

# ***A BALANCING ACT: ADDRESSING THE HISTORY AND EXAMINING THE CHANGES OF NAGPRA AND ITS REGULATIONS***

*This paper discusses the significance of the 2023 NAGPRA regulation change and what it means for Native American, anthropological, scientific, and museum communities. These changes could signify the start of a new era for Native American and museum relations. Or they could also be another placating action by the government that merely seems promising, only to be another disappointment. After years of terrible failures, and even very recent controversies, new regulations are changing the lay of the land. This article will introduce these regulations, discuss them in light of past failures and the purposes of NAGPRA, and offer both optimism and caution about the path forward.*

*The early United States anthropology community built their careers off the backs of Native Americans during their darkest times. As the government annexed their homelands and sent them on walks that would kill their elders and children, anthropologists proceeded to excavate Native American burial sites, ripping the dead from the earth in the name of science. Hundreds of years later, the spoils of these grave robberies lie isolated from their communities, their homes, and their people, encased in glass and hidden away from the light. Whether for research, educational, or cultural purposes, these reasons are no longer valid; the time has come to return the spoils of genocide.*

*The Native American Graves Protection and Repatriation Act (NAGPRA) was passed in 1990 to support this mission. The Native American and scientific communities enthusiastically responded to the Act's passage. Yet when push came to shove, there was astounding noncompliance by the federally funded entities the Act targeted. After over thirty years with nearly no repercussions for ignoring NAGPRA's regulations, institutions became emboldened to hoard Native American ancestors. However, in 2023, promising new changes in NAGPRA regulations have created a clear guide to compliance and an even clearer guide to punishments for noncompliance.*

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“Native Americans have always been the object of study instead of real people.”<sup>1</sup>

## I. INTRODUCTION

Many say good things are worth waiting for. What if the time spent waiting held injustice, disrespect, and unspeakable horrors? Is the light at the end of this tunnel worth the harrowing journey? This has been the reality for the Native American community.<sup>2</sup> As seen in 2022 alone, two universities unearthed hundreds of previously undocumented Native American ancestors,<sup>3</sup> articles of cultural patrimony, and artifacts.<sup>4</sup> Inside the University of North Dakota's back rooms and storage closets sat unmarked cardboard boxes with unconscionable contents: the samples of over seventy ancestors and other Native American artifacts, including sacred headdresses.<sup>5</sup> At almost the same time, the University of Kansas reported that they discovered somewhere between 200 and 380 Native American ancestors and 554 associated funerary objects in boxes on campus.<sup>6</sup> What is especially egregious about the findings in Kansas is that there *were* records of these ancestors in a public database, yet no one in the administration was aware of their presence.<sup>7</sup> The frequency of these scandals and the repeated histories of administrative ignorance in response

<sup>1</sup> Shannon O’Loughlin, Chief Executive of the Association on American Indian Affairs and Citizen of the Choctaw Nation of Oklahoma. Logan Jaffe, Mary Hudetz, & Ash Ngu, *America’s Biggest Museums Fail to Return Native American Human Remains*, PROPUBLICA (Jan. 11, 2023) <https://www.propublica.org/article/repatriation-nagpra-museums-human-remains>.

<sup>2</sup> Maya Hodison, Cuyler Dunn, & Mackenzie Clark, *KU is in possession of Native American remains*, THE LAWRENCE TIMES (Sept. 20, 2022) <https://lawrencekstimes.com/2022/09/20/ku-native-american-remains/>; Mitch Smith & Julie Bosman, *Congress Told Colleges to Return Native Remains. What’s Taking So Long?*, THE N.Y. TIMES, (Sept. 15, 2022) <https://www.nytimes.com/2022/09/15/us/native-american-remains-university-of-north-dakota.html>.

<sup>3</sup> Native American human remains will be referred to as “ancestors” as a sign of respect and to reiterate that these were once human beings, not merely items within a collection.

<sup>4</sup> Hodison et al., *supra* note 2; Cultural patrimony is defined as an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself per NAGPRA. This subject will be further discussed later in this paper.

<sup>5</sup> Graham Lee Brewer, *Search for missing Native artifacts led to the discovery of bodies stored in ‘the most inhumane way possible’*, NBC NEWS (Sept. 4, 2022) <https://www.nbcnews.com/news/us-news/search-missing-native-artifacts-led-discovery-bodies-stored-inhumane-w-rcna46151>.

<sup>6</sup> Lawrence Times, *KU shares next steps for repatriation of Indigenous remains found on campus*, THE LAWRENCE TIMES (Sept. 23, 2022) <https://lawrencekstimes.com/2022/09/23/ku-update-nagpra/>.

<sup>7</sup> See NAT. PARK SERVICE, *Inventories* <https://grantsdev.cr.nps.gov/NagpraPublic/Home/Inventory> (last visited Feb. 21, 2024); see Elizabeth Weiss and James W. Springer, *NAGPRA: From Compromise to Collapse*, CATO INSTITUTE (2022–2023) <https://www.cato.org/regulation/winter-2022-2023/nagpra-compromise-collapse#nagpra>.

to Native American ancestors and artifacts begs the question: when will this end?

Over thirty years later, a light awaits at the end of a dark tunnel. Landmark NAGPRA regulations reform with the potential to make real change. Museums are covering their exhibits.<sup>8</sup> Earnest communications have begun.<sup>9</sup> These revamped regulations “clarify and improve upon the systematic processes for the disposition or repatriation of Native American ancestors, funerary objects, sacred objects, or objects of cultural patrimony,” providing a step-by-step roadmap for museums and Federal agencies, and imposing a timeline for the disposition or repatriation of these ancestors and artifacts.<sup>10</sup> The regulations, passed in December 2023 and put into effect in January 2024, mark a turning point in the dark history of Native American anthropology. Institutions are rushing to repatriate ancestors and artifacts, covering exhibits and closing wings in the process.<sup>11</sup> However, there is concern that this is another flash in the pan, a moment of excitement followed by decades of disappointment.<sup>12</sup> How can the Native American community trust that this is not another placating action by the United States government? The revisions of NAGPRA feel promising, with visible changes taking place, but there is palpable apprehension about these regulations and their long-term workability.

This paper analyzes the origins of NAGPRA, the call for and implementation of the 2023 revisions, and the potential they hold. Section II discusses the scientific community’s approach to Native Americans as specimens as opposed to individuals, which paved the way for the current treatment of Native American ancestors and artifacts today. It subsequently discusses the genesis of NAGPRA and how it functioned prior to the 2023 regulation change. Next, section III discusses the 2023 regulation change, why it was necessary to move forward, and the impacts of the change. The regulations are ambitious and have already proven effective in the short-term, but in the long-term elicit questions about how realistic institutional

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<sup>8</sup> See Chandelis Duster & Nicole Chavez, *Museums to close exhibits featuring Native American artifacts, as new federal regulations take effect*, CNN (Jan. 26, 2024) [us/museums-to-close-exhibits-featuring-native-american-artifacts-as-new-federal-regulations-take-effect/index.html](https://www.cnn.com/2024/01/26/us/museums-to-close-exhibits-featuring-native-american-artifacts-as-new-federal-regulations-take-effect/index.html); see Jenna Kunze, *Native American Displays to Comply with New Regulations*, NATIVE NEWS ONLINE (Jan. 23, 2024), <https://nativenewsonline.net/sovereignty/field-museum-others-cover-native-american-displays-to-comply-with-new-regulations>.

<sup>9</sup> Mary Hudetz, *Senator Urges Museums to Return Native Remains and Objects: “Give the Items Back. Comply with Federal Law. Hurry.”*, PROPUBLICA (Feb. 2, 2024) <https://www.propublica.org/article/senator-schatz-museums-native-american-remains-belongings>.

<sup>10</sup> Julia Jacobs & Zachary Small, *Field Museum Covers Some Native Displays as New Rules Take Effect*, THE N.Y. TIMES (Jan. 11, 2024 2 P.M.), <https://www.nytimes.com/2024/01/11/arts/design/field-museum-nagpra.html>.

<sup>11</sup> Jaffe et al. *supra* note 1.

<sup>12</sup> See generally Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human remains, Funerary Objects, Sacred Objects, and Object of Cultural Patrimony, 88 Fed. Reg. 86,452 (Jan. 12, 2024) (to be codified at 43 C.F.R. 10)

compliance may be. Section IV highlights the monumental changes within the regulations and the need to address specific issues. Although it is more difficult for institutions to hide behind the label “culturally unidentifiable” when requests for repatriation arise, and Tribes and Native Hawaiian Organizations are deferred to as the resident authorities in these processes for the first time, the reality of these new changes is that this may be too costly or time-consuming to occur within the current parameters set by the Department of the Interior.

## II. ALL ROADS LEAD TO NAGPRA: WHAT LED TO THE ACT AND THE CURRENT GUIDANCE

*“We kind of get brushed under the rug — not just our issues, but who we are as a people. Even after death, we’re still fighting for our rights to be Indian.”<sup>13</sup>*

The United States has a history of failed attempts when attempting to remedy the harm done to Native American and Native Hawaiian Organizations (“NHO”) by the anthropological and archeological communities. Each act, although addressing the holes within its predecessor, has still not been enough to create a sufficient system to treat Native Americans’ and NHOs’ artifacts with respect. NAGPRA is the most recent effort in a history, with the previous thirty years leading to minimal change.

To comprehend the gravity of the 2023 regulation change, examining NAGPRA’s past is critical to determine its future direction. In the early 1900s, the rampant grave robbing and looting of Native American sacred sites prompted Congress to enact the Antiquities Act.<sup>14</sup> Due to deficiencies with this Act, activists pushed for another: the Archeological Resources Protection Act (“ARPA”), which is still prevalent today but not as comprehensive as its successor.<sup>15</sup> NAGPRA is the latest in this long line of efforts. The current statute provided for the repatriation of items belonging to federally funded institutions, but alone, it was not enough prior to the regulation change. It is these deficient pieces of legislation and employ legalese that has led to this present moment in Native American and museum relations, one in which the calls for reform have potentially, finally, been answered.

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<sup>13</sup> Tweesna Rose Mills, Shoshone-Umatilla Nations member and Co-Chair of KU’s first Nations Student Association in 2022. Maya Hodison, *Native American students mourn after ancestral remains discovered in KU’s possession*, THE LAWRENCE TIMES (Sept. 22, 2023) <https://lawrencekstimes.com/2022/09/22/ku-students-mourn-ancestors/>.

<sup>14</sup> Mx. B. Stephen Jones, *Strengthening NAGPRA*, 41 CARDOSO ARTS & ENT. L.J. 883, 887 (2023); Elizabeth M. Koehler, *Ph.D., Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of U.S. and Canadian Law*, 41 INT’L LAW 103, 112 (2007).

<sup>15</sup> 173 A.L.R. Fed. 585 (2001).

A. THE STATE OF PROTECTIONS FOR NATIVE AMERICAN ANCESTORS & ARTIFACTS PRE-NAGPRA

*“Since 1885, there have been a number of archaeologists that have made their careers on the backs of our ancestors pulled out of the ground or mounds. It’s really, truly heartbreaking when you think about that.”<sup>16</sup>*

The Native American Graves Protection and Repatriation Act (NAGPRA) was the result of many forces working to address the sacrilegious perpetrations against Native Americans in the anthropological and archeological spheres.<sup>17</sup> The earliest catalyst credited for the passage of NAGPRA legislation is Maria Pearson, a member of the Turtle Clan of the Yankton Sioux,<sup>18</sup> who is considered “the Founding Mother of the modern Indian repatriation movement.”<sup>19</sup> Pearson became motivated to call for change when learning about the treatment of skeletons uncovered by the Iowa Department of Transportation during road construction.<sup>20</sup> Pearson’s husband, an engineer, informed her that the burials of Native Americans, including a mother and child, were sent to a lab while their white counterparts were “quickly reburied.”<sup>21</sup> Appalled, Pearson began protesting by sitting outside of the Iowa Governor’s office every day in her traditional Turtle Clan attire.<sup>22</sup> This controversy, and primarily the efforts of Pearson, led to the first legislative act in the United States that specifically protected Native American ancestors, the Iowa Burials Protection Act of 1976.<sup>23</sup>

The United States has been stealing ancestors and artifacts since realizing there was value in studying Native Americans.<sup>24</sup> The tradition began on the battlefield during the Indian Wars, with the Smithsonian Museum partnering with U.S. Army Gen. William Tecumseh Sherman to pay his soldiers up to \$500 to gather items, including clothing, weapons, and everyday tools in the late 1800s. From the 1890’s through 1930’s,

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<sup>16</sup> Alex Wesaw, director of American Indian Relations at Ohio History Connection and a citizen of the Pokagon Band of Potawatomi Indians. Mary Hudetz & Graham Lee Brewer, *Senate Committee Probes Top Universities, Museums Over Failures to Repatriate Human Remains*, PROPUBLICA (Apr. 21, 2023)

<https://www.propublica.org/article/senate-probes-universities-museums-nagpra-failures>.

<sup>17</sup> 173 A.L.R. Fed. 585.

<sup>18</sup> *South Dakota History*, SOUTH DAKOTA HISTORICAL SOC. PRESS. 51 (4). (Dec. 20, 2021). The Yankton Sioux are part of the federally recognized tribe of the Yankton Dakota.

<sup>19</sup> Gradwohl, David M.; Joe B. Thomson; Michael J. Perry, *Still Running: A Tribute to Maria Pearson, Yankton Sioux. Special issue of the Journal of the Iowa Archeological Society*, (IOWA CITY: IOWA ARCHEOLOGICAL SOCIETY, Vol. 52, 2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See also id.* (Pearson went on to lobby national leaders, and her efforts, along with many others, are credited as leading to the creation of NAGPRA).

<sup>24</sup> Hudetz & Brewer *supra* note 16.

anthropologists carried out burial mound excavations in the Midwest and Southeast, regions hit especially hard by forced tribal relocation.<sup>25</sup>

These highly sought-after artifacts began appearing in both the educational and collectors' spheres: both Harvard University's Peabody Museum of Archaeology and Ethnology and the University of California Berkeley's collections date back to the 19th and early 20th centuries.<sup>26</sup> However, this information was not solely for historical purposes, and many scientists who embraced the eugenics movement used stolen craniums for studies that argued Native Americans were inferior to white people.<sup>27</sup>

*i. Predecessors of NAGPRA*

*“The museums tend to think of all these objects as their personal property, and they don't want to turn it back over to the tribes even though much of it was unscrupulously obtained.”<sup>28</sup>*

NAGPRA is the most recent iteration of over a century of efforts by Congress to protect and preserve the United States' historic resources.<sup>29</sup> The Antiquities Act, National Historic Preservation Act, and Archaeological Resources Protection Act paved the way for NAGPRA through a system of trial and error, in addition to the narrowing of explicit goals, to create today's landscape. Brought into a relatively unregulated arena, the three acts, respectively, sought to mitigate the injustices faced by the Native American community due to the lack of control over the artifacts and ancestors taken by amateur archeologists and grave robbers.<sup>30</sup> Although both of NAGPRA's predecessors were sparse in comparison, the acts marked a turn

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* One harrowing example of this practice is the Smithsonian's "Racial Brain Collection", which is a collection of over 250 brains, removed upon the death of predominantly Black, Indigenous, and other people of color. The vast majority of the remains were removed without the consent of the individuals or their families or were dug up and looted by scientists and anthropologists. Of the 268 brains collected by the Smithsonian, only four have been repatriated as of August 23, 2023. The Smithsonian is not subject to NAGPRA but is instead subject to the National Museum of the American Indian Act. It does not have to publicly share information about repatriation efforts but shares its inventory list with tribes; *see also* Nicola Dungca and Claire Healy, *Revealing the Smithsonian's 'racial brain collection'*, THE WASHINGTON POST (Aug. 23, 2024) <https://www.washingtonpost.com/history/interactive/2023/smithsonian-brains-collection-racial-history-repatriation/>.

<sup>28</sup> Kurt Dongoske, tribal historical preservation officer for the Zuni Pueblo in New Mexico. Mary Hudetz, *A Scientist Said Her Research Could Help with Repatriation. Instead, it Destroyed Native Remains.*, PROPUBLICA, (July 20 2023). <https://www.propublica.org/article/delayed-repatriation-allows-destructive-research-native-american-remains>.

<sup>29</sup> *See generally* Marina F. Rothberg, *Indiana Jones and the Illicit Excavation and Trafficking of Antiquities: Refining Federal Statutes to Strengthen Cultural Heritage Protections*, 63 B.C. L. REV. 1555 (2022).

<sup>30</sup> Jones, *supra* note 14.

(albeit small) in United States museum culture: what was previously apathy towards the fate of these artifacts and ancestors became concern, and later attempted proactivity.<sup>31</sup>

a. The Antiquities Act

Congress enacted the Antiquities Act of 1906 to address the unregulated landscape of archaeology and artifact sites.<sup>32</sup> The Act primarily targeted indigenous sites in practice, despite its broader verbiage. Although repealed in 2014,<sup>33</sup> the Act gave the Secretaries of the Interior, Agriculture, and War the “power to grant permits to properly qualified institutions for excavations and gathering of artifacts” on federal lands.<sup>34</sup> Traditionally, these permits belonged to institutions (primarily museums and universities) as opposed to individuals.<sup>35</sup> In addition, it declared a general commitment to preservation policy and instituted enforcement provisions for those who attempted to “appropriate, excavate, injure, or destroy” any potential “object of antiquity.”<sup>36</sup>

Although enacted with good intentions, the Antiquities Act had fundamental issues. The scope of the Act was minute and centered on protecting monuments and other historical sites.<sup>37</sup> There is no mention of a Native American or Hawaiian interest to be protected,<sup>38</sup> nor was it successful in preventing illegal excavations.<sup>39</sup> The Act’s penalties were insufficient in deterring looters, as the maximum penalty was a \$500 fine or imprisonment for ninety days.<sup>40</sup> One of the most substantial deficiencies was the term “any object of antiquity,” a term without a definition,<sup>41</sup> which led to a ruling from the Ninth Circuit finding the verbiage unconstitutionally vague.<sup>42</sup> The decision created doubt in the Act’s ability to protect objects of

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<sup>31</sup> Rothberg, *supra* note 29.

<sup>32</sup> CULTURAL PROPERTY NEWS, *A Primer: NAGPRA, ARPA, and the Antiquities Act*, , <https://culturalpropertynews.org/a-primer-nagpra-arpa-and-the-antiquities-act/#:~:text=Although%20the%201906%20Antiquities%20Act,Protection%20and%20Repatriation%20Act%20of> (last visited Dec. 8, 2023).

<sup>33</sup> 113 P.L. 113-287(7) (2014).

<sup>34</sup> 16 U.S.C. 431-433 (2011); *Antiquities Act of 1906*, NAT’L PARK SERV.: Archeology, <https://www.nps.gov/subjects/archeology/antiquities-act.htm#:~:text=An%20Act%20for%20the%20Preservation,scientific%20interest%20on%20federal%20lands> (last visited Dec. 8, 2023).

<sup>35</sup> Elizabeth M. Koehler, Ph.D., *Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of U.S. and Canadian Law*, 41 INT’L LAW. 103, 112 (2007).

<sup>36</sup> *Supra* note 33 at 433.

<sup>37</sup> Koehler, *supra* note 35 at 105.

<sup>38</sup> 16 U.S.C. 431-433, § 3.

<sup>39</sup> Annual Report of Jesse L. Nusbaum, Department Archeologist and Superintendent of Mesa Verde National Park, to the Secretary of the Interior for Fiscal Year Ended June 30, 1929, 6–7.

<sup>40</sup> 16 U.S.C. 433 (2011).

<sup>41</sup> *Id.*

<sup>42</sup> *United States v. Diaz*, 499 F.2d 113, 114–15 (9th Cir. 1974).

antiquity, leading to the birth of the Archaeological Resources Protection Act of 1979.<sup>43</sup>

## B. THE NATIONAL HISTORIC PRESERVATION ACT (NHPA)

The National Historic Preservation Act (NHPA) was passed in 1966 by Congress to safeguard American landmarks.<sup>44</sup> The Act created a partnership between the federal government and state, tribal, and local governments to foster “a new ethic” through all levels and agencies.<sup>45</sup> Congressional findings highlighted the need for the Act’s creation because “the present governmental and nongovernmental historic preservation programs...are inadequate to ensure future generations a genuine opportunity to appreciate...the rich heritage of our Nation”<sup>46</sup> and “historic properties significant to the Nation’s heritage are being lost or substantially altered...with increasing frequency.”<sup>47</sup> Congress viewed it “necessary and appropriate” for the Federal Government to give “maximum encouragement” to those undertaking preservation efforts to start federally funding preservation activities with matching grants-in-aid provided by the National Park Service.<sup>48</sup>

The NHPA created the Advisory Council on Historical Preservation (ACHP).<sup>49</sup> The Council promotes “the preservation, enhancement, and sustainable use of our nation’s diverse historic resources, and advises the President and Congress on national historic preservation policy.”<sup>50</sup> The Council is comprised of twenty-four statutorily designated members from federal agencies, preservation organizations, Indian tribes, and expert private citizens, and has a staff of forty-two that carry out preservation cause reviews, provide training, conduct outreach, in addition to other related tasks.<sup>51</sup> One of the key responsibilities of the Council is to administer the requirements of Section 106 of the NHPA, which ensures the consideration of historic properties during the development of federal projects.<sup>52</sup>

The NHPA and ACHP still exist today, and in 1992, the NHPA was amended to require federal agencies to consult with Native American tribes before enacting policies or making decisions about historic sites on tribal

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<sup>43</sup> Koehler, *supra* note 35 at 112.

<sup>44</sup> National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915.

<sup>45</sup> ADVISORY COUNCIL ON HISTORIC PRESERVATION, *National Historic Preservation Act*, <https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act>.

<sup>46</sup> Section 1(b)(5) of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515.

<sup>47</sup> *Id.* at Section 1(b)(3).

<sup>48</sup> *Id.* at Section 1(b)(7); *see also supra* note 45.

<sup>49</sup> ADVISORY COUNCIL ON HISTORIC PRESERVATION, *About the ACHP*, <https://www.achp.gov/about> (last visited Feb. 11, 2024).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> ADVISORY COUNCIL ON HISTORIC PRESERVATION, *Office of Federal Agency Programs*, [https://www.achp.gov/sites/default/files/whitepapers/2020-06/OfficeFedAgencyFactSheet2019\\_061520.pdf](https://www.achp.gov/sites/default/files/whitepapers/2020-06/OfficeFedAgencyFactSheet2019_061520.pdf) (last visited Feb. 11, 2024).

land.<sup>53</sup> However, NHPA functions more broadly within the legal arena of historic preservation as opposed to more focused legislation such as NAGPRA. Artifacts and ancestors stolen do not specifically fall under the purview of NHPA, thus creating the congressional need to refine the goals of preservation and protection efforts for the material culture and Native American ancestors.

### C. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT (ARPA)

The Archeological Resources Protection Act of 1979 (ARPA) addressed the holes within the Antiquities Act of 1906.<sup>54</sup> The archaeological and anthropological communities had a crisis on their hands; by 1979, looters had pillaged nearly 3,000 recorded ancient sites on national forest lands in Arizona alone.<sup>55</sup> Looting was considered “a relatively low-risk activity with a high-profit potential” due to Congress stating the Antiquities Act “did not provide adequate protection” to prevent these incidents from occurring.<sup>56</sup> Promoters of ARPA worked to ensure the legislative history and statutory language were “abundantly clear” to protect archaeological resources and sites.<sup>57</sup>

ARPA was passed federally in 1979 and amended in 1988.<sup>58</sup> The stated purpose of ARPA was essentially to secure the protection of archaeological resources and sites on federal and tribal lands.<sup>59</sup> ARPA was intentional in ensuring there was a concrete definition for the items under its purview: the term “archeological resource” means “any material remains of past human life or activities which are of archeological interest,”<sup>60</sup> including things like pottery, graves, remains, fossils, with the caveat that things under 100 years of age are outside of ARPA’s protection.<sup>61</sup> However, this is a rolling threshold, meaning new items age into ARPA’s protection daily, regardless of age at the Act’s passage date.

In practice, ARPA prohibits excavation without a permit on federal and tribal lands,<sup>62</sup> in addition to trafficking in archaeological resources

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<sup>53</sup> National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4006, 106 Stat. 4753, 4755-56.

<sup>54</sup> Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U.L. REV. 599, 601 (1995).

<sup>55</sup> 125 Cong. Rec. 21,240 (1979) (statement of Sen. Domenici).

<sup>56</sup> 16 U.S.C. § 470aa(a)(3) (1979).

<sup>57</sup> 125 Cong. Rec. 17,395 (1979) (statement of Rep. Rhodes).

<sup>58</sup> U.S. FOREST SERV., *Archeological Resources Protection*, <https://www.fs.usda.gov/lei/archeological-resources-protection.php#:~:text=The%20Archeological%20Resources%20Protection%20Act,archaeological%20collections%20from%20those%20sites> (last visited Dec. 8, 2023).

<sup>59</sup> 16 U.S.C.A. § 470aa (1979).

<sup>60</sup> 16 U.S.C.A. § 470bb(1) (1979).

<sup>61</sup> *Id.*

<sup>62</sup> 16 U.S.C.A. § 470cc(a) (1979).

removed illegally.<sup>63</sup> ARPA makes it illegal to sell, purchase, exchange, or transport anything excavated or removed in violation of local, state, or federal law.<sup>64</sup> The penalties under ARPA are far more substantial than those under its predecessor, with maximum penalties at \$100,000 and five years in prison for repeated violations.<sup>65</sup> ARPA is now a powerful tool for prosecution because any new step in the transaction process— a resale, transfer, or trafficking of an item or remain, would trigger a new ARPA violation. Additional sections include setting requirements that must be met before permit issuance by a Federal land manager,<sup>66</sup> the prohibition of disclosing sensitive information (like the nature and location of archeological resources) publicly,<sup>67</sup> as well as requiring the Departments of the Interior, Agriculture, Defense, and the Tennessee Valley Authority to conduct surveys of the archeological resources on their lands and report on any ARPA violations.<sup>68</sup> One of the most unique and valuable features of ARPA, however, is that it works to facilitate communication between private individuals, encouraging them to share their information about archeological resources collected prior to ARPA, Federal authorities managing archeological resources, and professional archeologists.<sup>69</sup> This drafting increases collectors' likelihood of coming forward with ancestors and artifacts, thus increasing the likelihood they can return to their rightful tribe or be put to rest.

Where ARPA focuses on excavation and permitting, there was minimal guidance regarding the next steps in the process of encouraging institutions to give back the items obtained through compliance.<sup>70</sup> The natural next step in this statutory evolution was to establish a procedure that would both incentivize the return of these ancestors and artifacts as well as create a rightful claim for Tribes and NHOs to assert when requesting repatriation.<sup>71</sup>

*i. Legislative Intent and Circumstances that Led to NAGPRA's Passage*

*"You can give me back my people's bones and stop digging them up."*<sup>72</sup>

As the years progressed after Maria Pearson's success, publicity highlighting the unconscionable treatment of Native American burial sites galvanized the support for change. In 1982, the case of *Wana the Bear v.*

<sup>63</sup> Hudetz, *supra* note 28; 16 U.S.C.A. §470ee(b) (1979).

<sup>64</sup> 16 U.S.C.A. §470ee(b) (1979).

<sup>65</sup> *Id.* at § 470(ee)(d).

<sup>66</sup> *Id.* at § 470(cc); Hudetz, *supra* note 28.

<sup>67</sup> 16 U.S.C. § 470(gg) (1979).

<sup>68</sup> 16 U.S.C. § 470(mm) (1988).

<sup>69</sup> 16 U.S.C. § 470(jj) (2013).

<sup>70</sup> Rothberg, *supra* note 29.

<sup>71</sup> 25 U.S.C. § 3005(a) (1990).

<sup>72</sup> Maria Pearson, *Founding Mother of the Modern Indian Repatriation Movement. Gradwohl, supra* note 19.

*Community Construction* highlighted further injustices towards Native Americans by upholding the (then) non-protected status of Native American burial grounds.<sup>73</sup> The plaintiff was a member of the Bear People Lodge of the Miwok Indians and a descendant of those within the burial ground and sought to avoid further desecration at the site.<sup>74</sup> The court's decision to side with the construction company led to the destruction of the burial ground, which became a residential development.<sup>75</sup> This tragedy, in tandem with the 1987 looting of a 500-year-old burial mound at the Slack Farm,<sup>76</sup> the 1988 looting of the Hopewell mound on General Electric Company's property in Indiana,<sup>77</sup> and 1991 protests of the 237 uncovered skeletons at the Dickson mounds site in Illinois led to a national outcry for reform that continued even after the announcement of NAGPRA's passage.<sup>78</sup>

Congress enacted NAGPRA in 1990, intending to recognize that human remains of any ancestry "must at all times be treated with dignity and respect."<sup>79</sup> The effort was to encourage a "continuing dialogue" between museums, Indian Tribes, and NHOs to both promote a greater understanding between the groups and recognize the importance of appropriately preserving the past.<sup>80</sup> When drafting NAGPRA, Congress attempted to find the balance between the scientific interest of examining remains and recognizing the spiritual reverence Native Americans hold for

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<sup>73</sup> The Court of Appeal held that the burial ground was not protectable as a public cemetery under 1872 cemetery law because Indians were not using the burial ground at the time the statute was enacted.

<sup>74</sup> *Id.* at 538; Although the remains of 200 people were disinterred, it is believed that the site once held over 600.

<sup>75</sup> *Id.*

<sup>76</sup> *National Geographic Magazine*, March 1989; In 1989, ten looters paid \$10,000 to a new landowner of the property to dig at the site. The individuals spent two months destroying graves, Missippian culture houses, and other items of cultural significance at the burial site in Uniontown, Kentucky. Local complaints led to the arrests of the perpetrators, and the damage done attracted worldwide attention (and a National Geographic article).

<sup>77</sup> Munson, C. A., Jones, M. M., & Fry, R. E., *The GE Mound: An ARPA Case Study. American Antiquity*, (60(1), 131–59. 1995); A mound on the then General Electric's plastics plant was broken into when road workers needed the soil. The workers discovered "significant" archeological remains that were neither reported to state authorities or GE, and the mound was looted over the summer of 1988. <https://traffickingculture.org/encyclopedia/case-studies/ge-mound-mount-vernon-site/>.

<sup>78</sup> See also Logan Jaffe, *How a Tourist Attraction Displaying the Open Graves of Native Americans Became a State-Run Museum*, PROPUBLICA (Feb. 9, 2023), <https://www.propublica.org/article/dickson-mounds-museum-history> (Don. F. Dickson was an Illinois chiropractor who excavated at least 234 burials and opened the site to the public. Dickson rearranged objects to make burials more dramatic, removed mandibles of some of the deceased to display them next to animal mandibles, and ProPublica noted that many bones and belongings were broken, while some were stolen. Michael Haney, an activist of Seminole and Sioux heritage, helped gather crowds to protest Illinois Gov. James R. Thompson's decision to keep the museum open in light of the anticipated passage of NAGPRA. Haney responded to the operation of the museum in a public hearing by saying "If you want to know about Indians, ask living Indians. Don't desecrate our graves.").

<sup>79</sup> S. REP. NO. 101-473 (1989).

<sup>80</sup> *Id.* at 4.

their ancestors.<sup>81</sup> Congress's findings acknowledged that there were “many” Federal agencies and museums receiving federal funding that held “large numbers of human remains of Native Americans in their collections”<sup>82</sup> and that “many” Tribes and NHOs “have expressed a clear and unequivocal interest in the return of these remains...so that their tribe, family, or organization may determine the appropriate disposition of the remains which is consistent with their religious and cultural practices.”<sup>83</sup> With this information, NAGPRA attempted to accomplish two goals: protecting Native American and Hawaiian burial sites on federal and tribal lands and establishing a process to inventory and repatriate stolen Native American ancestors and funeral objects.<sup>84</sup> With the first goal, NAGPRA sought to limit excavation to those who have acquired permits and specifically protect “cultural items” of Native Americans, including human remains, funerary objects, sacred objects, and cultural patrimony.<sup>85</sup> With the second, the idea was to create a process to identify Native American remains and cultural artifacts in collections and holdings found before the effective date, which aids in finding lineal descendants and repatriating the property.<sup>86</sup>

#### D. NAGPRA FUNDAMENTALS

*“A big part of that unrelenting, inhumane policy was that the remains of Native ancestors and culturally significant items were also taken from them. Not with permission, but by force. Not discovered, but stolen.”<sup>87</sup>*

##### *i. The Implementation of NAGPRA*

The Secretary of the Interior has the primary duty to implement NAGPRA, which resides within the National Park Service (NPS), where it is now part of the Office of Cultural Resource Stewardship and Partnerships.<sup>88</sup> In addition, the NAGPRA Review Committee monitors and reviews the implementation of NAGPRA.<sup>89</sup> The Secretary of the Interior appoints these Committee members.<sup>90</sup> Historically, three members are

<sup>81</sup> Renee Kosslak, *Native American Graves Act*, (Dec. 2, 2001) <https://web.archive.org/web/20011231023931/http://academic.udayton.edu/Race/03justice/NALR007.htm>.

<sup>82</sup> See *infra* Trope & Echo-Hawk note 85 at 4.

<sup>83</sup> *Id.*

<sup>84</sup> 173 A.L.R. Fed. 585.

<sup>85</sup> See generally Trope & Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. L.J. 35 (1992).

<sup>86</sup> 43 C.F.R. § 10.1-10.17 (1990).

<sup>87</sup> Brian Schatz, Hawaiian Senator and Chair for the Senate Committee on Indian Affairs. Hudetz *supra* note 9.

<sup>88</sup> Trope & Echo-Hawk, *supra* note 85.

<sup>89</sup> REV. COMM., Native American Graves Protection and Repatriation Act, <https://www.nps.gov/subjects/nagpra/review-committee.htm> (last visited Dec. 8, 2023).

<sup>90</sup> *Supra* note 12; Some of the current members (their terms expire between 2024 and 2027) include those nominated by the Association of Tribal Archives, the American Alliance of Museums, the Confederated Tribes of the Umatilla Indian Reservation, the Seminole Tribe of Florida, and the American Anthropological Association.

nominated by Indian tribes, NHOs, and traditional Native American religious leaders, with at least two of which are traditional Indian religious leaders.<sup>91</sup> National museum organizations and national scientific organizations nominate three members as well.<sup>92</sup> Lastly, all other appointed members from the two previous categories appoint one member from a list created by the group.<sup>93</sup> This seven-member Committee is specifically responsible for tasks including reviewing and making findings relating to the identity of cultural items, facilitating the resolution of disputes, compiling inventories of culturally unidentifiable human remains held by museums and Federal agencies, as well as providing specific recommendations regarding what to do with them.<sup>94</sup> In addition, the Committee consults with Indian Tribes, NHOs, and the Secretary of the Interior on matters that are impacting tribes or organizations and how to better carry out NAGPRA.<sup>95</sup> The current subcommittee was established in 2018 and “address[es] any issues related to the Committee’s responsibility to report to Congress.”<sup>96</sup> Despite all the Committee does, its role is solely advisory, and no recommendation, finding, or report is binding.<sup>97</sup>

The Assistant Secretary of the National NAGPRA program determines the fines for civil fees from museums and institutions.<sup>98</sup> An allegation for noncompliance must go to the Manager of the National NAGPRA Program,<sup>99</sup> which will be replied to by the Assistant Secretary either asking for more information or determining whether a civil penalty is or is not appropriate given the circumstances.<sup>100</sup> Each individual failure to comply is a separate violation, with the base penalty starting at \$7,475,<sup>101</sup>

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<sup>91</sup> *Id.*; a traditional Indian religious leader is a person who an Indian Tribe identifies as serving it in the practice of traditional Native American religion.

<sup>92</sup> *Id.*; National museum organizations and national scientific organizations are organizations that 1) focus on the interests of museums and science disciplines throughout the United States, as opposed to a lesser geographical scope; 2) offer membership throughout the United States, although such membership need not be exclusive to the United States; and 3) are organized under the laws of the United States government.

<sup>93</sup> 43 C.F.R. § 10.12(b)(3) (2024).

<sup>94</sup> *Id.* at § 10.12(c). Since 1992, the Committee has taken on 114 requests for human remains with no cultural affiliation, with 111 being for the disposition of a particular set of human remains and 3 to approve and consider a state process for disposition.

<sup>95</sup> *Id.*

<sup>96</sup> SUBCOMMITTEES, Native American Graves Protection and Repatriation Act, (last visited Dec. 8, 2023), <https://www.nps.gov/subjects/nagpra/subcommittees.htm>

<sup>97</sup> See generally Rebecca Tsosie, *Nagpra and the Problem of "Culturally Unidentifiable" Remains: The Argument for A Human Rights Framework*, 44 ARIZ. ST. L.J. 809 (2012) (The records or findings made by the Committee can be used as evidence in actions brought by those alleging violations of NAGPRA).

<sup>98</sup> 43 C.F.R. § 10.11(a) (2024). Federal agencies are not subject to these penalties, but to respective Federal regulations.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at § 10.11(b). The Assistant Secretary may ask for any additional relevant information from parties to determine whether an alleged failure to comply is substantiated and may also investigate appropriate factors for justifying an increase or reduction to penalty amounts.

<sup>101</sup> *Id.* at § 10.11(c)(1).

but is subject to annual adjustments for inflation. The penalty can be increased or decreased depending on the circumstances. For increasing the penalty, factors like ceremonial or cultural value, archeological or cultural value, and economic or non-economic damages suffered by an aggrieved party.<sup>102</sup> To decrease, it aids the institution if they come into NAGPRA compliance, give an actual or in-kind payment to an aggrieved party, if the penalty constitutes excessive punishment, or the museum has been previously compliant and cannot pay the total penalty.<sup>103</sup>

ii. *The Content of NAGPRA*

*“For 150 years our ancestors have been treated like objects, play things...they need to be recognized as the flesh and blood human beings that walked these grounds.”<sup>104</sup>*

Signed into law by George H.W. Bush on November 23, 1990, NAGPRA created a framework for the identification, protection, and repatriation of Native American ancestors and cultural items.<sup>105</sup> NAGPRA does this through sections dictating ownership,<sup>106</sup> inventory for human remains and associated funerary objects,<sup>107</sup> repatriation,<sup>108</sup> penalty,<sup>109</sup> and enforcement.<sup>110</sup> NAGPRA states that Native American ancestors and associated funerary objects belong to lineal descendants, and if those descendants are unidentifiable, the artifacts or ancestors belong to the tribe where they were found.<sup>111</sup> If the tribe is unidentifiable, then the artifacts or remains are to be returned to the tribe having the closest known relationship to them.<sup>112</sup> NAGPRA additionally requires that museums, agencies, and universities compile NAGPRA summaries (essentially inventories of artifacts and ancestors relevant to the Act), consult with Native American tribes, and repatriate the items that meet the requirements outlined by NAGPRA and claimed by tribes.<sup>113</sup>

Lineal descendants, Indian tribes, and NHOs that are aware they may have interest in an institution’s collections or holdings can make

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<sup>102</sup> 43 C.F.R. § 10.11(c)(1)-(c)(2) (2024); other factors can include the number of violations accrued.

<sup>103</sup> 43 C.F.R. § 10.11(c)(3) (2024).

<sup>104</sup> Scott Willard, NAGPRA Director for the Miami Tribe of Oklahoma. *Acknowledging the Significance of Indigenous Ancestors and Funeral Artifacts in Indiana*, AMERICAN CIVIL LIBERTIES UNION: INDIANA, (June 29, 2023) <https://www.aclu-in.org/en/news/acknowledging-significance-indigenous-ancestors-and-funeral-artifacts>.

<sup>105</sup> Trope & Echo-Hawk, *supra* note 76 at 36.

<sup>106</sup> 25 U.S.C. §3002 (1990).

<sup>107</sup> *Id.* at §3003.

<sup>108</sup> *Id.* at §3005.

<sup>109</sup> *Id.* at §3007.

<sup>110</sup> *Id.* at §3013.

<sup>111</sup> 42 C.F.R. § 10.14 (1990).

<sup>112</sup> *Id.*

<sup>113</sup> 25 U.S.C. §3005 (1990).

requests for repatriation.<sup>114</sup> Lineal descendants are individuals tracing their ancestry “directly and without interruption by means of the traditional kinship system” via their tribe or NHO to the ancestors, funerary objects, or sacred objects requested.<sup>115</sup> For the sake of the statute, an Indian tribe is any tribe, band, nation, or other organized group or community of Indians recognized as eligible for the special programs and services offered to those due to their status as Indians.<sup>116</sup> An NHO serves and represents the interests of Native Hawaiians, has a primary and stated purpose for the provision of services to Native Hawaiians, and has expertise in Native Hawaiian Affairs.<sup>117</sup>

When it comes to non-federally recognized Indian groups, museums, and Federal agencies are not required to consult with them.<sup>118</sup> If a museum or Federal agency would like to return ancestors or cultural items to one of these groups, they must request the NAGPRA Review Committee.<sup>119</sup>

#### E. BEYOND THE PAST: THE LIVING IMPACT OF THESE RULES AND REGULATIONS

*“I always have a bit of unease because I know if I’m going to a university or to a museum...that the chances are pretty high that we’ve got some ancestors sitting in a basement or closet somewhere.”<sup>120</sup>*

Before discussing the framework of NAGPRA and the implications of the 2023 regulations, it is vital to remember that these actions have tangible impacts on many within the Indigenous community that are still alive. It is well-known that the United States’ legacy is one of theft and cruelty concerning its Indigenous population.<sup>121</sup> The generational trauma of

<sup>114</sup> 42 C.F.R. § 10.14 (1990).

<sup>115</sup> 25 U.S.C. §3005 (1990).

<sup>116</sup> *Id.*, U.S. DEPT. OF THE INTERIOR: INDIAN AFFAIRS, *Programs and Services*, <https://www.bia.gov/programs-services#:~:text=Programs%20administered%20through%20the%20Bureau,economicall y%20depressed%20areas%20of%20the> (last visited Dec. 8, 2023); For example, those who are recipients of the programs and services administered through the Bureau of Indian Affairs. This includes social services, natural resource management, economic development programs, law enforcement and detention, as well as others.

<sup>117</sup> U.S. DEPT. OF THE INTERIOR, *NHOs*, <https://www.doi.gov/hawaiian/NHOL> (last visited Dec. 8, 2023). This includes the Office of Hawaiian Affairs as well. The Island Burial Councils also maintain lists of the appropriate Hawaiian organizations, agencies, and offices to notify when human remains are discovered in the Hawaiian Islands.

<sup>118</sup> 25 U.S.C. §3005 (1990).

<sup>119</sup> *Id.* The NAGPRA Review Committee has become especially relevant in recent years and will be further discussed later on in this paper.

<sup>120</sup> Raphael Wahwassuck, tribal preservation officer for the Prairie Band Potawatomi Nation in Mayetta, Kansas. John O’Connor et al., *Centuries after Native American remains were dug up, a new law returns them for reburial in Illinois*, AP NEWS (Sept, 18, 2023), <https://apnews.com/article/native-american-repatriation-human-remains-tribes-ancestors-20a5518e52da998dd8d691bcc93f75f>.

<sup>121</sup> Hudetz *supra* note 9.

this attempted extermination lives within the descendants of ancestors that may very well be folded up in cardboard boxes or placed on display like a carnival curiosity.<sup>122</sup> Donna Augustine, an elder from the Wabanaki nations on the East Coast, distills the sentiment perfectly: “How can we tell our children, our youth, that they are worth something when at the same time, right over here, there’s a museum, and they’re studying our ancestors? It’s like telling us we’re less-than.”<sup>123</sup> The challenge lies in finding an appropriate balance of science and religion— when is the right time to give back these ancestors and artifacts? Is it feasible that there will ever be a “right time” in scientists’ eyes to repatriate?

i. *Transgenerational trauma*

*“We as a community have to carry that burden. Part of the cost is that emotional toll, the cultural, spiritual cost that is carried by the community.”<sup>124</sup>*

Native American populations have been devalued and marginalized at nearly every turn since Christopher Columbus set foot in North America hundreds of years ago. The population decreased by 95% between 1492 and the establishment of the United States in 1776 due to the genocidal efforts of Europeans and the inability of Native Americans’ immune systems to cope with new diseases.<sup>125</sup> After the formation of the United States, the injustices did not cease. As a result of the Indian Removal Act of 1830, the government forced Tribes west of the Mississippi to relocate east, causing a mass migration of roughly 100,000 people, leading to the deaths of thousands.<sup>126</sup> The latter half of the nineteenth century brought the effort of “kill[ing] the Indian and sav[ing] the man,” leading to children being ripped away from their families to “civilize” them.<sup>127</sup> As the losses progressed, the government even banned Native Americans from engaging in mourning practices due to the Religious Crimes Code, passed within the broader Code

<sup>122</sup> As discussed in Part I.; See also Kathleen Brown-Rice, *Explaining the Theory of Historical Trauma Among Native Americans*, THE PROFESSIONAL COUNSELOR (Vol. 3, Iss. 3) <https://tpcjournal.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans/>

<sup>123</sup> Mary Hudetz & Ash Ngu, *Tribes in Maine Spent Decades Fighting to Rebury Ancestral Remains. Harvard Resisted Them at Nearly Every Turn.*, PROPUBLICA (Dec. 4, 2023) <https://www.propublica.org/article/inside-wabanaki-tribes-struggle-to-reclaim-ancestral-remains-from-harvard>

<sup>124</sup> Theresa Pasqual, director of the Acoma Historic Preservation Office. Mary Hudetz, *We Carry the Burden of Repatriating Our Ancestors. Here’s What It’s Like to Report on the Process as an Indigenous Journalist*, PROPUBLICA (Aug. 9, 2023) <https://www.propublica.org/article/what-its-like-to-report-on-repatriation>.

<sup>125</sup> See Jerry Trusty, Eugenie Joan Looby, and Daya Singh Sandhu, *Multicultural counseling: Context, theory and practice, and competence*, 1<sup>st</sup> ed., 2002 at chapter four.

<sup>126</sup> 25 U.S.C. §174 (1830).

<sup>127</sup> “Kill the Indian in him, and save the man”: R.H. Pratt on the education of Native Americans, CARLISLE INDIAN SCH. DIGITAL RESOURCE CEN., <https://carlisleindian.dickinson.edu/teach/kill-indian-him-and-save-man-r-h-pratt-education-native-americans> (last visited on Feb. 9, 2024).

of Indian Offenses in 1883.<sup>128</sup> The traumas faced by the United States Indigenous community are well-documented, and the concept of historical trauma is “collective and multilayered rather than solely centered on an individual.”<sup>129</sup> Scientists have seen results of these historical losses and trauma present not only in the genes of Native Americans living today,<sup>130</sup> but also in the higher death rates from tuberculosis, alcoholism, diabetes, homicide, and suicide.<sup>131</sup> Socially, Native Americans are ten percent more likely than the average American to live below the poverty level,<sup>132</sup> twice as likely to be victims of violent crime, 70% of victimizations involve an offender of another race.<sup>133</sup> Every time a discovery of ancestors trapped in dank basements is released, or the shocking confession that testing on ancestors occurred without permission, these communities become re-traumatized, experiencing not only their pain but the pain of generations before them.<sup>134</sup>

ii. *Science Versus Spirituality*

*“There’s somehow this perspective that this kind of research will enhance or benefit us...what it does is bolsters their careers; it bolsters their professional, academic standing. Let’s be real about it.”<sup>135</sup>*

The question of balancing religion and science, especially considering human remains, has been debated between scientists and community leaders for decades. The debate of science versus spirituality threads through the debate of archaeology and anthropology, especially concerning Native American Tribes and Native Hawaiian Organizations. The academic side of the debate provides information on the genesis of man when humans arrived in North America, their diets and other related pieces of information that help modern-day humans understand what life was like

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<sup>128</sup> See generally, Barbara S. Falcone, *Legal Protections (or the Lack Thereof) of American Indian Sacred Religious Sites: the Need for Comprehensive Legislation*, 41 FED. B. NEWS & J. 568 (1994).

<sup>129</sup> Brown-Rice, *supra* note 122.

<sup>130</sup> See Mary P. Rogers-LaVanne, Alyssa C. Bader, Alida de Flamingh et al., *Association between gene methylation and experiences of historical trauma in Alaska Native peoples*, INT’L J. FOR EQUITY IN HEALTH, (Sept. 8, 2023), <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-023-01967-7#:~:text=Historical%20trauma%20experienced%20by%20Native,6%2C7%2C8%5D>); The rates are: tuberculosis (750% higher), alcoholism (524% higher), diabetes (293% higher), homicide (103.3% higher), and suicide (66% higher).

<sup>131</sup> See generally Teresa N. Brockie, Morgan Heinzelmann and Jessica Gill, *A Framework to Examine the Role of Epigenetics in Health Disparities among Native Americans*, NAT’L. LIBRARY OF MEDICINE: NAT’L. CEN. FOR BIOTECHNOLOGY INFO. (Dec. 9, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3872279/>

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*; see notes 2; 8; & 123.

<sup>135</sup> Theresa Pasqual, director of the Acoma Historic Preservation Office. Hudetz, *supra* note 28.

thousands of years ago.<sup>136</sup> However, those within Indigenous communities counter with the question: when is it enough?<sup>137</sup> Scientists have had possession of ancestors, at this rate, for at least thirty years since the passage of NAGPRA, and there has been minimal movement on the repatriation, even with the acknowledgment that these specimens were often stolen.<sup>138</sup>

a. The Case for Science

*“There’s this perverse sense of ownership, that ‘these are our samples.’  
And ‘You know, we’re protecting it for the good of research.’”*<sup>139</sup>

Elizabeth Weiss, professor of physical anthropology and osteology at San José State University, represents a sector of the scientific community that disagrees with “repatriation laws and the ideology behind repatriation.”<sup>140</sup> Weiss has repeatedly expressed her negative views of repatriation and its prioritization of religion over science, distilling one argument from the scientific community here:

I’m against reburying bones. I think they can tell us a lot about the past...I think they can be used to train forensic anthropologists. I think that they are a key resource for young anthropologists, for archaeologists, forensic anthropologists, and I think that we still have a lot to learn from skeletal remains. I also think that a collection is not something that you study once and then it can be repatriated, because as you build knowledge on the collection, it helps you ask deeper questions as you learn more about the collection.<sup>141</sup>

Professor Weiss wrote a book with anthropologist and attorney James W. Springer, arguing that NAGPRA undermines scientific research and “favors religion over science.”<sup>142</sup> The book received a substantial amount of negative criticism from inside San José State as well as outside, with representatives of several international universities decrying the publication.<sup>143</sup> Weiss believed that the release of her book and her

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<sup>136</sup> *Id.*

<sup>137</sup> Hodison, *supra* note 13.

<sup>138</sup> Hudetz, *supra* note 123.

<sup>139</sup> Hudetz, *supra* note 28.

<sup>140</sup> *Id.*; Weiss states: “Repatriation is not just the burying of human remains and funerary objects: it is an ideology that places Native American voices above those of non-Native Americans. Thus, the narrative given by a Native American elder is favored over the facts provided by a non-Native scientist.”

<sup>141</sup> Colleen Flaherty, *Much More Than Bones*, INSIDE HIGHER ED. (Feb. 14, 2022), <https://www.insidehighered.com/news/2022/02/15/anthropologist-says-shes-being-punished-views-bones>.

<sup>142</sup> See generally, ELIZABETH WEISS & JAMES W. SPRINGER, *REPATRIATION AND ERASING THE PAST* (2020).

<sup>143</sup> Gabriella Angeleti, *Anthropologist opposed to Indigenous repatriation sues university for alleged threats to her free speech*, THE ART NEWSPAPER (27 Oct. 2022), <https://www.theartnewspaper.com/2022/10/27/elizabeth-weiss-anthropologist-san-jose->

outspoken opinions regarding repatriation led to retaliation by San José State, leading her to sue the university.<sup>144</sup> Prior to the suit, she had faced criticism for opposing a planned Native American studies program that was best headed by Native scholars, was denied sponsorship for a panel on “cancel culture,” and was denied placement on a thesis committee for research involving bones.<sup>145</sup> In the summer of 2021, Weiss posted a photo of herself smiling and holding a Native American skull without gloves from the University’s collection that was in the process of being repatriated.<sup>146</sup> This tweet led to not only a series of complaints against Weiss for her actions but also a Presidential Directive from San José State that their collections of ancestors will “be exclusively managed” by the SJSU NAGPRA Coordinator and SJSU Tribal Liaison...<sup>147</sup> This directive effectively locked Weiss out of the curatorial facility that houses all skeletal remains, preventing her from conducting academic research and cutting her out of some contractually assigned leadership duties over the University’s collection of human remains.<sup>148</sup> Weiss’ attempted suit failed, and she has since resigned.<sup>149</sup>

#### b. The Spiritual Perspective

*“We never ceded or relinquished our dead. They were stolen.”*<sup>150</sup>

While the scientific community argues the value of discovering more about humankind from these ancestors, James E. Rogers College of Law professor Rebecca Tsosie remarks, “[i]t is unclear what the precise public benefit might be, aside from ‘more knowledge’ about who was here before the historic European colonization of Indigenous lands and peoples.”<sup>151</sup> When institutions hold artifacts or ancestors for dozens, up to hundreds, of years, it begs the question: when is it enough? How much research is published before a scientist is ready to return an artifact or

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[state-university-lawsuit-freedom-speech](#) (She has been quoted as saying “the repatriation of human remains is a threat to amassing scientific knowledge.”; an open letter from these representatives states the views within the book are “antithetical to the contemporary practice of anthropology and actively harmful to indigenous people and the strides the discipline has made in the last three decades.”; about a thousand professors and graduate students signed this letter, calling the book “anti-indigenous” and “racist”).

<sup>144</sup> *Weiss v. Perez*, 602 F. Supp. 3d 1279, 1285 (N.D. Cal. 2022).

<sup>145</sup> Angeleti *supra* note 159.

<sup>146</sup> *Weiss*, 602 F. Supp. 3d at 1287.

<sup>147</sup> *Id.* at 1288.

<sup>148</sup> *Id.*

<sup>149</sup> Julia Prodis Sulek, *Controversial San Jose State Professor Who Posed with Native American Skull to Resign After Reaching Settlement*, THE MERCURY NEWS, (Jul. 3, 2023, 10:37 A.M.) <https://www.mercurynews.com/2023/06/26/controversial-san-jose-state-prof-who-posed-with-native-american-skull-to-resign-after-settlement-reached/>.

<sup>150</sup> James Riding In, Pawnee tribal member and Arizona State professor. Jaffe et al., *supra* note 1.

<sup>151</sup> Tsosie, *supra* note 97 at 844.

remain? How much value does an artifact or remain that has been sitting in a box for decades suddenly have once it is time for repatriation?

The ancestors are universally considered sacred for Native Americans.<sup>152</sup> For some Native American tribes, they believe that their remains are imbued with the spirit of the ancestor to whom they belong and connect to living citizens of those tribes.<sup>153</sup> Native American cultures maintain deep, cultural connections to their ancestors, sacred ceremonies, and gravesites, and these connections untether due to both the failure to repatriate and the displacement of the ancestors.<sup>154</sup> It is crucial to acknowledge that death rites and rituals greatly vary by tribe, with some tribes treating discussion of the dead as taboo,<sup>155</sup> while others reach out to spirits in times of need and work to facilitate communication with them.<sup>156</sup> Many tribes have intentional funeral rites and rituals to allow their deceased family members to reconnect with the earth and free their souls.<sup>157</sup> Regardless of tribal belief, disrupting resting ancestors creates a disconnect between the decedent and their resting state or between this ancestor and their current family members. By choosing not to repatriate these ancestors and funerary artifacts, institutions are choosing to continue the disconnect between Native Americans and lineage.

#### F. HEEDING THE CALLS FOR CHANGE

*“No more science, no more scientific research on those ancestors.”<sup>158</sup>*

Before the regulation change, although there were a fair amount of positive changes due to NAGPRA, there was a palpable feeling that this was not enough.<sup>159</sup> Significant changes, within the higher education realm especially, were likely due to the reporting of ProPublica on the phenomenon of NAGPRA non-compliance taking place nationally, and the

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<sup>152</sup> ALIVE HOSPICE, *Culture and Death: Native American Heritage* (last visited Dec. 8, 2023) <https://www.alivehospice.org/news-events/culture-and-death-native-american-heritage/>

<sup>153</sup> Michael Casey, *Native people demand accountability for ancestral remains*, CHEROKEE PHOENIX (May 20, 2023) [https://www.cherokeephoenix.org/news/native-people-demand-accountability-for-ancestral-remains/article\\_65476196-f684-11ed-8213-476f0f35431b.html#:~:text=For%20Native%20tribes%2C%20the%20loss.living%20citizens%20of%20those%20tribes.](https://www.cherokeephoenix.org/news/native-people-demand-accountability-for-ancestral-remains/article_65476196-f684-11ed-8213-476f0f35431b.html#:~:text=For%20Native%20tribes%2C%20the%20loss.living%20citizens%20of%20those%20tribes.)

<sup>154</sup> See Willard *supra* note 104.

<sup>155</sup> *Id.*; the Navajo, among other tribes, fear the ghosts of the deceased as they are believed to resent the living.

<sup>156</sup> *Id.*; Rituals can include cremation, mortuary poles (a totem pole used to keep tribal members' ashes or remains), tree burials (similar to Tibetan sky burials, the deceased's body is placed on a platform to be closer to the sky and consumed by animals), and traditional earth burials).

<sup>157</sup> *Id.*

<sup>158</sup> Donna Augustine, Wabanaki Elder. Hudetz *supra* note 123.

<sup>159</sup> See generally Asia Fields et. al, *The Repatriation Project: The Delayed Return of Native Remains*, PROPUBLICA (Feb. 21, 2024) <https://www.propublica.org/series/the-repatriation-project>.

court of public opinion hastened efforts.<sup>160</sup> Riding this wave, the Department of the Interior announced their proposed changes and sought feedback from all communities impacted by NAGPRA.<sup>161</sup> After a lengthy comment period, a new NAGPRA regulation scheme was born: one that was easy to follow, broke elements down, and gave institutions no excuse for noncompliance.<sup>162</sup>

*i. NAGPRA's Prior Ineffectiveness*

*"It's immoral, it's hypocritical, and it has to stop."*<sup>163</sup>

There have been undeniable leaps and bounds in the repatriation process due to NAGPRA. Since 1990, there have been more than 213,000 ancestors and 2.8 million associated funerary objects reported under the Act, with 55% and 76% completing the NAGPRA process, respectively.<sup>164</sup> The National NAGPRA Program, as conducted by the National Park Service, reports that since NAGPRA's inception, more than 50% of reported Native American ancestors have completed the NAGPRA process,<sup>165</sup> over 2 million associated funerary objects have transferred, and more than 358,000 unassociated funerary objects have been repatriated, along with another 31,264 other cultural items.<sup>166</sup> As NAGPRA has become more settled law, it has led to increased activity; in 2023 alone, the number of ancestors that completed the NAGPRA process grew by roughly 6%, and available grant funds for the NAGPRA process increased to \$3.4 million.<sup>167</sup> There were also 446 notices published in the Federal Register, 13 letters alleging failure to comply with NAGPRA received.<sup>168</sup> A large part of the success in repatriation is due to a 2010 rule change within NAGPRA, which allows tribes to request consultation on culturally unidentifiable human remains and associated funerary objects.<sup>169</sup>

An additional reason for success was ProPublica's *Repatriation Project* led by Asia Fields, Mary Hudetz, Logan Jaffee, and Ash Ngu, which

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<sup>160</sup> *Id.*

<sup>161</sup> See 88 Fed. Reg. 86,452 *supra* note 12.

<sup>162</sup> *Id.*

<sup>163</sup> Brian Schatz, Hawaiian Senator and Chair for the Senate Committee on Indian Affairs. Hudetz, *supra* note 9.

<sup>164</sup> Logan Jaffe, Mary Hudetz, & Ash Ngu, *Dozens of Museum and Universities Pledge to Return Native American Remains. Few Have Funded the Effort.*, PROPUBLICA (March 15, 2023, 5:00 A.M.),

<https://www.propublica.org/article/museums-universities-pledge-to-return-native-american-remains>; as of Nov 2023.

<sup>165</sup> DEPT. OF THE INT., NAT'L PARKS SERVICE, Fiscal Year 2023 Rep. (Sept. 30, 2023); this number is now nearly 117,000 as of November 2023.

<sup>166</sup> *Id.*

<sup>167</sup>

*Id.*;

See

[https://public.tableau.com/app/profile/nationalnagpra/viz/2023NativeAmericanGravesProtectionandRepatriationAct/1\\_Reported](https://public.tableau.com/app/profile/nationalnagpra/viz/2023NativeAmericanGravesProtectionandRepatriationAct/1_Reported) for updated but unreported figures from 2023.

<sup>168</sup> See U.S. DEPT. OF THE INTERIOR *supra* note 117.

<sup>169</sup> 75 C.F.R. 12378 (2010).

made 2023 a banner year for repatriation.<sup>170</sup> The project, launched in early 2023, covered topics ranging from the Dickson Mounds Museum in Illinois,<sup>171</sup> to a University of California, Berkeley Professor who taught with Native American ancestors,<sup>172</sup> the resistance of Harvard to repatriation requests by a local tribe,<sup>173</sup> and other stories, all equally tragic to read. The impact of their reporting has led to dozens of museums and universities pledging to return Native American ancestors,<sup>174</sup> museums scrambling to remove Native American artifacts and ancestors in the wake of the regulation change,<sup>175</sup> and United States Senators to take notice of the NAGPRA crises altogether.<sup>176</sup> It seems unlikely that without these authors' undertakings that NAGPRA would have garnered so much national attention. Hudetz, an Apsáalooke,<sup>177</sup> articulates the call that many other Native activists and journalists have felt when taking this issue upon their shoulders: “How could I write about this issue, I often asked myself. But how could I not, given that it has lingered far longer than Congress intended...”<sup>178</sup> In cases like these it is apparent that the indigenous voices that sway the court of public opinion, often at their own personal and emotional expense, are the ones creating the space where changes are made.

For example, UC Berkeley used to be the most egregious offender of NAGPRA, holding over 9,000 Native American ancestors before 2023.<sup>179</sup> However, on October 31st, 2023, UC Berkeley filed a Notice of Inventory Completion within the Federal Register where they committed to repatriating 4,440 ancestors and nearly 25,000 artifacts excavated from burial sites across the San Francisco Bay Area.<sup>180</sup> This effort from UC Berkeley is one of many pledges made in 2023 from federally-funded entities that they would return Native American ancestors.<sup>181</sup> The University of Kentucky’s William S. Webb Museum of Anthropology was

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<sup>170</sup> Fields et al., *supra* note 159. This project was the backbone of this paper, and I am in perpetual gratitude to Asia Fields, Mary Hudetz, Logan Jaffe and Ash Ngu for their efforts. This paper, and NAGPRA itself, would not be the same without their reporting. I highly encourage anyone interested in this subject to read into the series.

<sup>171</sup> Logan Jaffe, *How a Tourist Attraction Displaying the Open Graves of Native Americans Became a State-Run Museum*, PROPUBLICA (Feb. 9, 2023), <https://www.propublica.org/article/dickson-mounds-museum-history>.

<sup>172</sup> Hudetz & Brewer, *supra* note 16.

<sup>173</sup> Hudetz, *supra* note 123.

<sup>174</sup> Jaffe, Hudetz & Ngu, *supra* note 164.

<sup>175</sup> Mary Hudetz & Logan Jaffe, *Some Museums Scrambled to Remove Native American Items From Display. These Museums Didn’t Need To.*, PROPUBLICA (Feb. 21, 2024, 5:00 A.M.), <https://www.propublica.org/article/why-museum-of-us-history-colorado-didnt-scramble-meet-new-repatriation-rules>.

<sup>176</sup> Hudetz, *supra* note 9.

<sup>177</sup> Hudetz, *supra* note 124. Otherwise known as a member of the Crow Tribe in Montana.

<sup>178</sup> *Id.*

<sup>179</sup> Mary Hudetz, *UC Berkeley Takes Significant Step to Repatriate 4,400 Native American Human Remains*, PROPUBLICA (Nov. 2, 2024) <https://www.propublica.org/article/berkeley-steps-to-largest-repatriation>.

<sup>180</sup> Fed. Reg., *Notice of Inventory Completion: University of California, Berkeley, Berkeley, California (National Park Service Notice)*, 88:74508, p. 74508 (Oct. 31, 2023).

<sup>181</sup> Jaffe et al., *supra* note 164.

another, which announced it would commit nearly \$900,000 and hire three new staff members over the next three years to aid in the repatriation effort; additionally determining that 138 sets of ancestors in their possession could repatriate to tribes in Oklahoma and Missouri.<sup>182</sup> The Tennessee Valley Authority (TVA), another well-known NAGPRA violator, reported to the Federal Register that it will enable the repatriation of nearly 5,000 Native American ancestors to tribal nations.<sup>183</sup> The announcement made news for not one but two reasons: it was not only a landmark step forward in repatriation efforts, but the TVA had only recorded around 3,500 remains to that point; there were an additional 1,500 ancestors, roughly, in TVA repositories at the University of Tennessee-Knoxville, the University of Kentucky, and the University of Alabama that were not previously reported under NAGPRA and thus violated federal law.<sup>184</sup>

Despite these successes, NAGPRA's enforcement was lacking. Since NAGPRA passed, there have been twenty-three allegations of violations made against museums and universities.<sup>185</sup> Of the twenty-three allegations, only *eleven* assessments have been made to date, totaling \$59,111.34.<sup>186</sup> The Assistant Secretary for Fish and Wildlife and Parks assessed the penalties and determined a penalty was not appropriate for seven of the allegations and entered into a settlement agreement with four others.<sup>187</sup> There are still sixty-three allegations that need to be determined, with the bulk of those allegations requiring further investigation before submission to the Assistant Secretary for Fish and Wildlife and Parks.<sup>188</sup> Of the over 600 federally-funded museums and institutions that hold Native American artifacts and ancestors, ten have roughly half of the 100,000 Native American ancestors in collections.<sup>189</sup> For reference, the Ohio History Connection, which holds a whopping collection of 7,000 Native American ancestors, has the worst NAGPRA compliance rate at 0%

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<sup>182</sup> "Notice of Inventory Completion: William S. Webb Museum of Anthropology, University of Kentucky, Lexington, KY (National Park Service Notice)". Federal Register 88:5912 (Jan. 30, 2023) p. 5910.

<sup>183</sup> "Notice of Inventory Completion: Tennessee Valley Authority, Knoxville, TN (National Park Service Notice)". Federal Register 88: 18578 (Mar. 29, 2023) p. 18578.

<sup>184</sup> Jaffe et al., *supra* note 164.

<sup>185</sup> DEPT. OF THE INT., NAT'L PARKS SERVICE *supra* note 165.

<sup>186</sup> *Id.*; as of September 30th, 2023. These assessments have an average fee of \$4,156.49 that is paid to the U.S. Treasury.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* Ten require further investigation, sixty-one are under review prior to submission to the Assistant Secretary, and three can be administratively closed.

<sup>189</sup> Hudetz, *supra* note 9. Exactly 632 institutions reported having Native American remains; 97,622 of those remains have not been made available to tribes; there are 613 tribes to which institutions have been made available as of November 2023. The institutions with the most Native American remains are: The Ohio History Connection (7,167), the Illinois State Museum (7,110), Harvard University (5,680), the University of California, Berkeley (4,959), Indiana University (4,838), the University of Tennessee, Knoxville (3,929), the University of Kentucky (3,807), the Department of the Interior (3,672), the University of Alabama (2,732), and the University of Arizona (2,624).

repatriated.<sup>190</sup> Though this practice of hoarding at the expense of Native Americans was once the norm, the actions of the Ohio History Connection now stand as the outdated outlier, with the tide turning in 2022.

### III. NAGPRA'S 2023 REGULATION CHANGE

*“Our people have always been involved in the protection of our ancestors and returning our ancestors from these different institutions.”*<sup>191</sup>

NAGPRA was passed with optimism but only led to disappointment. The poorly enforced penalty schemes, the burden placed on Tribes and NHO to initiate repatriation and disposition, and the lack of clear guidelines on how the process is supposed to operate left institutions and Federal agencies in a freeze state with little incentive to change.<sup>192</sup> In 2022, the Office of the Secretary of the Interior came to address these issues with a proposed rule change.<sup>193</sup> The new regulations announced the goal of clarifying and improving the processes for disposition and repatriation, and after a busy comment period, became final in December 2023.<sup>194</sup> One of the most beneficial changes to the regulations was a series of roadmaps providing institutions and Federal agencies a step-by-step guide to properly engage with repatriation and disposition procedures, allowing Tribes and NHOs to take the position of power through fielding requests instead of vice-versa.<sup>195</sup>

#### A. THE 2022 PROPOSED RULE AND PUBLIC COMMENT PERIOD

The Office of the Secretary of the Interior posted a proposed rule change on October 18, 2022, with the focus regarding the systematic process for disposition and repatriation of Native American ancestors, funerary objects, sacred objects, and objects of cultural patrimony.<sup>196</sup> The goal of the proposed regulations was to “clarify and improve upon the systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony.”<sup>197</sup> To achieve this goal, the proposed revisions included

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<sup>190</sup> Ash Ngu & Andrea Suozzo, *Does Your Local Museum or University Still Have Native American Remains?*, PROPUBLICA (Jan. 11, 2023) [Data updated from Nov. 29, 2023] <https://projects.propublica.org/repatriation-nagpra-database/>; the organization has returned 17 Native American remains.

<sup>191</sup> Charlene Nijmeh, Chairwoman of the Muwekma Ohlone Tribe. Hudetz, *supra* 179.

<sup>192</sup> See Hudetz, *supra* note 123.

<sup>193</sup> 43 C.F.R. §10.11 (2024).

<sup>194</sup> U.S. DEPT. OF THE INT., Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act (Dec. 6, 2023) <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves>.

<sup>195</sup> 43 C.F.R. § 10.1 (2024).

<sup>196</sup> U.S. DEPT. OF THE INT. *supra* note 194.

<sup>197</sup> *Id.*

describing the repatriation process in “accessible language with clear timelines and terms, reduce ambiguity, and improve efficiency in meeting the requirements.”<sup>198</sup> The revisions also emphasized “consultation in every step” and stated they would be deferring to “the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs.”<sup>199</sup> During the comment period, which was originally open from October 2022 to January 2023, the Department of the Interior noted it would be holding Tribal and Native Hawaiian consultation sessions, public listening sessions, and NAGPRA Review Committee meetings that would be open to the public.<sup>200</sup> After several requests for extensions to public comment, the period was kept open until January 31, 2023.

At the end of the comment period, there were a total of 206 submissions, with 181 individual submissions and 25 attachments as identified by the submitter.<sup>201</sup> Sources of comments included individual members of the public, Indian Tribes, museums, organizations, but interestingly, no NHOs.<sup>202</sup> The comments ranged in subject, from the changes to the definition of “affiliation” in relation to culture and geography, the role of Indian groups without Federal recognition, timelines, consent and consultation prior to scientific study, consultation roles, and more.<sup>203</sup> Notably, there were nearly 100 comments concerned about the burden and collection requirements created under these revisions, which echoes community concerns about the feasibility of these new regulations in the long run.<sup>204</sup>

## B. THE NEW REGULATIONS

The newly added purpose section of the NAGPRA regulations outlines the goals to restore and protect Native American artifacts and ancestors.<sup>205</sup> The Department of the Interior has outlined several major changes in a post of the Federal Register, including widening the acceptable criteria to establish a claim to an artifact or ancestor and the addition of easy-to-follow roadmaps.<sup>206</sup> The roadmaps outline every major process that must be followed within the regulations, including how to determine cultural affiliation, creating plans of action, disposition processes, and repatriation procedures.

### i. An Overview

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<sup>198</sup> 43 C.F.R. § 10.1 (2024).

<sup>199</sup> *Id.*

<sup>200</sup> *See* 88 Fed. Reg. 86,452 *supra* note 12 at I.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* *See* Fields et al., *supra* note 159.

<sup>205</sup> 43 C.F.R. § 10.1(a)(1) (2024).

<sup>206</sup> *See* 88 Fed. Reg. 86,452 *supra* note 12 at II.

The Act provides affected parties with systematic processes to protect and restore Native American ancestors,<sup>207</sup> funerary objects, sacred objects, and objects of cultural patrimony.<sup>208</sup> The aforementioned objects include items an ancestor may be buried with, ceremonial objects used by a traditional religious leader for a present-day practice, or an object with ongoing historical, traditional, or cultural importance to a Tribal group or NHOs, respectively.<sup>209</sup> The Act adds an option for lineal descendants, Indian Tribes, and NHOs to submit claims for disposition or requests for repatriation, but does not require it.<sup>210</sup>

#### a. Charting the Paths

For the first time in NAGPRA's history, there are clear step-by-step plans in place to guide museums and Federal agencies to do right by the Native American community, and they leave little room for excuses. There are seven roadmaps within the reissued regulations, covering every step from identification of artifacts and ancestors to reintering them.<sup>211</sup> These guidelines allow for Native American practices to take the reins, with oral tradition being included as a valid informational source to determine the origin of an artifact or remain, requiring consultation with stakeholders like landowners and lineal descendants when making a plan to excavate, and redefining the meaning of "possession" to change the way museums view their artifacts.<sup>212</sup> These roadmaps make the repatriation process accessible, easy to follow, but most importantly, it makes the process clear. Noncompliance in the face of such black and white regulations will be risky, with penalties starting in the civil realm, but with the possibility of criminal penalties if an institution sells or profits from Native American artifacts or ancestors obtained in violation of NAGPRA.<sup>213</sup>

#### b. Determining Cultural Affiliations

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<sup>207</sup> Native American and Native Hawaiian remains will be referred to as *ancestors* for the rest of this paper to show respect for the descendants.

<sup>208</sup> 43 C.F.R. § 10.1(a) (2024).

<sup>209</sup> *See id.* at § 10.2 (the definition section of these regulations outlines specific examples for each type of object as well).

<sup>210</sup> *Id.* at § 10.1(b)(2). A claim for disposition is to return the remains of an ancestor so they can be properly buried, while a request for repatriation is to return the ancestor or artifact to the rightful owner.

<sup>211</sup> *Id.* at § 10.3-§10.10(k).

<sup>212</sup> *Id.* at §10.2. Defines "possession" or "control" as:

"having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item. A museum or Federal agency may have possession or control regardless of the physical location of the object or item. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency."

<sup>213</sup> NAT'L. PARK SERV., *Enforcement*  
<https://www.nps.gov/subjects/nagpra/enforcement.htm> (last visited Feb. 10, 2024).

One of the most important changes to the regulations is the broadening of acceptable criteria to establish a cultural connection to an artifact or ancestor, which allows Tribes and NHOs' evidence to be weighed equally with scientists'. The new regulations emphasize that determining a cultural connection "does not require exhaustive studies...[and] cultural affiliation is not precluded solely because of reasonable gaps in the information available."<sup>214</sup> This roadmap creates a three-step plan for institutions to determine affiliations if unknown: collect information available, identify required criteria, and make a determination of affiliation.<sup>215</sup> The first step requires the relevant institution to collect information regarding the ancestor or artifacts and supplement this knowledge through consulting Tribes or NHOs. The most monumental shift this roadmap ushers in are the broadened acceptable types of knowledge, including non-Eurocentric sources like oral tradition, folklore, and linguistic ties.<sup>216</sup> Once information has been gathered, the institution must make one of three determinations: there is one or more earlier group connected to this artifact or remain, there is one or more Tribe or NHO connected, or there is a relationship of shared group identity between said earlier group and the relevant Tribe or NHO that can be reasonably traced through time.<sup>217</sup> Lastly, the relevant institution will make a written record of its determination based on these findings, concluding that: cultural affiliation is identifiable, is *reasonably* identifiable based on where the artifact or remains were found or its acquisition history, or it cannot clearly or reasonably be identified.<sup>218</sup>

### c. Plans of Action

The next section requires Tribes and NHOs to be consulted in anticipation of archeological digs, giving them a proactive place in the process instead of a reactive one. The next section outlines the process of permitting, excavating, and allowing the disposition of artifacts and ancestors found on Federal or Tribal lands.<sup>219</sup> Prior to any activity likely to result in a discovery or excavation, there must be a plan of action created that outlines the evidence as to why that area is of interest.<sup>220</sup> The requesting

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<sup>214</sup> 43 C.F.R. § 10.3 (2024).

<sup>215</sup> *Id.* There is also an advice section in § 10.3(d)-(e) on how to grapple with joint dispositions or repatriations and competing claims or requests. First, with joint dispositions or repatriations, as long as the groups submit requests that identify all joint claimants or requestors, the request will be treated as a single claim and is allowed. Second, with competing claims or requests, the relevant institution must determine which requesting group has the closest cultural affiliation. Both groups are allowed to submit information to show by a preponderance of the evidence that they have a stronger relationship.

<sup>216</sup> *Id.* at § 10.3(1).

<sup>217</sup> *Id.* at § 10.3(b)(1)(i)-(iii).

<sup>218</sup> *Id.* at § 10.3(c)(1)(i)-(iii).

<sup>219</sup> *Id.* at § 10.4.

<sup>220</sup> *Id.* at § 10.4(1)(i)-(ii). Invitations must be in writing and include a description of the planned activity or discovery, its geographical location by county and state, the names of consulting parties, and a proposed timeline for and method for consultation.

Federal agency or DHHL must reach out to these parties with a description of the planned activity and timeline.<sup>221</sup> Once the potentially affiliated parties have responded and approved, the Federal Agency or DHHL will create a comprehensive agreement for all stakeholders and must be consented to by a majority of them.<sup>222</sup> If this happens, the Federal agency or DHHL will sign the plan of action and the activity may proceed.<sup>223</sup>

#### d. Disposition Procedures and Unclaimed Ancestors & Artifacts

These sections create a straightforward process for museums to follow when it comes to determining what to do with their unclaimed collection portions. Disposition procedures are outlined under §10.7, which requires that within a year of excavation from Federal or Tribal lands that the appropriate official must identify who has priority for disposition for artifacts or ancestors.<sup>224</sup> The priority for disposition is: 1) the known lineal descendant for artifacts and associated funerary objects;<sup>225</sup> 2) the Indian tribe or NHO from whose Tribal lands the ancestor or cultural items were removed; 3) the Indian Tribe or NHO with the closest cultural affiliation; 4) On Federal land recognized by aboriginal land of a Tribe, that which has the strongest relationship to the artifacts or ancestor;<sup>226</sup> 5) Any Indian Tribe or NHO that requests transfer of unclaimed ancestors or artifacts.<sup>227</sup> In order to allow for these dispositions, the possessing or custodial institutions must submit lists of what is unclaimed.<sup>228</sup> If the ancestor or remain has been published to the Federal Register with no valid claimant identified or gone unclaimed for a year, the possessing or custodial institution may submit a notice for proposed transfer or reinterment to the Federal Register.<sup>229</sup> If there are no objections, no earlier than thirty days and no later than ninety days the ancestors and artifacts must be transferred or reinterred.<sup>230</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at § 10.4(c).

<sup>223</sup> *Id.* at § 10.4(d). Under §10.4(d), a Federal agency or DHHL is allowed to coordinate its responsibility under this subpart with other relevant Federal laws (like ARPA, for example), but this does not relieve the responsibility for compliance with the NHPA.

<sup>224</sup> *Id.* at § 10.7.

<sup>225</sup> *See also id.* at § 10.1 (a living descendant can trace ancestry to known individuals whose remains are subject to this part through traditional kinship or common-law systems or can show a living person ancestry).

<sup>226</sup> *Id.* at § 10.7(a)(4). This is either i) the Indian Tribe recognized as aboriginally occupying the geographical location where the human remains or cultural items were removed; or ii) a different Indian Tribe who shows a preponderance of the evidence a stronger relationship to the human remains or cultural items; or fits within number five of this list.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at § 10.7(d). These lists must be submitted no later than January 5, 2025 and submit updated lists by December 31 of each year per this section.

<sup>229</sup> *Id.* at § 10.7(d)(1)-(3). The publishing institution must say why no valid claimant has been found, and at any time before the artifacts and ancestors are reinterred, a Tribe or NHO may receive a claim for disposition. If it applies, the current process will cease.

<sup>230</sup> *Id.* at § 10.7(d)(4). Once this occurs, the transfer is complete.

e. Repatriation and Transferring or Reinterring Ancestors & Artifacts

The final roadmaps illustrate the step-by-step process of an actual repatriation all the way through reinterring ancestors. Federal agencies and museums must lay crucial groundwork in order to repatriate the artifacts and ancestors within their collections.<sup>231</sup> They must first create a summary of their holdings and collections or an itemized list of ancestors,<sup>232</sup> initiate consultation and respond to any consulting party.<sup>233</sup> After the summary has been compiled, any valid claimant may submit a request for repatriation.<sup>234</sup> The Federal agency or museum will respond, stating the result of the request.<sup>235</sup> If criteria was met, a notice of intended repatriation will be submitted to the Federal Register, and repatriation will take place between thirty and ninety days later unless there is a stay of repatriation.<sup>236</sup> There may be a stay of repatriation if a court has enjoined the repatriation, there are competing requests for repatriation, a Federal agency or museum rules the artifact is “indispensable for completion of a specific scientific study”.<sup>237</sup>

The process of transferring or reinterring ancestors or associated funerary objects is fairly brief. First, the museum or Federal agency will agree to transfer the artifacts or ancestors to the appropriate Tribe or NHO or decide to reinter in according to applicable laws and policies.<sup>238</sup> Next, the Federal agency or museum will submit a notice of proposed transfer or

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<sup>231</sup> Within this section, the processes for artifacts and ancestors are the same, so the two have been combined.

<sup>232</sup> *Id.* at § 10.9(a)(1); *id.* § 10.10(a). The summary must include: 1) the estimated number and a general description of the holding or collection, including any cultural items; 2) the geographical location by county or State where these artifacts and ancestors are from 3) the acquisition history of the artifacts and ancestors; 4) any known lineal descendants, Tribes or NHOs with cultural affiliation; and 5) the presence of any potentially hazardous substances used to treat any of the artifacts or ancestors.

<sup>233</sup> *Id.* at § 10.9(b)-(c); *id.* at § 10.10(b)-(c). No later than thirty days after completing the summary, consulting parties must be identified and contacted. Consultation will continue until the museum or Federal agency sends a repatriation statement for that object to a valid claimant.

<sup>234</sup> *Id.* at § 10.9(d); *id.* § 10.10(d). Any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony. Per the section, these requests must be for an artifact that meets its relevant definition (a request for a sacred object actually applies to a sacred object), and include information to support a finding that the museum or Federal agency does not have a right of possession.

<sup>235</sup> *Id.* at § 10.9(e); *id.* at § 10.10(e). The requestor will have: met the criteria for repatriation, met the criteria but a Federal agency or museum has asserted a right of possession, did not meet the criteria and why, or that there are competing requests for the artifact or ancestor.

<sup>236</sup> *Id.* at § 10.9(f)-(h); *id.* at § 10.10(f)-(h).

<sup>237</sup> *Id.* at § 10.9(j); *id.* at § 10.10(j). This study must be “of major benefit to the people of the United States”.

<sup>238</sup> *Id.* at § 10.10(k)(1). Prior to either of these taking place, a request for repatriation of the remains or funerary objects may be received, and if so, the process taking place will pause to determine the validity of the request.

reinterment to the Federal Register.<sup>239</sup> Lastly, the ancestors or associated funerary objects will be reinterred or transferred.<sup>240</sup>

#### IV. SPECIFIC CHANGES & SPECIAL PROBLEMS

*“The best way I can describe how we have found things is in the most inhumane way possible...just completely disregarded that these were once people.”<sup>241</sup>*

The Department of the Interior highlighted other major changes in a press release issued in early December 2023. Changes covered included how the new regulations strengthen the authority and role of Tribes and NHOs in the repatriation process by requiring deference to the Indigenous Knowledge of lineal descendants, Tribes, and NHOs.<sup>242</sup> One of the most notable changes highlighted in the press release but not the Federal Register summary was that the category of “culturally unidentifiable remains” was eliminated.<sup>243</sup> This landmark decision addresses one of the original regulation’s largest issues. For decades, institutions would classify items and ancestors as “culturally unidentifiable” in order to smack away NAGPRA’s hand upon their collections.<sup>244</sup> With this change, institutions will not be able to hide behind poor recordkeeping, reliance on the resistance to DNA testing to establish a biological link, or the systemic distrust of Native American oral tradition any longer. As long as at least one link is established through these newly broadened options, the artifact or remain in question is no longer culturally unidentifiable.<sup>245</sup>

With these changes come new problems the Department of the Interior is attempting to address. There has been substantial critiques on the feasibility of these goals, including whether the penalties provide enough

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<sup>239</sup> *Id.* at § 10.10(k)(2). This notice will include an abstract of all the relevant information about the decision, the number of individuals and associated funerary objects involved, how it was determined that there are no valid claimants to these artifacts and remains, and the names of all consulting parties.

<sup>240</sup> *Id.* at § 10.10(k)(3).

<sup>241</sup> Laine Lyons, Member of the Turtle Mountain Band of Chippewa Indians and employee of the UND Alumni Association and Foundation who assisted with the discovery of Native American remains on the campus. Graham Lee Brewer, *Search for missing Native artifacts led to the discovery of bodies stored in ‘the most inhumane way possible’*, NBC NEWS (Sept. 4, 2022) <https://www.nbcnews.com/news/us-news/search-missing-native-artifacts-led-discovery-bodies-stored-inhumane-w-rcna46151>.

<sup>242</sup> U.S. DEPT. OF THE INT. *supra* note 194.

<sup>243</sup> *Id.*

<sup>244</sup> See Hudetz & Ngu, *supra* note 123; see also Hudetz, *supra* note 28.

<sup>245</sup> 43 C.F.R. § 10.3(a)-(c) (2024). The regulations state:

“One or more of the following *equally relevant types of information* about human remains or cultural items may be made available: i) anthropological; ii) archeological; iii) biological; iv) folkloric; v) geographical; vi) historical; vii) kinship; viii) linguistic; ix) oral traditional; x) other relevant information or expert opinion, including Native American traditional knowledge.”

incentive for compliance, how historically-ignored, non-federally recognized tribes fit into this new scheme, if at all, and how the scandal-ridden higher educational system will be able to address their unique issues with these regulations

#### A. SPECIFIC CHANGES

According to the Department of the Interior, there are several major changes made to the standing NAGPRA regulations.<sup>246</sup> The most notable including changing the standard for what can qualify to be “culturally affiliated,”<sup>247</sup> including lowering of the prior standard from “preponderance of the evidence” to “clearly or reasonably identify” when determining cultural affiliation.<sup>248</sup> Next, the term “consultation” was revised to provide more instruction on goals and processes within the Consultation portion of the regulations, and in tandem with this is that the requirement for written requests to consult from Indian Tribes or NHOs has been removed.<sup>249</sup> Additionally, the regulations added a Duty of Care section, which requires free, prior, and informed consent “before any exhibition of, access to, or research on ancestors or cultural items.”<sup>250</sup> Fourth, the guidelines for possession have changed, delineating between possession and custodial institutions.<sup>251</sup> Lastly, the creation of the explicit requirement for deference to Tribes and NHOs puts them in the position of authority over their ancestors and artifacts for the first time in NAGPRA’s history.<sup>252</sup>

*i. Changing the Standard for “Culturally Unidentifiable Human Remains”*

*“The wolves [were] in charge of how to deal with the sheep.”<sup>253</sup>*

One of the most monumental changes that stems from the new regulations is the removal of the option to state that ancestors are “culturally unidentifiable”. Previously, this was the unambiguously steepest NAGPRA hurdle.<sup>254</sup> By placing the burden of proof on Tribes and NHOs and refusing to allowing culturally significant sources of information like oral tradition and folklore, many tribes were unable to meet the Eurocentric-standards required to reunite them with their related artefact or remain.<sup>255</sup>

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<sup>246</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at I.

<sup>247</sup> See 43 C.F.R. § 10.3(a)(1) (2024).

<sup>248</sup> See *id.* at § 10.3(c).

<sup>249</sup> *Id.* at § 10.2.

<sup>250</sup> *Id.* at § 10.1(D).

<sup>251</sup> *Id.* at § 10.1(d)(3).

<sup>252</sup> *Id.* at § 10.1(a)(3).

<sup>253</sup> Darrell Newell, Former Passamaquoddy Vice Chief. See generally, Fields et. al, *supra* note 159.

<sup>254</sup> See *id.*; see Hudetz *supra* note 28.

<sup>255</sup> *Id.*

The history of the label “culturally unidentifiable” is drenched in the pain of Tribes and NHOs who, in many cases, offered all the information they could to get their ancestors returned, but were denied on the grounds of insufficient evidence or because of the refusal to permit DNA testing, which is often against their religious practices.<sup>256</sup> Fortunately, the change in regulations provides the possibility to a happy ending to this tragic story; by widening the sources of “valid” informational sources to include oral tradition, folklore, kinship, linguistic, and less “hard science” type sources, Tribes and NHOs are put back in the driver’s seat when it comes to leading the repatriation process.<sup>257</sup>

a. The Status Prior to the Regulation Change

*“Institutions take advantage of it.”*<sup>258</sup>

Previously, if an item was culturally unidentifiable, the entity who holds the item would not have to repatriate it.<sup>259</sup> NAGPRA’s language made the right to repatriation legally enforceable provided the claimant had a cultural affiliation with the object, which meant the tribe claiming the item could prove they are federally recognized and they possessed a shared group identity with an identifiable earlier group that the ancestors represent.<sup>260</sup> The “group identity” portion was crucial and was one of the major contributors to why some institutions had not repatriated more items. If a group was not a “federally recognized Indian tribe or NHO,” institutions were not required to return ancestors or artifacts to them as the group in question has no legal claim.<sup>261</sup> The burden of proof lied with the tribe or organization requesting the item, which proved to be difficult if the recording was not considered sufficient by Western standards.<sup>262</sup>

This “substantial evidence” burden of proof was established in the landmark case *Bonnichsen et al. v. United States*, where thousands-year-old remains were found in Kennewick, Washington, in 1996.<sup>263</sup> A coalition of five tribes indigenous to the area filed a claim under NAGPRA to return their “collective ancestor,” and scientists filed suit in district court to enjoin the ancestor.<sup>264</sup> The federal district court held that the Secretary of the Interior erred in finding the ancestor was “Native American” for purposes of NAGPRA. The ruling from the Ninth Circuit stated that the skeleton was

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<sup>256</sup> *Id.*

<sup>257</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at I.

<sup>258</sup> Dr. Rae Gould, executive director of the Native American and Indigenous Studies Initiative at Brown University and a member of the Hassanamisco Band of Nipmucs of Massachusetts. Jaffe et al., *supra* note 1.

<sup>259</sup> 43 C.F.R. § 10.11 (1990).

<sup>260</sup> Tsosie, *supra* note 97.

<sup>261</sup> *Id.* at 817–18.

<sup>262</sup> See Jaffee et. al, (quoting Dr. Rae Gould, “One of the faults with the law” is that institutions, and not tribes, have the final say on whether their collections are considered culturally related to the tribes seeking repatriation).

<sup>263</sup> *Bonnichsen v. United States*, 367 F.3d 864, 869 (9th Cir. 2004).

<sup>264</sup> *Id.* at 871.

federal property,<sup>265</sup> and that it should be made available for scientific study.<sup>266</sup> Additionally, the court disagreed with the Secretary's interpretation of the Act that the ancestor was "indigenous" because they predated European contact and, therefore, "Native American" under NAGPRA as they came from federal land after 1990.<sup>267</sup> The new ruling outlined that ancestors are considered Native American if they are "of, or relating to a tribe, people, or culture that is indigenous to the United States," and that this definition can only apply if the claimant tribe can show a "special significant genetic or cultural relationship to the remains."<sup>268</sup>

This issue was further illustrated in *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management*, when a Native American ancestor, called the Spirit Cave Man, was discovered in 1940 and placed in the storage of Nevada State Museum were disclosed as part of the Museum's NAGPRA inventory in 1990.<sup>269</sup> The Fallon Paiute Shoshone tribe asserted a NAGPRA claim for the ancestor, asserting the land the Spirit Cave Man resided in was traditionally tribal, and the burial site had cultural materials that could serve as further proof of cultural affiliation.<sup>270</sup> The Bureau of Land Management (BLM) solicited proof of cultural affiliation, and despite the tribe's submittal of "a voluminous set of documents substantiating the claim of cultural affiliation," because they did not consent to DNA testing on cultural grounds, the BLM concluded there was not "sufficient evidence" to affiliate them.<sup>271</sup> Because many tribes are resistant to DNA testing on cultural or religious grounds, the inability to find "valid proof" of cultural affiliation is prevalent within NAGPRA repatriation efforts.<sup>272</sup>

The validity of something deemed "culturally identifiable" heavily depended on the accurate and effective recording attached to the artifact or ancestor. These records create space for institutions to abuse NAGPRA heavily.<sup>273</sup> Western institutions used the loophole to disempower oral tradition, they also exploited their own lack of systematic recording of their archival collections. For example, in 2000, both the American Museum of Natural History and Harvard, after each taking a decade to inventory their collections, reported that most of their Native American collections may not

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<sup>265</sup> *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1122 n.10 (D. Or. 2002) (The bones were considered property of the Bureau of Land Management).

<sup>266</sup> *Bonnichsen*, 367 F. 3d at 880 (This finding was upheld by the 9th Circuit Court of Appeals).

<sup>267</sup> *Id.* at 872.

<sup>268</sup> *Id.* at 879.

<sup>269</sup> *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F.Supp. 2d 1207, 1209 (D. Nev. 2006).

<sup>270</sup> *Id.* at 1210.

<sup>271</sup> *Id.* at 1210–12.

<sup>272</sup> Erin Blakemore, *Why the Navajo Nation Banned Genetic Research*, HISTORY.COM, (Jul. 11, 2023), <https://www.history.com/news/why-the-navajo-nation-banned-genetic-research>; Hudetz *supra* note 28; these cases illustrate that in addition to religious grounds, Native Americans have a great (and valid) distrust of those who use their DNA. In many cases, DNA testing has destroyed remains, been used for phrenology, or to prove there are not valid ties to a geographic area.

<sup>273</sup> *Id.*

have cultural affiliation due to lack of information to make repatriation decisions.<sup>274</sup> The practice of exploiting the “culturally unidentifiable” loophole was familiar: the Ohio History Connection and the University of Tennessee, Knoxville, managed to escape the repatriation process by categorizing everything in their collections that might be subject to the law as “culturally unidentifiable” as well.<sup>275</sup>

#### b. How the Regulations Change This

The creation of a process to determine cultural affiliation and widening the sources of information accepted as “equally relevant” allows Tribes and NHOs to have a say in what truly belongs to them. Now, the valid evidence to determine ancestry and proper possession is not limited to DNA testing or another traditionally Western litmus; admissible sources can come in the form of folklore, kinship, linguistic, oral traditional, or “other relevant information or expert opinion, including Native American traditional knowledge.”<sup>276</sup> The regulations include that only one type of information is necessary to determine cultural information if no other relevant information is available.<sup>277</sup> After collecting the accessible information, the possessing entity *must* make a determination of cultural affiliation, and if it cannot be “clearly or reasonably identified” the entity will still have to explain why this is the case.<sup>278</sup>

This process puts Tribes and NHOs at the forefront of the repatriation process and legitimizes the claims they have to artifacts and ancestors. Repatriation attempts have been squashed for years due to the lack of evidence, and this will open the floodgates of tribes able to claim what is rightfully theirs. Historically, tribal evidence has been ruled insufficient or even ignored by the entities receiving their requests.<sup>279</sup> The new regulations create a promising future where tribes can forego this suffering with newly discovered items or with newly filed complaints, but that does not undo the ongoing suffering of complaints from the recent past, or even more distant past. Both the tribes in *Bonnichsen* and *Fallon Paiute-Shoshone Tribes* would likely have successful repatriation claims within their first attempts. In *Bonnichsen*, with the tribes’ proof of a “collective ancestor” likely falling under the geographical, anthropological, and oral traditional sources would be considered enough information under new

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<sup>274</sup> See also *Id.* (a further example is that the American Museum of Natural History declared an entire portion of its collection from Chaco Canyon culturally unidentifiable, despite the area being the well-known homeland of the Pueblo Indian peoples of New Mexico, the Hopi Indians of Arizona, and the Navajo Indians of the Southwest. To date, the museum has not revised its decision).

<sup>275</sup> Jaffe et al., *supra* note 1.

<sup>276</sup> 43 C.F.R. § 10.3(a)(1) (2024); The equally relevant types of information about human remains or cultural items include: anthropological, archeological, biological, folkloric, geographical, historical, kinship, linguistic, oral traditional, or other relevant information or expert opinion, including Native American traditional knowledge.

<sup>277</sup> *Id.* at § 10.3(b) (2024).

<sup>278</sup> *Id.* at § 10.3(c).

<sup>279</sup> See Fields et al. *supra* note 159.

regulations. With *Fallon Paiute*, their “voluminous set of documents” likely would have supplied all relevant valid informational sources to qualify for a repatriation claim.

ii. *Communication with Tribes*

*“It is time for institutions to prioritize this work, in both the allocation of resources and the ethical commitment to genuinely engage in consultation with Native Nations.”*<sup>280</sup>

Prior to the regulation change, there was truly no obligation for agencies and museums to consult with Tribes or NHOs when it came to repatriation.<sup>281</sup> The onus of communication was on Tribes and NHOs to reach out to these institutions, often with extensive information regarding their ties to the artifacts and ancestors they wanted repatriated, in order to facilitate discussion.<sup>282</sup> Due to this, institutions were able to hold on to artifacts and ancestors essentially until they faced pressure, whether from Tribes, the court of public opinion, or internally, to make a change.<sup>283</sup> This, paired with the low likelihood of facing any sort of penalty from the NAGPRA Committee created a disconnected line of communication between Tribes and NHOs and the institutions that stored their ancestors and artifacts, and led to few incentives to engage in the financial undertaking of repatriation.<sup>284</sup> The new regulations address this in several ways, with the key thread running through the changes is this: prioritize the expertise and experience of Tribes and NHOs.<sup>285</sup> By placing the burden of NAGPRA compliance with Federal agencies and museums, it not only saves these groups time and money, but allows *them* to be the authorities in the matter, not the other way around.

a. Free, Prior, and Informed Consent before Exhibitions and Research

*“The halls we are closing are artifacts of an era when museums such as ours did not respect the values, perspectives and indeed shared humanity of Indigenous peoples...actions that may feel sudden to some may seem long overdue to others.”*<sup>286</sup>

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<sup>280</sup> Comment from the 2022 Proposed NAGPRA Regulation Changes. *Supra* note 12 at NPS 2022-0004-0115.

<sup>281</sup> See Jaffe et al., *supra* note 1; see Hudetz *supra* note 28; Hudetz *supra* note 123.

<sup>282</sup> See Bonnichsen, note 263.

<sup>283</sup> See Jaffe et. al., *supra* note 1; see Hudetz, *supra* note 28; see Hudetz *supra* note 281.

<sup>284</sup> *Id.*

<sup>285</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at I..

<sup>286</sup> Julia Jacobs & Zachary Small, *Leading Museums Remove Native Displays Amid New Federal Rules*, THE N.Y. TIMES (Jan. 26, 2024) <https://www.nytimes.com/2024/01/26/arts/design/american-museum-of-natural-history-nagpra.html>

(1) The Status Prior to the Regulation Change

The culture in these museum and agency settings has been clear for the past few centuries: if something or someone is in their collection, they can treat them as they please. This has set a heartless precedent that allows for Federal agencies and museums to treat the artifacts and ancestors within their collections as merely items, leading to practices of teaching with ancestors, DNA testing without consent, and resisting repatriation requests.<sup>287</sup> With no oversight, institutions have abused their collections to the detriment of the living relatives of these ancestors. At the University of Utah, an anthropology professor used National Science Foundation funds to determine the timing of prevalence of certain cultivations within Native American diets.<sup>288</sup> The researcher, Joan Brenner Coltrain, claimed this research would help provide a precise date of when individuals were living, and therefore lead to repatriation to descendant tribes.<sup>289</sup> However, the DNA analysis destroyed portions of ancestors, and inspired even more destructive research on ancestors by other scientists, who also received federal funding.<sup>290</sup> Because these ancestors “belonged” to the institutions, consent was not sought from tribes. Navajo Nation citizen and assistant professor at Arizona State University Krystal Tsosie summed up the issue succinctly: “There’s this perverse sense of ownership, that ‘these are our samples.’ And ‘You know, we’re protecting it for the good of research.’”<sup>291</sup>

(2) How the Regulations Change This

Undeniably, the most visible change within these regulations is the requirement that Federal agencies and museums obtain “free, prior, and informed consent” from lineal descendants, Tribes, or NHOs, before allowing exhibition, access to, or research on artifacts and ancestors.<sup>292</sup> In response to the implementation of these regulations, museums across the country are removing and covering their Native displays to avoid noncompliance penalties under these new rules.<sup>293</sup> These major museums, which include the American Museum of Natural History,<sup>294</sup> the Field

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<sup>287</sup> See Hudetz, *supra* note 28; see Hudetz & Brewer, *supra* note 16.

<sup>288</sup> Hudetz, *supra* note 28.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*; Federal agencies have awarded over \$15 million to universities for this kind of research after NAGPRA’s passage. These practices would now be in violation of NAGPRA.

<sup>291</sup> *Id.*

<sup>292</sup> 43 C.F.R. § 10.1(d)(3) (2024) (Research includes, but is not limited to, any study, analysis, examination, or other means of acquiring or preserving information about human remains or cultural items. Research of any kind on human remains or cultural items is not required by the Act or these regulations).

<sup>293</sup> Jacobs & Small, *supra* note 286; see Jacobs & Small, *supra* note 10.

<sup>294</sup> *Id.*

Museum,<sup>295</sup> and the Metropolitan Museum of Art,<sup>296</sup> are the crest of a wave for true change. These regulations address these concerns twofold: ancestors will be taken down from display and have the opportunity to rest instead of existing as spectacles, and ancestors will not be subject to testing, which is often against the religious wishes of Tribes and NHOs.<sup>297</sup>

An especially notable statement is from the Peabody Museum of Archaeology, where representatives have stated that their staff are in the process of removing “all funerary belongings and likely funerary belongings” from display.<sup>298</sup> The Museum, which has already returned the remains of over 4,000 ancestors and more than 10,000 funerary objects, has also pledged to provide travel funding for tribal representatives to come and physically take possession of artifacts and ancestors.<sup>299</sup> Although the funds are appreciated by some, others note that it is not enough when staring at the painful history.<sup>300</sup> Rosita Worl, received her doctorate in anthropology from Harvard and serves as the president of a nonprofit supporting Indigenous cultures in Alaska, states that this work is a “good gesture” but that the work required to initiate a repatriation claim requires more than a simple stipend.<sup>301</sup>

The Department of the Interior discusses that this new regulation will allow for “native Americans [to have a] greater ability to negotiate” after a history of “museums and institutions which have consistently ignored the requests of native Americans.”<sup>302</sup> The regulations provide peace of mind to many Tribal and NHO leaders, as there is now a binding guarantee that these regulations will “eliminate the longstanding policy of scientific research on future ancestors found.”<sup>303</sup> This new regulation will put bargaining chips back in Tribes and NHOs’ hands, as many items eligible for repatriation will be of “considerable scientific value,” and “repatriation is not the only alternative.”

The language defines research within this act to ensure it also equates with the phrase “scientific study”, and the Department of the

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<sup>295</sup> *Field Museum Alters Cultural Galleries in Response to Updated Federal Regulations*, Field Museum, <https://www.fieldmuseum.org/about/press/field-museum-alters-cultural-galleries-in-response-to-updated-federal-regulations> (last visited Jan 25, 2024).

<sup>296</sup> Jacobs & Small, *supra* note 286.

<sup>297</sup> *Supra* note 104.

<sup>298</sup> Lydialyle Gibson, *Peabody Museum Removes Native American Funerary Objects*, HARV. MAG. (Jan. 30, 2024) <https://www.harvardmagazine.com/2024/01/peabody-museum-removes-native-american-funerary-objects#:~:text=The%20Peabody%20Museum%20of%20Archaeology,and%20obtaining%20consent%20from%20tribes>; (The university first apologized for their indigenous holdings in 2021, as referenced in the story about the Wabanaki tribe. The university has been attempting to make amends since the discovery of the remains of fifteen possibly enslaved people within its collection).

<sup>299</sup> *Id.*

<sup>300</sup> Jacobs & Small, *supra* note 286.

<sup>301</sup> *Id.*; Worl is the President of the Sealaska Heritage Institute, a nonprofit founded in 1980 “to perpetuate and enhance Tlingit, Haida and Tsimshian cultures of Southeast Alaska.

<sup>302</sup> 136 Cong. Rec. 35678.

<sup>303</sup> *Id.*

Interior goes on to discuss that research or scientific studies that could be used as stays of repatriation in this act are no longer required to determine cultural affiliation.<sup>304</sup> The Department notes the Act does not specifically prohibit museums or Federal agencies from conducting scientific studies but does “clearly state” that these studies are not authorized by the act.<sup>305</sup> Additionally, the act *does* allow for the delay of repatriation for scientific study, but not for the prevention, with the only exception being through providing a “right of possession” which will be discussed in the following section.<sup>306</sup> Changing the standard to requiring special permission for testing will not only respect the ancestors whose ancestors come into the care of institutions and museums but also provide peace of mind for the living descendants.

iii. *The Discussion of Possession*

*“While the actions we are taking this week may seem sudden, they reflect a growing urgency among all museums to change their relationships to, and representation of, Indigenous cultures.”*<sup>307</sup>

a. The Status Prior to the Regulation Change

The culture of possession prior to the regulation change was simple. If an institution had an ancestor or artifact, they proceeded however they would like, often with no repercussions. This is illustrated in the struggles of the Wabanaki tribal nations, who were repeatedly denied repatriation requests from Harvard University’s Peabody Museum of Archaeology and Ethnology.<sup>308</sup> In 2013, the group created a “deeply researched” report for the University to encourage the repatriation of the remains of ancestors disinterred from an area near Maine’s Blue Hill Bay, which included histories of their presence in the region and closely held stories passed down for generations.<sup>309</sup> Despite the elders’ and leaders’ efforts, Harvard not only declined but impeded the repatriation of other ancestors from the same area in Maine held by a Massachusetts preparatory school.<sup>310</sup> The preparatory school’s museum director met with the tribes and decided there was “no question about” repatriating, but received pressure from the director of the Harvard Museum for two years to reverse his decision. The Harvard director opposed the repatriation on the grounds that ancestors they had been DNA testing on provided information about the potential that these ancestors were

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<sup>304</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at I(B).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*; 25 U.S.C. 3005(c)

<sup>307</sup> Sean Decatur, President of the American Museum of Natural History. See Duster & Chavez *supra* note 8.

<sup>308</sup> Hudetz, *supra* note 123; the Wabanaki tribal nations are an alliance of the Penobscot, Passamaquoddy, Maliseet Mi’kmaq, and Abenaki and are located from Newfoundland Canada to mid-Maine.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

genetically linked to Indigenous people in North and South America, and shared this news with the preparatory school's director to sway him to stop the repatriation.<sup>311</sup> Prior to this information's release, Harvard had ensured the Wabanaki that they did not allow destructive DNA testing without tribal consent. Eventually, capitalizing on an "institutional reckoning" in 2019, the tribe made a final request to Harvard for repatriation that had been stalled until 2021, when they were finally able to rebury their ancestors.<sup>312</sup>

#### b. How the Regulations Change This

The regulations change the definition of possession to prove that merely having custody of an item within a collection is not sufficient to establish valid possession or control, and therefore treat the sample as they please.<sup>313</sup> Custody of an item through a loan, lease license, bailment or other similar arrangement is not enough to properly constitute possession.<sup>314</sup> This authority only resides with the loaning, licensing, bailing or otherwise transferring entity.<sup>315</sup> What this means is that only the entity that has the authority to loan or lease an item, for example, has actual possession over this item. So, for example, if the Peabody Museum loans an item to the Smithsonian, even though the item is presently with the Smithsonian, Harvard still has possession of it.

However, even if a museum only has custody, it is required under the new regulations that they report this holding.<sup>316</sup> The regulations differ depending on who the rightful owner of any given artifact or remain may be.<sup>317</sup> If the owner is likely a Federal agency, the institution must report a summary of any likely Native American artifacts and ancestors to both the Federal agency and the Manager of the National NAGPRA Program. However, if the custodial institution cannot determine who the rightful possessor of the artifacts and ancestors are, they must submit a statement describing the items to the Manager of the National NAGPRA Program.<sup>318</sup> There is no formal guidance on what to do in instances where the holding belongs to another non-Federal institution. The recommended guidance when attempting to contest actions on repatriation is "to do so through informal negotiations" which may require requesting the assistance of the National NAGPRA Program Manager or the Review Committee.<sup>319</sup>

So, what does this mean in terms of rectifying the wrongs done to ancestors' remains? In the case of the Wabanaki, they would have been able to receive their ancestors' likely decades earlier, first through their ability

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<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (Harvard has never publically apologized).

<sup>313</sup> 43 C.F.R. § 10.8(a)(1)(i) (2024).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at § 10.8(c)-(d).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at § 10.8(d).

<sup>319</sup> *Id.* at § 10.8(e).

to submit a valid claim by showing they are culturally affiliated.<sup>320</sup> Additionally, with every violation committed against the Wabanaki, Harvard would likely have had to pay tens, if not hundreds of thousands of dollars in fines. If the institution had been aware that custody may not have been enough to constitute possession, there may have been an increased incentive to repatriate instead of refusing and impeding another repatriation process.

*iv. Deferring to Tribes and Native Hawaiian Organizations*

*“It appears that the [updated] law has tilted the intent of NAGPRA to favor tribes, tribal expectations, [and] tribal cultural knowledge. It’s going to give us more efficacy.”<sup>321</sup>*

*a. The Status Prior to the Regulation Change*

Tribes and NHOs often had to fight tooth and nail to prove that they were the rightful possessors of ancestors and artifacts, pleading to custodial institutions to repatriate.<sup>322</sup> Alex White Plume, a leader of Oglala Lakota repatriation efforts remarked that NAGPRA “wasn’t crafted to be kind or help us along in our grieving process” but was “another attempt to keep us from getting our artifacts that were taken off dead bodies...”<sup>323</sup> The Oglala Lakota met with the American Museum of Natural History (AMNH) in the late 1990s to encourage the repatriation of objects from the massacre at Wounded Knee.<sup>324</sup> Located on the Pine Ridge Reservation of South Dakota, the United States government sought to subdue the growing Ghost Dance spiritual movement which led to the U.S. Army’s Cavalry surrounding a band of Dancers.<sup>325</sup> A fight broke out during the attempted arrest and a shot was fired, leading to a grisly massacre that left between 150-300 Native Americans dead, with nearly half being women and children.<sup>326</sup> In the days following the tragedy, objects including clothing, arrows, and moccasins had been taken as trophies.<sup>327</sup> When the summaries created in compliance in the original NAGPRA passage of 1990 reached Tribes, they were unable

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<sup>320</sup> *Id.* at § 10.3.

<sup>321</sup> Mark Macarro, newly elected president of the National Congress of American Indians & member of the Pechanga Band of Luiseño Indians. Jenna Kunze, *Federal Government Overhauls NAGPRA to Expedite Return of Native Ancestral Remains*, NATIVE NEWS ONLINE, (Dec. 7, 2023), <https://nativenewsonline.net/sovereignty/federal-government-overhauls-nagpra-to-expedite-return-of-native-ancestral-remains>.

<sup>322</sup> Nicole Santa Cruz, *A Prominent Museum Obtained Items From a Massacre of Native Americans in 1895. The Survivors’ Descendants Want Them Back.*, PROPUBLICA, (Oct. 20, 2023), <https://www.propublica.org/article/wounded-knee-american-museum-natural-history>.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> HISTORY.COM, *Wounded Knee* <https://www.history.com/topics/native-american-history/wounded-knee> (Last visited Feb. 20, 2024).

<sup>326</sup> *Id.*

<sup>327</sup> See Santa Cruz *supra* note 323.

to work with the material given due to their lack of knowledge of the museum cataloging protocols, nor did the museum have sufficient information about the tribal objects, which led to a stalemate.<sup>328</sup> The burden was then placed on Tribes to determine the origins of objects with broad names like “dress and adornment,” “ritual and recreation,” and “specified/unknown.”<sup>329</sup> Former senior curator for the Denver Museum of Nature & Science summarizes the nature of these issues: “when the repatriation process fails, it’s frequently because museums are not taking enough responsibility — moral responsibility — for finding ways forward with tribes.”<sup>330</sup>

#### b. How the Regulations Change This

For the first time in NAGPRA’s history, Native American Tribes and Hawaiian Organizations are the ones with the authority. Previously, Federal agencies and museums were the arbiters of what was “enough” when it came to repatriation, and in many cases, there was simply nothing that could ever meet this threshold.<sup>331</sup> Within the newly added purpose paragraph of the regulations is the explicit “[requirement of] deference to the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations”.<sup>332</sup> The Department of the Interior wanted to clearly establish that these new regulations are “to ensure the meaningful consideration of Native American traditional knowledge” as well as “the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes”.<sup>333</sup> Tribes and NHOs are no longer forced to initiate the lengthy repatriation process, take on the financial burdens of research and compiling information that will be deemed “valid” by possessing institutions, and in most cases, inevitably get denied despite their efforts.<sup>334</sup> In cases like that of the Oglala Lakota, these new regulations will allow for a streamlined process that does not require them to shoulder the burden of repatriation research. Armed with the knowledge that a museum holds artifacts from one of their greatest tragedies, the museum will be required by regulation to defer to the Tribe’s knowledge of what was likely taken from the killing field as a souvenir many years ago.<sup>335</sup> Additionally, for Tribes with less resources, they will be more likely to be successful in retrieving artifacts and ancestors than prior to the regulations because they are presumed to be the authority instead of a hurdle in the way of science.

### B. SPECIAL PROBLEMS FOR NAGPRA

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> See *Bonnichsen*, *supra* note 263; see *Fallon-Paiute-Shoshone Tribe* *supra* note 269.

<sup>332</sup> 43 C.F.R. § 10.1(a)(3) (2024).

<sup>333</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at I.

<sup>334</sup> See *Fields et al.* *supra* note 159.

<sup>335</sup> See U.S. DEPT. OF THE INT. *supra* note 194.

*“They value the idea of Native Americans as specimens more than they do as human beings.”<sup>336</sup>*

It is undeniable that the changes in these regulations mark the start of a new era in Native American and Native Hawaiian relations with the archeological and anthropological communities. These regulations create an opportunity for amends to finally be made, historical wrongs righted, and justice served. But this also feels eerily like the attitude surrounding the passage of NAGPRA in 1990. Much like this year, there were many controversies that led to activism by Native Americans and relief when the government was ready to make what felt like a serious, lasting change.<sup>337</sup> History has a tendency to repeat itself, and with these new regulations, it is hard to ignore the echoes of the past. Some of the primary concerns regarding the changes in these regulations is the long-term feasibility of this new plan, especially with timelines of only five years.<sup>338</sup> The next concern inevitably surrounds the penalties in place. The history of minimal enforcement with these regulations begs the question: what is going to happen when institutions are noncompliant? Third, a repeated complaint from parties is the lack of protection and consideration for Nonfederally Recognized Tribes, which are not protected under NAGPRA.<sup>339</sup> Lastly, a concerning trend in recent years has seen Universities discover unlabeled, uncatalogued boxes of ancestors and artifacts in their basements and backrooms, with little to no record of how they got there.<sup>340</sup>

*i. How Realistic are these Goals?*

*“It’s outrageous that tribes still have to go up against all this.”<sup>341</sup>*

Historically, the steepest hurdles that faced institutions engaging in repatriation are the lack of funding and the sheer amount of time it would take for the repatriation process. Funding shortages plague all stages of the

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<sup>336</sup> Shannon O’Loughlin, Chief Executive of the Association of American Indian Affairs. Michael Casey, *Native American remains discovered at Dartmouth College spark calls for accountability*, WBUR NEWS, (May 15, 2023), <https://www.wbur.org/news/2023/05/15/native-american-remains-dartmouth-college>.

<sup>337</sup> As discussed in Part II.

<sup>338</sup> 43 C.F.R. § 10.10 (2024).

<sup>339</sup> NAT’L. PARK SERV., *Frequently Asked Questions* (Last visited on Feb. 5, 2024) <https://www.nps.gov/subjects/nagpra/frequently-asked-questions.htm#:~:text=NAGPRA%20does%20not%20require%20museums,with%20Federally%20recognized%20Indian%20Tribes> (In a self-explanatory way, Nonfederally Recognized Tribes are those not recognized by the federal government. What this means is they do not receive any of the funding that agencies like the Bureau of Indian Affairs would offer. Some tribes are not recognized because lost their recognition as a result of termination efforts by the federal government, others are not because they simply were never formally recognized in the first place).

<sup>340</sup> See Fields et al. *supra* note 159.

<sup>341</sup> Rosita Worl, President of Sealaska Heritage and Tlingit Citizen. See Santa Cruz *supra* note 323.

repatriation process, from the federal NAGPRA office through university system officials putting the burden of repatriation on individual campuses.<sup>342</sup> Institutions struggle with funding, slow hiring processes, as well as limited staffing and budgets while trying to communicate with tribes on how to repatriate items.<sup>343</sup> Further down the repatriation process, once tribes get contacted about collections, they may not have the money, time, or staff to handle these workloads.<sup>344</sup> Due to lack of incentive to prioritize NAGPRA processes, institutions are not as likely to make petitions for additional funding. If there are no employees to work on the process, the cycle repeats itself. When NAGPRA passed in 1990, the Congressional Budget Office estimated it would take ten years for all objects and ancestors covered under NAGPRA to be returned.<sup>345</sup> This estimate is now understood to be laughable, with some estimates for repatriation ballooning up to seventy years.<sup>346</sup> This concern was reflected in the present day; there were thirty comments within the Department of the Interior's Federal Register posting which warned that timelines were "too short, unrealistic, unworkable, and unachievable".<sup>347</sup> Critics of the proposed regulation changes pointed out these tight timelines may lead to an inundation of requests to Tribes and NHOs, which in turn may lead to further issues regarding tribal priorities.<sup>348</sup>

Although no NHOs made statements during the comment period for the new regulations, Tribes had a lot of concerns regarding the goals and their feasibility.<sup>349</sup> In terms of the flood of repatriations requests these groups will be receiving, Tribes wanted timelines to reflect Tribal priority.<sup>350</sup> The likely result will be a prioritized request queue for repatriation, with the remains of ancestors at the top, followed by funerary objects, and then artifacts with lower levels of perceived cultural significance at the bottom of the list. This ordering is crucial, especially to many tribal members concerned about the impending financial undertaking resulting from the regulation change. With sections of the regulations now mandatory for Tribes that were voluntary before,<sup>351</sup> and some estimations of repatriation processes costing up to \$17.2 million per year, Tribes are understandably hesitant.<sup>352</sup> Rosita Worl, president of Sealaska Heritage

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<sup>342</sup> Madalyn Wright, *University of California system slammed for slow return of Indigenous artifacts*, COURTHOUSE NEWS SOURCE (Nov. 17, 2022) <https://www.courthousenews.com/university-of-california-system-slammed-for-slow-return-of-indigenous-artifacts/>; Jaffe et al. *supra* note 1.

<sup>343</sup> Leslie Hoefert, *CalNAPRA and AB 275: The Reality of Consultation and Repatriation*, (Master's Thesis, SONOMA STATE U.) (<https://scholarworks.calstate.edu/downloads/4j03d618d>).

<sup>344</sup> *Id.*

<sup>345</sup> Jaffe et al. *supra* note 1.

<sup>346</sup> Hudetz & Brewer *supra* note 16.

<sup>347</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at II(J).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at II(K).

<sup>352</sup> *Id.* at II(M).

Institute, estimates that successful repatriations can cost \$100,000 or more due to hiring researchers, sending groups to view artifacts or ancestors, and potential disputes with possessing or custodial institutions.<sup>353</sup> Remarkably, the repatriation of a Teeyhíttaan Clan hat cost Sealaska \$200,00, and they did not even get full ownership of it.<sup>354</sup>

The Department of the Interior acknowledges that for some Tribes or NHOs, this lift will be too heavy.<sup>355</sup> They have stated they will “develop and provide templates” and “provide additional resources to assist with identifying consulting parties” to attempt to mitigate this work.<sup>356</sup> The Department also remarks that they anticipate a change in the awarding of grant funds due to regulation changes after the first five years, in that more funds will be requested by Tribes and NHOs to gain assistance and therefore there will be changes to the allowable activities for grant funds.<sup>357</sup> The Department continues on to note that they believe “any estimate based on current practice or past grant awards is inherently flawed” due to the wide variety of approaches museums and Federal agencies take to comply with repatriation regulations,<sup>358</sup> and that there will be a difference between estimated costs for the new regulations and current practices.

ii. *Are these Penalties Sufficient Motivation?*

*“Repatriation isn’t just a rule on paper, but it brings really meaningful healing and closure to people.”<sup>359</sup>*

A logical concern is whether the penalties will actually come into play when noncompliance occurs. Historically, there has not been substantial enforcement when institutions fail to follow NAGPRA.<sup>360</sup> Due to little likelihood of facing a penalty, the primary motivation before the regulation change was often the court of public opinion.<sup>361</sup> In 1997, the University of Nebraska-Lincoln was embroiled in scandal when a graduate student reported their anthropology professor for mishandling the remains of an Omaha ancestor, telling the student to tamper with documents “to keep the Omaha people and anyone else from knowing about these items.”<sup>362</sup>

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<sup>353</sup> See Santa Cruz *supra* note 323.

<sup>354</sup> “Native American Graves Protection and Repatriation Review Committee Findings Related to the Return of Cultural Items in the Possession of the Alaska State Museum, Juneau, AK, (National Park Service Notice)”. Federal Register 78: 5205 (Jan. 24, 2013) p. 5205.

<sup>355</sup> 43 C.F.R. § 10.10 (2024).

<sup>356</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at II(A).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> Bryan Newland, Assistant Secretary for Indian Affairs. See Jacobs & Small, *supra* note 286.

<sup>360</sup> See DEPT. OF THE INT. *supra* note 165.

<sup>361</sup> See *supra* Part II(ii).

<sup>362</sup> Joe Duggan, “Questions Unearthed, Answers Remain Treatment of Indian Remains Has UNL Buried in Controversy,” LINCOLN J. STAR (July 19, 1998) (he hid the bones in a

After the story broke and a police investigation took place, a 52-page report released the University from charges of noncompliance with NAGPRA, despite unauthorized destructive testing on Ponca, Pawnee, and Arika ancestors prior to the passage of NAGPRA.<sup>363</sup> During the investigation it was uncovered that in the 1960's, the Anthropology department Chair Preston Holder ordered the incineration of Native American ancestors on the University's East Campus.<sup>364</sup> The pressure from the University and local Native American communities led to a meeting between the two groups to determine a path forward, which included a commemorative plaque where the ancestors were incinerated, and an increased effort on repatriation.<sup>365</sup> Since the agreement and dedication on April 7, 2001, 98% of the ancestors (roughly 2,000) in the University of Nebraska State Museum have been returned,<sup>366</sup> due to the diligent efforts of the University working with local Native American tribes.

However, aside from the court of public opinion, there are both civil and criminal provisions within enforcement of NAGPRA, ranging in penalty from fines to imprisonment.<sup>367</sup> The new regulations have not changed these schemes. It is worth noting that the average penalty price of \$2,570 has never come anywhere near the base penalty price listed within the regulations.<sup>368</sup> The lowest penalty issued as of 2023 was a paltry \$439.40, and the highest was \$9,820, which is not even double the base price of \$7,475.<sup>369</sup> The minimal change in the penalty scheme does not encourage confidence, and those concerned about NAGPRA reform can only hope that this will prove to be a stronger motivator than it has been in the past.

### iii. Nonfederally Recognized Tribes

*“Our pre-contact past is controlled by archeological understanding that was developed without talking to tribes and excluding us, and even at times dismissing what we have to say.”<sup>370</sup>*

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drawer filled with trash, a mummified ear, and student reports stating he had manipulated a child's skull to make it look like it was talking).

<sup>363</sup> John Hotovy & Derek Tiggelaar, *Native American Bones Controversy*, NEBRASKA U: A COLLABORATIVE HISTORY, (2010) [https://unlhistory.unl.edu/exhibits/show/bones\\_controversy](https://unlhistory.unl.edu/exhibits/show/bones_controversy).

<sup>364</sup> *Id.* The report indicated that no one knew why the incineration took place. At the time, it was viewed as such a non-issue to the point that no one felt compelled to either report or conceal the incineration. The author stated “at the time, no one cared.”

<sup>365</sup> Robert Gritmit, “Report of Robert T. Gritmit to Richard R. Wood: Investigation of UNL Compliance with NAGPRA” (April 23, 1999) <http://govdocs.nebraska.gov/epubs/U0130/B001-1999.pdf>.

<sup>366</sup> See Ngu & Suozzo *supra* note 190.

<sup>367</sup> 18 U.S.C. §1170; *see* 25 U.S.C. §3007

<sup>368</sup> U.S. DEPT. OF INT. *supra* note 165; There are twenty-three instances of penalties being issued, with the amount of penalties collected totaling \$59,111.34.

<sup>369</sup> *Id.*

<sup>370</sup> Marie Richards of the Sault Ste. Marie Tribe. *See* Scott Willard *supra* note 104.

Indian groups without Federal recognition have traditionally been ignored by NAGPRA, only able to get items repatriated when working with the Review Committee or through a joint claim for disposition or joint request for repatriation.<sup>371</sup> Federally recognized tribes are those seen to have government-to-government relations with the United States, thus making them eligible for funding and services from the Bureau of Indian Affairs.<sup>372</sup>

Nonfederally Recognized Tribes come into existence in a number of ways, including losing their recognition during the termination era of the 1950s, choosing to give up their status voluntarily, or never gaining recognition to begin with.<sup>373</sup> There were fifty-three comments to the Department of the Interior concerning these groups, as they have less standing than their recognized counterparts when engaging in the repatriation process.<sup>374</sup> The Department countered that they are unable to expand the definition of “Indian Tribe” within the reissue of these regulations, but that the groups can work in tandem as they did before the change.<sup>375</sup>

California provides a model that the Department may benefit from.<sup>376</sup> The state has the largest numbers of recognized and Nonfederally Recognized Tribes in the country, at eighteen and sixty-four, respectively.<sup>377</sup> Part of the Act requires all institutions that receive state funding to provide a repatriation process for appropriate tribes and requires a “state cultural affiliation” with a present-day California Indian tribe. Part of where CalNAGPRA deviates from its federal counterpart is that claims for repatriation can be made by tribes that: fall under the federal “Indian tribe” standard, are indigenous to California, and are listed in the BAR petitioner list under the Federal Code of Regulations or are determined to be an organization with a continuous identity of tribehood.<sup>378</sup>

*iv. Higher Educational Institutions*

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<sup>371</sup> See U.S. DEPT. OF INT. *supra* note 165.

<sup>372</sup> U.S. DEPT. OF INT., *Why Tribes Exist Today in the United States* (Feb. 20 2024) <https://www.bia.gov/frequently-asked-questions>.

<sup>373</sup> MILWAUKEE PUB. MUSEUM, *Federal Acknowledgement or Recognition* (Feb. 20 2024) <https://www.mpm.edu/educators/wirp/nations/tribe/federal-acknowledgement>.

<sup>374</sup> See 88 Fed. Reg. 86,452 *supra* note 12 at II(A).

<sup>375</sup> *Id.*

<sup>376</sup> Kim Turner, *Improving Cal NAGPRA: Honoring Native American Rights*, 3 (Dec. 15, 2016) (unpublished Capstone Project) (on file with the University of San Francisco digital repository at Gleeson Library); Aside from CalNAGPRA, there are other burial laws by state. CalNAGPRA is the only state-based NAGPRA statute of its kind. The Washington College of Law State Burials Project is a great resource to see how other states are addressing this issue: <https://www.wcl.american.edu/burial/>

<sup>377</sup> *Id.* at 5.

<sup>378</sup> *Id.* (This identity can be established via: the presentation of an autonomous government, aboriginal ties, recognition by the Indian community, or demonstrated membership criteria).

*“To state it plainly, at Harvard, the issue of whether Native American ancestors should be in our collections is clear — they should not.”*<sup>379</sup>

a. The Issues

When assessing NAGPRA and all the institutions it covers, one specific group has historically high rates of noncompliance: higher education. Of the ten institutions that hold roughly half of the reported Native American ancestors still unavailable to tribes, seven of them are universities.<sup>380</sup> With this phenomenon comes a unique side effect; universities *keep* discovering Native American ancestors on campus. In March of 2023, Dartmouth announced the discovery of the partial skeletal remains of fifteen Native American ancestors, with some used to teach a class as recently as 2022.<sup>381</sup> This pattern is oft repeated and seems to only appear in universities, which could result from shifting administration, poor oversight, or simply a lack of safeguards to protect anthropological findings. Additionally, since many collections of this type have not increased since NAGPRA’s passage in 1990, it may be harder to keep track of inventories.

Undertaking the regulation of these institutions will require colossal efforts: universities have human remains and artifacts numbering in the thousands. Harvard University has 5,680 sets of ancestors, UC Berkeley has nearly 5,000, Indiana University has 4,800, and the University of Tennessee, Knoxville has close to 4,000.<sup>382</sup> These totals do not include other items covered under NAGPRA, which vastly outnumber ancestors and are often equally important to tribes. Allocating the time, money, and effort to rightfully return these items will prove to be a difficult, but possible feat.

(1) The Status Prior to the Regulation Change

It is worth noting that before new regulations, programs were already in place which greatly assisted in repatriating Native American artifacts and ancestors in the higher education sphere. California’s state equivalent of NAGPRA, aptly titled the California Native American Graves Protection and Repatriation Act (CalNAGPRA), was created to address the state-specific gaps in its federal counterpart.<sup>383</sup> In 2018, AB-2836 passed to specifically target the University of California (UC) system, calling for the creation of systemwide and campus-specific Oversight Committees and policies.<sup>384</sup> AB-275 followed in 2020, adding additional requirements,

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<sup>379</sup> Harvard President Claudine Gay. *See* Hudetz *supra* note 123.

<sup>380</sup> Ngu & Suozzo *supra* note 190.

<sup>381</sup> *See also* Casey *supra* note 337 (the remains were kept in a locked cabinet in the basement of Silsby Hall).

<sup>382</sup> Ngu & Suozzo *supra* note 190.

<sup>383</sup> *See* Turner *supra*

<sup>384</sup> OFF. OF TRIBAL AFFAIRS, *Native American Graves Protection and Repatriation Act*, Department of Anthropology: College of Social Sciences and Interdisciplinary Studies

including that all state-funded entities must submit a Preliminary Inventory and Summary of all their archeological and ethnographic collections originating from California to the California Native American Heritage Commission (NAHC), which has oversight authority of CalNAGPRA.<sup>385</sup> Once the information is submitted, the NAHC's website publishes the results for review by tribes.<sup>386</sup>

A vital part of the 2018 amendment was the creation of the campus specific NAGPRA Oversight Committees. Every UC campus has some iteration of a NAGPRA representative, whether a “coordinator,”<sup>387</sup> “official,”<sup>388</sup> or something similar. These individuals lead teams comprised of NAGPRA Specialists, Assistants, or sometimes implementation committees. For example, the NAGPRA Project Staff at UC Davis includes a Repatriation Coordinator and Senior Strategic Advisor, a NAGPRA Specialist, and two NAGPRA Assistants.<sup>389</sup> Meanwhile, UC Berkeley has a Campus NAGPRA Implementation Committee made up of one NAGPRA Official, three campus committee members, and three tribal committee members.<sup>390</sup> At UC Davis, there is a NAGPRA Coordinator, Tribal Liaison, and trained, supervised student assistants to aid with the NAGPRA/CalNAGPRA inventory process.<sup>391</sup>

An additional feature of CalNAGPRA that sets it apart from NAGPRA is its penalty provision. CalNAGPRA states any institution that fails to comply may be fined a civil penalty of \$20,000 per violation under Commission regulations.<sup>392</sup> The Commission considers the archeological, historical, or commercial value; the cultural and spiritual significance of the item; the damages suffered, both economic and noneconomic, by the aggrieved party; and the number of violations that have occurred.<sup>393</sup> Because this bill is still so new within the California system, there have yet to be examples of California-specific penalties in practice.

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(Dec. 8 2023) <https://www.csus.edu/college/social-sciences-interdisciplinary-studies/anthropology/nagpra.html>.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> SAN JOSÉ STATE UNI., *NAGPRA and CalNAGPRA*, (Nov. 16 2023) <https://www.sjsu.edu/provost/resources/nagpra-calnagpra/>; UC DAVIS, *Native American Graves Protection and Repatriation Act* (Nov. 17 2023) <https://nagpra.ucdavis.edu/> (last modified Nov. 17, 2023); SACRAMENTO STATE, *Native American Graves Protection and Repatriation Act* (Dec. 9, 2023) <https://www.csus.edu/college/social-sciences-interdisciplinary-studies/anthropology/nagpra.html>.

<sup>388</sup> UC BERKELEY, *NAGPRA at Berkeley* (Dec. 9 2023) <https://nagpra.berkeley.edu/nagpra-berkeley>.

<sup>389</sup> UC DAVIS, *NAGPRA Project Staff* (last modified Apr. 18, 2023) <https://nagpra.ucdavis.edu/nagpra-project-staff> (all of these members hold at least Master's Degrees).

<sup>390</sup> UC BERKELEY, *UC Berkeley Campus NAGPRA Implementation Committee* (Dec. 9, 2023) <https://nagpra.berkeley.edu/nagpra-berkeley/uc-berkeley-campus-nagpra-implementation-committee> (there is no information provided about the education level of these committee members nor what the committee members individually do).

<sup>391</sup> See UC DAVIS *supra* note 389; see *Weiss* 602 F. Supp. 3d at 1288.

<sup>392</sup> Cal NAGPRA, Assemb. B. 978, 2001-2002 Reg. Sess. ch. 818 (8029) (Cal. 2001)

<sup>393</sup> *Id.*

## (2) How the Regulations Change This

The regulation change regarding the protocol for “previously lost or unknown holdings” will create a process for educational institutions to move forward upon the discovery of ancestors and artifacts.<sup>394</sup> Two timelines will require that universities (as well as the standard Federal agencies and museums) must 1) submit summaries within six months of located unassociated funerary objects, sacred objects, or objects of cultural patrimony and 2) submit inventories within two years of locating ancestors or associated funerary objects.<sup>395</sup>

This new regulation creates a timeline that kicks in as soon as the most recent scandal is pulled from the depths of a dark university basement or backroom. The likelihood of these instances will only increase due to requirements for complete inventories and summaries, which will lead to institutions searching far and wide to ensure there’s no stone unturned that could lead them susceptible to fines. Now, instead of university faculty and staff coming across these boxes and freezing in fear of the next step, or perhaps starting a repatriation process and then forgetting to complete it,<sup>396</sup> they will be empowered to begin the repatriation process and return these ancestors and artifacts to their rightful homes.

## V. CONCLUSION

*“I feel like it’s like we’re opening a new chapter.”<sup>397</sup>*

The new NAGPRA regulations mark a change hundreds of years in the making. Native American Tribes and Native Hawaiian Organizations have been struggling for decades, even since NAGPRA was passed, to be taken seriously so they can facilitate the return of what was stolen from them. Presently, the changes feel promising: museum wings are closing, non-compliant exhibits are hidden from public view, but an undeniable discomfort remains: how long until this novelty wears off and institutions become apathetic again? When will it become apparent that penalties will not be issued or enforced, or that Tribes and NHOs can be ignored with little backlash? The court of public opinion will have the final say in the matter, but what happens when the public’s eye glances away?

The Indigenous people of the United States carry the suffering of their ancestors. In their hearts, their minds, and their DNA.<sup>398</sup> It is difficult

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<sup>394</sup> See 43 C.F.R. § 10.8(a) (2024); 43 C.F.R. § 10.9(a)(2) (2024); 43 C.F.R. § 10.10(d)(2) (2024).

<sup>395</sup> *Id.* at § 10.9; *id.* at § 10.19.

<sup>396</sup> Times *supra* note 2.

<sup>397</sup> Meranda Roberts, citizen of the Yerington Paiute Tribe in Nevada and visiting professor of art history at Pomona College. Hudetz *supra* note 9.

<sup>398</sup> Brockie et al. *supra* note 131.

to comprehend the effects these community members experience when another news story breaks about their ancestors being discovered after languishing away a forgotten wing of a university stuffed in cardboard boxes or finding that their ancestors are being stored only mere miles away.

Skepticism aside, these regulation changes are a massive win for the Native American community. NAGPRA has been sitting essentially idle for over thirty years, with few changes ever taking place.<sup>399</sup> For regulations to go in effect and museums to respond so quickly marks a turning point many have been dreaming of for decades, even years. Myra Masiel-Zamora, archaeologist, and curator with the Pechanga band of Indians observed that “the tenor of talks [has shifted]”, and the dialogue between Native Americans is no longer a fight, but a conversation.<sup>400</sup> Since the regulations passed, there has been little pushback from museums and other impacted institutions, signifying that the culture truly has changed. Instead of fighting tooth and nail to keep what they believe is “theirs”, institutions are ready to cooperate, even if it means some objects may never come back on display.<sup>401</sup> The concerted effort between the Federal government, museums, Native American activists, and the broader public has resulted in a path for ancestors to recover dignity in death.

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<sup>399</sup> Jacobs & Small *supra* note 286.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*