

## PROPERTY

# NAGPRA: From Compromise to Collapse

*Federal legislation that was crafted as a compromise between researchers and Native American tribes is being misread and creating conflict.*

◆ BY ELIZABETH WEISS AND JAMES W. SPRINGER

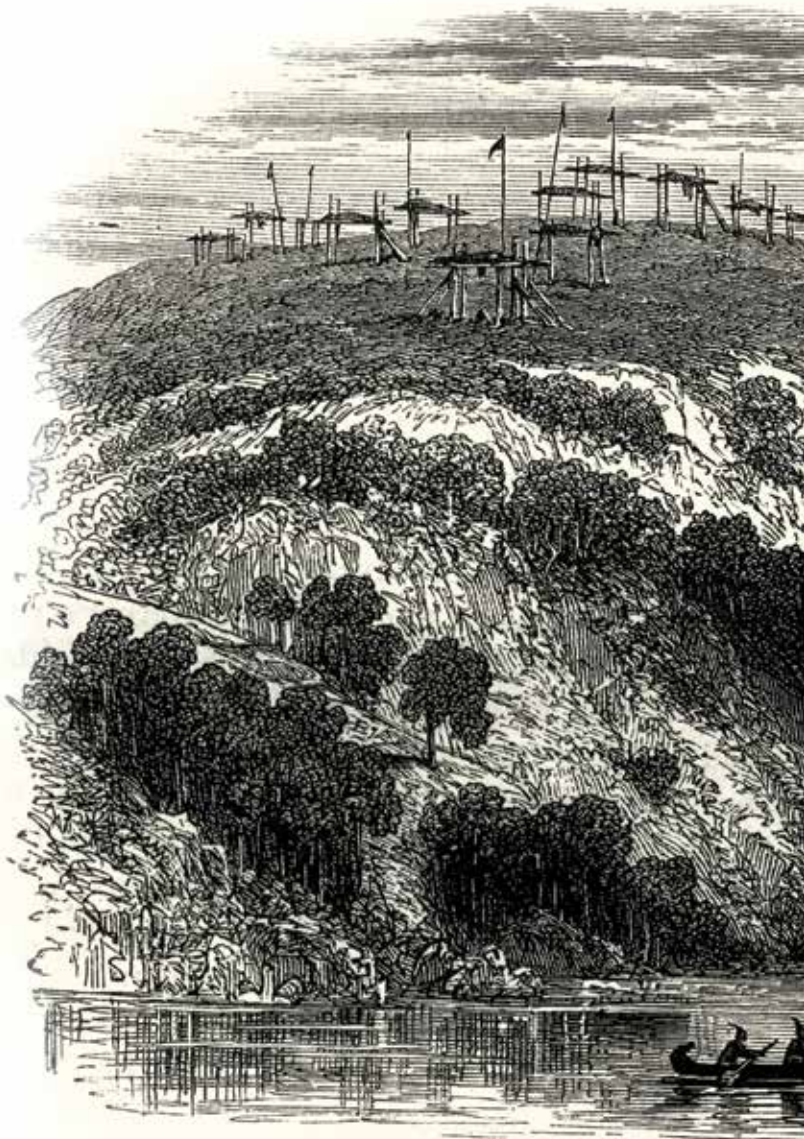
**R**ecently, several news stories have alleged that American universities are failing to comply with laws governing the repatriation of human remains, funerary items, and sacred objects to modern Native American tribes. The reports allege foot-dragging and even the hiding of collections.

A closer inspection finds that universities are, in fact, following the laws, but the journalists seem to misunderstand them. In this article, we give examples of such articles, describe how the Native American Graves Protection and Repatriation Act (NAGPRA) is misunderstood, and explain why a legislative compromise created to ensure continued research is failing.

## NAGPRA

After several years of discussion, Congress passed and President George H.W. Bush signed NAGPRA in 1990. The law contains several definitions and provisions relating to ownership and possession of “human remains,” “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “items of cultural patrimony.” It gives certain rights to claim human remains to current Indian tribes and Native Hawaiian organizations that have been recognized by the U.S. government. These rights are dependent upon the remains having been found on Indian or federal lands after November 16, 1990. For remains found prior to that date, the right to claim the remains depends upon the claimants demonstrating cultural affiliation with the remains.

Where no claimant can demonstrate such affiliation, the remains are considered “culturally unidentifiable.” The legislative history of NAGPRA strongly suggests that it was not



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intended to make culturally unidentifiable remains subject to repatriation. The complaints that led to NAGPRA concerned actions taken by the U.S. government, or its military, or by private persons, to seize the bodies of known individuals or individuals who clearly belonged to an identifiable tribe. There was extensive testimony and comment on that issue. Much less comment was devoted to remains originating prior to 1492 AD, but that comment recognized the historical and scientific value of studying those remains and stated that they should be “kept with care” in the institutions that possess them.

A very large portion of remains held within institutions (mainly museums and universities) are culturally unidentifiable, meaning that they cannot plausibly, by the preponderance of the evidence standard established in NAGPRA, be associated with any federally recognized tribe, or indeed with any existing group. Even remains dating to as early as 1000–1500 AD are often culturally unidentifiable because of migration, population loss, and splitting and fusion of ethnic groups before European contact and the effects

of war, disease, trade, displacement, and acculturation as a result of Euro-American contact. The Department of the Interior subsequently issued regulations that purported to establish repatriation rights for culturally unidentifiable remains, but NAGPRA did not give the Interior Department the power to, in effect, amend the law to include those remains.

#### NORTH DAKOTA’S REPATRIATION DELAY

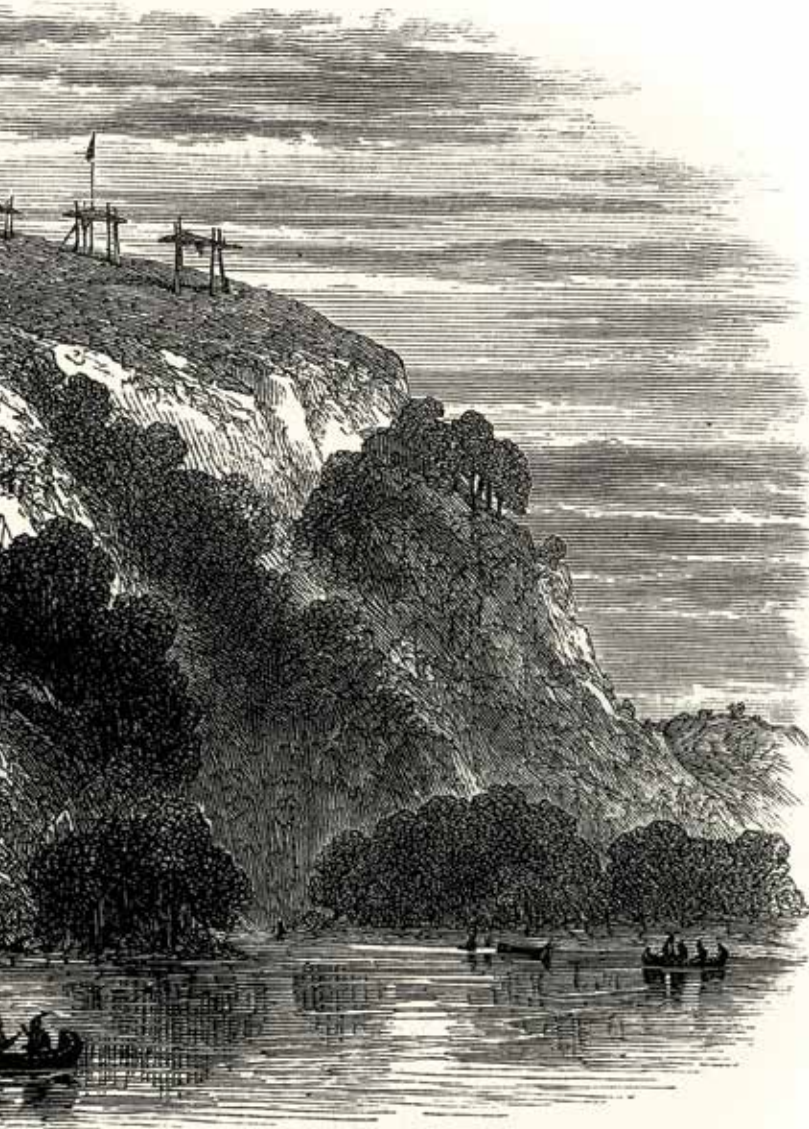
On September 15, 2022, the *New York Times* ran the article, “Congress Told Colleges to Return Native American Remains. What’s Taking So Long?” Its writers, Mitch Smith and Julie Bosman, appear to misunderstand NAGPRA, believing it intends for the *immediate* repatriation and reburial of *all* Native American skeletal remains regardless of when they were found or what tribe they are connected to. NAGPRA was passed as a compromise to ensure that federally recognized Native American tribes would be able to repatriate human remains that they were lineally descended from or culturally affiliated to, while universities would be able to continue to curate and study unaffiliated human remains.

The *Times* article does not address in detail the problem that determining relatedness with a tribe is difficult. DNA studies, contrary to popular belief, cannot link remains to specific tribes. Many Native American tribes have traveled from their original locations, joined with other tribes, split apart, integrated with non-Native Americans, and some have died out. Universities attempt to fulfill this obligation by weighing evidence from historical documentation (which only began after European contact, because pre-contact Native Americans did not develop written language), skeletal studies, artifact analyses, and information from living tribal members.

NAGPRA allows for both scientific evidence and indigenous knowledge to be considered for repatriation decisions. Yet, unfortunately, most repatriation decisions are based on accepting the validity of affiliation based on creation myths provided by tribal religious leaders. When examining the progress of NAGPRA based on the compromise it crafted, over 90% of culturally affiliated human remains linked to federally recognized tribes have been repatriated, according to a 2022 Government Accountability Office report. Even with NAGPRA’s leeway in defining affiliation, many collections just cannot be linked to a modern federally recognized tribe. Even if there is a link to a tribe, it may be a non-federally recognized tribe; for instance, three of the five North Dakota tribes mentioned in the *Times* article are not federally recognized.

#### CALIFORNIA’S COLLAPSING COLLECTIONS

In some areas, there are no federally recognized tribes. There are none in the San Francisco Bay Area, which is where some of the remains in the collection of the University of California, Berkeley—a university mentioned in the *Times* article—come from, as well as *all* the remains in the collection of San José State University.



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Nonetheless, Berkeley's repatriation is ramping up because of a 2020 amendment to California's version of NAGPRA. The state law, unlike its federal counterpart, places indigenous knowledge above scientific knowledge. If scientific studies (using techniques such as DNA analysis and craniometrics) conclude that the remains cannot be affiliated with a modern tribe, but indigenous knowledge (including creation myths) asserts an affiliation, the religious narrative must be accepted under California law.

#### UNIVERSITY OF KANSAS'S "HIDDEN" COLLECTIONS

A September 21, 2022, *Native News Online* article reported that University of Kansas chancellor Douglas Girod recently stated, "It has come to our attention that the University of Kansas is in possession of Native American ancestors in its museum collections." The article alleges, "While some efforts have been made in the past to repatriate items, the process was never completed." The author, Jenna Kunze, asks why, "if the university's holdings were self-reported and public, were faculty and staff unaware of them?" She notes that the university's director of tribal relation, Melissa Peterson, a member of the Diné tribe, finds the museum's continued possession of the remains "very disappointing." Now repatriation will occur.

Yet, the university's museum has been in compliance with NAGPRA. It completed the inventories of human remains and associated funerary objects, which were then published on NAGPRA's publicly available database. Furthermore, the museum returned human remains and associated funerary objects in 1996 and 1997 that were determined to be affiliated with federally recognized tribes from Hawaii and North Dakota. The collections that were kept at the museum and curated after the repatriation contained culturally unaffiliated human remains and associated funerary objects. This information was not hidden from any faculty or staff and could always be found on the NAGPRA website. Thus, the curators would not have been allowed to repatriate these remains under NAGPRA because, as mentioned earlier, NAGPRA requires universities to work with federally recognized tribes.

#### ALABAMA ORAL HISTORY

A September 7, 2022, *Native News Online* article, also by Kunze, reported that the University of Alabama had decided to repatriate some 10,000 remains to seven Muskogean language-speaking tribes. The remains, which hail from the Alabama Moundville archaeological site, were initially determined to be culturally unidentifiable, which allowed the university to curate them. Kunze asserts that allowing universities to retain Native American remains with unidentifiable tribal connections is a loophole in NAGPRA that needs to be closed. Yet, the

unidentifiable category is not a loophole; it was put in place as part of NAGPRA's compromise.

In the article, it is claimed that a re-examination of these remains had enabled them to be affiliated with modern federally recognized tribes. That is not, in fact, the whole story. The University of Alabama curators have not changed their position that the remains cannot be linked to modern tribes.

A 117-page NAGPRA Review Committee report on the remains that overturns the unidentifiable classification and allows for repatriation to occur does not draw on scientific evidence to affiliate the remains. The Choctaw Nation of Oklahoma stated, for example, "While information in the published literature derived

## The compromise that NAGPRA established allowed for three subsequent decades of important research. Human remains still have so much to teach us.

from the detailed study of human remains and burials may very well connect Moundville with the Choctaw Nation, we decline to submit it out of respect." They are not alone in declining to provide such evidence. The Chickasaw Nation stated, "While Moundville burial practices may be connected with more modern Chickasaw burial practices, we decline to comment on this out of respect." The Seminole tribe concurred with the Choctaw Nation. Thus, three of the seven tribes refused to provide biological and funerary evidence of an affiliation.

Absurdly, the tribes' oral history is claimed to go back 15,000 years. As stated in the report:

The typical American history book begins 500 years ago. The histories of the Muskogean-speaking Tribes go back roughly 30 times farther into the past. Such a temporally deep story can be difficult for the mind to comprehend.

They are right. The deep story is difficult to comprehend because linguistics has demonstrated that oral history is unlikely to pass the 500-year mark and, even then, it is riddled with errors and inaccuracies. Not challenging such falsehoods is clearly an aberration of duty and a failure of the NAGPRA compromise.

#### TEXAS'S WARRING TRIBES

On September 21, 2022, Austin, TX, public radio station KUT reported that the Miakan-Garza Tribe in San Marcos, TX, is renewing its yearslong fight to reclaim human remains held by the University of Texas at Austin. University anthropologists have stated that the remains are not affiliated with the tribe;

furthermore, the Miakan-Garza Tribe is not federally recognized.

Two other tribes—the Alabama-Coushatta and the Caddo—are also claiming affiliation with the remains. According to KUT reporter Riane Roldan, this led Maria Rocha, an elder of the Miakan-Garza Tribe, to say that “many federally recognized tribes object to nonrecognized tribes receiving remains, not because they want to rebury the remains themselves, but out of fear that they’ll start to ask for more federal benefits, which are already limited.”

In a September 14, 2022, *Houston Chronicle* article on the controversy, Emi Aguilar, a Coahuiltecan arts educator, misunderstands NAGPRA’s compromise and complexity when she states that it is irrelevant if other tribes are claiming affiliation to the remains (unless they are actively seeking reburial) and does not understand that the university can only repatriate to federally recognized tribes. Thus, the university would be within its rights to continue to curate and study the skeletal remains. However, it is likely that the NAGPRA compromise will fail and reburial will occur, as it did in a similar case at Texas State University.

### SAN JOSÉ STATE’S SACRED X-RAYS

These previously mentioned cases illustrate complexities in repatriation. They highlight some of the misunderstandings revolving around affiliation, federal recognition, and curation.

These are not the only issues in the collapsing of NAGPRA’s compromise. Perhaps the most problematic is the widening of the definition of sacred. Historian Ron McCoy, in a 2018 article in *Cultural Property News*, wrote about the broadening acceptance of defining the mundane as sacred. NAGPRA’s definition of “sacred objects” is “specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.” It is unclear what NAGPRA means in reference to “traditional Native American religions,” but it is possible for museums and universities to not acquiesce on unreasonable claims of “sacred objects.”

At San José State University, Native American tribes, using California law’s more lenient allowance to defer to tribes (although the definitions of “sacred object” are the same as in NAGPRA), has led to tribes claiming that x-ray images, reports, and photographs of human remains, as well as discarded animal bones (such as those consumed during meals), are also sacred and must be repatriated.

Lawmakers intended NAGPRA to be a compromise between science and Native American wishes in cases where there is a genuine connection between remains and funerary items and a modern tribe. Such compromise is a good thing. It recognizes and takes account of differing perspectives. What is happening now is not compromise; it is the collapse of the original intention of NAGPRA. The prospect of x-rays and photographs being repatriated and then ceremoniously burned is so absurd and extreme that it cannot possibly be regarded as part of the compromise. This is clearly not what the law intended.

In the current climate of political correctness, challenging “indigenous knowledge” or not going along with the wishes of

Native Americans opens archaeologists to accusations of racism and is a risk that few scientists and academics are currently prepared to take.

### CONCLUSIONS

The compromise that NAGPRA established allowed for three subsequent decades of important research. Most obviously, this research has provided a better understanding of the history of Native peoples. But discovery goes beyond that.

For example, we’ve gained a better understanding of disease origins, such as determining that tuberculosis—still a major cause of death worldwide—reached the New World prior to European contact and likely had multiple origins. Other disease origins, such as syphilis, are still debated; some theories suggest that it was brought to the Old World after Columbus returned from the Americas, others have found evidence that it may have been in Turkey prior to Columbus’s return and traveled west to Europe from Asia. Still others have suggested that the non-venereal form mutated to a venereal form after arriving in the Old World. Ancient DNA studies have not been able to resolve this issue yet, but with advances in technology this question will likely be answered, and in ways that could help protect from these diseases.

Unfortunately, the data—human remains—for such research may no longer be available for testing here in the United States. In Europe, on the other hand, where cemeteries are routinely excavated and the remains are preserved for skeletal research, the study of diseases of the past is advancing at a rapid pace.

There are other examples. Anthropologists use skeletal remains to train future forensic anthropologists who will go on to identify murder victims, bringing justice to the victims and closure to many families. Collections are used to understand bone biology to determine whether modern patterns of disease differ from past patterns, which enables us to understand how to prevent health problems such as early onset osteoporosis. And the study of skeletal remains shows promise in identifying patterns of child abuse by examining which traits are normal variations during growth compared to evidence of neglect.

Let’s not bury all human remains; they still have so much to teach us. R

### READINGS

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- “Congress Told Colleges to Return Native American Remains. What’s Taking So Long?” by Mitch Smith and Julie Bosman. *New York Times*, September 15, 2022.
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- “Is NAGPRA” Irretrievably Broken?” by Ron McCoy. *Cultural Property News*, December 19, 2018.
- “University of Kansas Says It Has Native American Remains in Museum Collection,” by Jenna Kunze. *Native News Online*, September 21, 2022.