tribe, the Yahi of California, was massacred. He lived in a museum at UC Berkeley where he himself was a living exhibit meant to show the life of an "uncivilized man", untouched by Western society. The exhibit often showed Ishi completing daily tasks such as chipping stone arrowheads and making fires. Showing Ishi complete these tasks was meant to give viewers a glimpse of a "lost lifestyle" of the American Indian. His exhibit as a whole was meant to present a romanticized image of Native Americans and to provide a sentimental look at what white curators believed was the last "true" Native American. Ishi lived the remainder of his life in the museum until he died of tuberculosis in 1916 [1].

Ishi's story reveals how 19th and 20th century museum exhibits of Native Americans romanticized or exoticized Native lives. In this case, Ishi was treated not as a person with agency and a unique personal life but as a subject in an almost zoo-like exhibit that presented Native American culture as a monolith and romanticized Native life to the point of erasing violence against Ishi and his people.

Repatriation efforts did not occur until 1997 when the Butte County Native American Cultural Committee launched a campaign for reburial. They wanted all of Ishi's remains--including his death mask and his brain that was stored in the National Museum in Washington, DC [2]. Finally, in 1999, The Smithsonian made a surprising announcement that they would repatriate Ishi's brain, but not to the Butte County Native Americans who originally campaigned for repatriation. Instead, they gave the brain to the Yana, a larger tribe which the Yahi originally belonged to. The Smithsonian believed they had a responsibility to repatriate the remains to people who were living descendants of Ishi and believed that the Yana were the closest remaining descendants. The Yana expressed relief that after 80 years Ishi's brain could finally be buried [3].

[1] Orin Starn, *Ishi's Brain* (New York: Norton, 2004)

[2] Nancy Rockafeller and Orin Starn, "Ishi's Brain", *Current Anthropology*, 1999

[3] Mary Curtius, "Ishi's Brain to be Returned to Descendants" (Los Angeles: LA Times, 1999)

AHAYU:DA FIGURES AND THE PUEBLO OF ZUNI

While many high-profile and contentious NAGPRA cases center around repatriation of human remains, NAGPRA also applies to repatriation of sacred objects such as Ahayu:da wooden figures. The Pueblo of Zuni create wood sculptures of Ahayu:da, twin war gods who act as protectors of the Zuni people. When these figures need to be replaced, the old Ahayu:da are buried so that they can decompose and symbolically return to the earth. When these figures sit in museums where they cannot be buried, the Pueblo of Zuni believe that they are in a state of spiritual unrest [1].

Ahayu:da statues were some of the first objects to be repatriated under NAGPRA. In 1990, the Penn Museum repatriated one war god statue to the Zuni Pueblo in New Mexico. The figure was returned to the Pueblo through a formal ceremony at the museum where both museum executives and Zuni representatives were present [2].

In 1991, all 67 Ahayu:da figures remaining in museums were repatriated to the Pueblo of Zuni. Many Pueblo leaders credit this historic landmark to their tradition that states that they must ask for something politely four times before resorting to greater means. Because of this belief, the Pueblo of Zuni never sued museums over ownership of the Ahayu:da. Many believe that this noncombative process allowed museums to remain open-minded about repatriation and come to their own conclusions about ownership and ethics [3]. Repatriation of all Ahayu:da figures marks a historic breakthrough for the Pueblo of Zuni and, more broadly, for all repatriation efforts under NAGPRA.

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[1] T.J. Ferguson, "Repatriation of the Pueblo of Zuni", *American Indian Quarterly*, 1996

[2] "Repatriations." *Penn Museum*, www.penn.museum

[3] Michael Haederle, "War Gods are Finally at Peace" (Los Angeles: LA Times, 1991)

KENNEWICK MAN

Columbia River, Summer 1996. Two college men found a human skull while wading in the river. They called the police who retrieved the rest of the skeleton from the river and took the remains to the county coroner, Floyd Johnson. Upon further examination of the body, the coroner's office concluded that these were not modern remains and called James Chatters, an anthropologist [1]

Chatters could tell that the remains were clearly old and showed signs that they were from a local Native American: the teeth did not have cavities, meaning the individual ate a low-sugar diet; the teeth were worn down which is common for prehistoric remains; researchers found a prehistoric stone spear point in the hip, possibly indicating that the individual died in battle. Carbon dating proved that the bones were over 9,000 years old, the oldest set of remains ever found in that area [2]

After the skeleton was determined to be Native American and the bones were carbon dated, five Native American tribes from around the Columbia River—the Confederated Tribes of the Colville Reservation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, the Wanapum, and the Confederated Tribes and Bands of the Yakama Indian Nation—formed the Coalition and claimed that, under NAGPRA, the body should be returned to them for reburial. Since the bones were found on federal land, the Army Corps of Engineers received temporary custody of the remains and placed them in the Department of Energy's Pacific Northwest Laboratory until the Corps reached a decision regarding repatriation. On September 17th 1996, the Corps initially decided to repatriate and published a notice of repatriation, citing that the remains were found on public land and that the land had been sold to the federal government by the Native American tribes who made up the Coalition [3].

Scientists from around the country objected to this decision, saying they were denied the opportunity to study Kennewick Man before he would be reburied. A month later, these scientists sued the US government over ownership of Kennewick Man [3].

The Legal Battle

Pt 1: Bonnichsen v. US. October 16th 1996.

Scientists from around the country objected to the Corps' decision to repatriate, saying that the Kennewick Man was a unique specimen and that the Corps was denying them the opportunity to study him. The scientific plaintiffs filed suit asking for a restraining order that would allow them to study Kennewick Man before his body was reburied. Further, they claimed that there was no administrative protocol in NAGPRA for them to follow, since people only file a claim for repatriation, not for the ability to study a specimen or object. The plaintiffs said that since they had no pathway to file a claim under NAGPRA, they could not have exhausted all administrative actions before the Corps repatriated the remains to the Coalition. The court agreed that the plaintiffs' claims against both the Corps and NAGPRA were valid [3].

Pt 2: Bonnichsen II.

The Army Corps of Engineers made a motion for a summary judgement where they ruled that the scientist plaintiffs did not have legal standing to gain custody of the Kennewick Man. They claimed that the plaintiffs should not be able to invoke NAGPRA because their interests were not protected by the act—NAGPRA is meant to protect the interests of Native Americans whose remains and sacred artifacts have been taken and sold without their permission. The court denied the Corps' motion for summary and vacated their previous decision to repatriate Kennewick Man's remains. The court also denied the plaintiff's request for scientific study. After these rulings, the court told the Corps to reach a new decision on remand after considering the scientific plaintiffs' claims on the scientific importance of studying the Kennewick Man [3].

Part 3: Bonnichsen III.

During their Amended Complaint, the scientific plaintiffs invoked the Administrative Procedural Act (APA) and stated that the Corps violated the APA by acting biased in favor of the Coalition during their possession of the Kennewick Man. Since they Corps were not acting as neutral decision makers during the legal process, the plaintiffs called their decisions into question.

Further, the plaintiffs brought up the definition of Native American under NAGPRA and questioned whether, according to NAGPRA language, Kennewick Man should be considered Native American at all, let alone connected to the modern tribes that made up the Coalition. Finally, in 2002, the court ruled that the scientist plaintiffs should be allowed to study Kennewick Man [3].

Update in the Kennewick Man Case: New DNA Information

Genetic screening technology has evolved considerably since 2002, allowing researchers to analyze Kennewick Man's DNA in a way that was previously impossible. These tests concluded that Kennewick Man shares more DNA with Native Americans than with any other modern ethnic group. Further, Kennewick Man is most closely related to people in the Colville tribe in Washington state [4]. This new information means that the Coalition in *Bonnischsen v. U.S.* does have a genetic link to Kennewick Man, meaning there are legal grounds for repatriation. With this new genetic information in mind, the Coalition could reopen *Bonnischen v. U.S.* or file a new claim under NAGPRA, potentially giving these tribes the right to rebury Kennewick Man.

[1] Pat Walters, "The Ancient One", *Undone*, Episode 2, Gimlet Media, 2016

[2] Douglas Preson, "Kennewick Man Finally Free to Share His Secrets", *Smithsonian Magazine*, 2014

[3] Michelle Sibley, "Has Oregon Tightened the Perceived Loopholes of the Native American Graves Protection and Repatriation Act?" *American Indian Law Review*, 2003

[4] Helen Thompson, "Genome Analysis Links Kennewick Man to Native Americans", *Smithsonian Magazine*, 2015

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