

Oklahoma City University Law Library

Library User Guide - NAGPRA Native American Graves Protection and Repatriation Act

Introduction

For many years, Native Americans have endured the looting, removal, and exploitation of burial grounds, graves, human remains, and cultural artifacts for purposes of science, curiosity, or profit. The Native American Graves Protection and Repatriation Act is the federal law passed in 1990 that provides a process for museum and Federal agencies to repatriate Native American cultural items to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations. NAGPRA also protects burial sites on federal and tribal lands by requiring consultation with tribes before undertaking excavation of Indian sites. NAGPRA includes provisions for unclaimed and culturally unidentifiable Native American cultural items, intentional and inadvertent discovery of Native American cultural items on Federal and tribal lands, and penalties for non-compliance and illegal trafficking.

All federal agencies and all public and private museums that receive federal funds (with the exception of the Smithsonian Institution which must comply with the NMAI Act of 1969) are subject to NAGPRA. In November 1993, federal agencies and museums in possession or control of Native American cultural items – human remains, funerary objects, sacred objects, and objects of cultural patrimony – were required to prepare written summaries of the items to distribute to culturally affiliated tribes. In November 1995, federal agencies and museums were required to prepare inventories of the items, and to endeavor to identify the geographical and cultural affiliation of the items.

Law and Regulations

In the United States Code:

Native American Graves Protection and Repatriation Act - 25 U.S.C. 3001 et seq.
(Nov. 16, 1990)

In the Code of Federal Regulations:

Final Regulations - 43 CFR 10 [Dec. 04, 1995]

43 CFR 10 - amended January 13, 1997; August 1, 1997; and May 5, 2003; and published in the Code of Federal Regulations October 1, 2003

43 CFR 10.13 - Future applicability proposed rule, published in the *Federal Register* on October 20, 2004, Volume 69, number 202.

State Repatriation Statutes

Oklahoma. *Chapter 21 - Violating Sepulture and the Remains of the Dead, Statutes Annotated* (sections 1151 – 1168.7, 2002/2004-2005).

Yalung, Catherine B. and Laurel I Wala. "A Survey of State Repatriation and Burial Protection Statutes." *Arizona State Law Journal* 24 (Spring 1992): 419-33.

Schamel, Kathleen. "Update of Compilation of State Repatriation, Reburial and Grave Protections Laws (July 1997)." Online. Available from www.arrowheads.com/burials.htm. Accessed 31 August 2004.

Dictionaries and Encyclopedias

Lehman, Jeffrey and Shirelle Phelps, eds. *West's Encyclopedia of American Law*. 2d ed. Detroit : Thomson/Gale, 2004. OCU Call # KF 154.W47 2004 (Pro Se area in Reference Wing, 1st floor).

Sokolow, Gary A. *Native Americans and the Law: A Dictionary*. Santa Barbara: ABC-CLIO, 2000. OCU Call # KF8203.6.S66 2000 (Native American Collection, 3rd floor).

Johansen, Bruce Elliott, ed. *The Encyclopedia of Native American Legal Tradition*. Westport, Conn.: Greenwood Press, 1998. OCU Call #KF8204.E53 1998 (Native American Collection, 3rd floor).

Handbooks and Nutshells

Canby, William C., Jr. *American Indian Law in a Nutshell*, 4th ed. West Nutshell Series. St. Paul: Thomson/West, 2004. OCU Call # KF8205.Z9 C36 2001 (on reserve at the Circulation desk; earlier editions are located in Native American Collection, 3rd floor).

Cohen, Felix S. *Handbook of Federal Indian Law*. 1982 ed. Charlottesville, Va.: The Michie Company, 1982. OCU Call # KF 8205.C6 1982 (on reserve at the Circulation desk, and also in Native American Collection, 3rd floor). Although this treatise has not been updated to include NAGPRA, it provides a thorough background in federal Indian law.

Web Sites

National NAGPRA Home – www.cr.nps.gov/nagpra

This is the U.S. Department of the Interior web site for NAGPRA and is an extremely useful and extensive resource. Links include: Frequently Asked Questions, Grants, Training, Notices, Documents and Publications, Laws and Regulations, Review Committee, Special Topics, the Native American Consultation Database, the Culturally

Unidentifiable Native American Inventories Pilot Database, and NAGPRA Glossary. The site contains separate resources for tribes, museums, agencies, the public, and the press.

Indianz.com – <http://indianz.com>

This internet resources features current events and news of interest to Native Americans, including many articles and links related to NAGPRA and the Kennewick Man issue.

American Indian Ritual Object Repatriation Foundation website – www.repatriationfoundation.org

The Foundation is a nonprofit publicly supported organization that facilitates repatriation of sacred ceremonial material “to the appropriate American Indian Nation, clan, or family, and to educating the public about the importance of repatriation.” Available for free download from the website is “Mending the Circle: A Native American Repatriation Guide.”

National Museum of Natural History repatriation website – www.nmnh.si.edu/anthro/repatriation

This Smithsonian website describes the duties and activities of the Repatriation Office of the Division of Anthropology under the NMAI Act of 1989 (Public Law 101-185). The website explains the required reports, inventories, object summaries, and documentations, and defines what items fall under the Act. The NMAI Act is available in its entirety, along with the 1996 Amendment. Other links include the Annual Report on Repatriation Office activities, Guidelines and Procedures, Repatriation Reports, Inventory Reports, Ethnographic Object Summaries, Documentation of Human Remains, Repatriations: Archeology Table, Repatriations: Ethnology Table, and Repatriation: Physical Table.

Summaries of Repatriation reports are grouped under the tribe name, and also by area. A tribal member can click on his or her tribe’s name to obtain information about repatriation activities for that tribe. The Inventory of Native American Human Remains and Archeological Artifacts lists 29 Oklahoma human remains and 1,428 Oklahoma archeological artifacts.

Guides

Blanco, Caroline, et al. ***Cultural Property Law: A Practitioner’s Guide***. Chicago: Section of Environment, Energy, and Resources, American Bar Association, 2004. OCU Call # KF 4310.C85 2004 (Native American Collection, 3rd floor).

NAGPRA and other cultural property laws are presented in the practice areas of federal, state, local, private, museum, and tribal management of cultural property, international laws on cultural property, cultural property in the marketplace, and management of underwater cultural property.

Pevar, Stephen L. ***The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights***. 3rd ed. American Civil Liberties Union Handbook Series. Carbondale : Southern Illinois University Press, 2002. OCU Call # KF 8210.C5 P48

2002 (on reserve at the Circ. desk; earlier editions in Native American Collection, 3rd floor).

Books

Richman, Jennifer R. and Marion P. Forsyth, eds. *Legal Perspectives on Cultural Resources*. Heritage Resources Management Series. Walnut Creek, CA.: AltaMira Press, 2004. OCU Call # KF 8210.A57 L44 2004 (Native American Collection, 3rd floor). A collection of essays by legal experts and archeologists, this book discusses a variety of issues concerning cultural resources: historic preservation laws, cultural property law theory, the “treasure trove” rule, constructive possession by landowners, sentencing guidelines for cultural heritage resource crimes, export regulation and illicit trade in archaeological materials, the *McClain* doctrine, underwater cultural heritage, NAGPRA’s legislative history and archeological issues, Kennewick Man, enforcement of repatriation rights, and constitutional issues.

Gulliford, Andrew. *Sacred Objects and Sacred Places: Preserving Tribal Traditions*. Boulder, Colo.: University Press of Colorado, 2000 (available through interlibrary loan). This book covers extensively the issues of repatriation and preservation of Native American remains and cultural items, beginning with the shameful grave-robbing and skeleton-collecting practices of the 1800’s. The author includes discussions of sacred places and beliefs, the Kennewick man controversy, NAGPRA, museum curation and pesticides, and tribal traditions. Of particular interest to Oklahomans is the chapter by Lawrence Hart detailing the successful Cheyenne repatriation of 18 human remains from the Smithsonian Museum of Natural History, pages 33-37.

Fine-Dare, Kathleen S. *Grave Injustice: The American Indian Repatriation Movement and NAGPRA*. Lincoln: University of Nebraska Press, 2002. OCU Call # KF 8210.A57 F56 2002 (Native American Collection, 3rd floor). The author, a professor of anthropology and women’s studies at Fort Lewis College in Colorado, has first-hand experience with NAGPRA, having participated in a consultation process at her college concerning the repatriation of human remains held at the college. She traces the history of archeology and cultural looting, describes the romanticization and denigration of American Indians in the 1800’s, and reviews the American Indian repatriation movement. Problems with NAGPRA compliance, interpretation and enforcement are described, along with a discussion of the successful Pueblo-Pecos Pueblo repatriation of thousands of items.

Mihesuah, Devon A., ed. *Repatriation Reader: Who Owns American Indian Remains?* Lincoln: University of Nebraska Press, 2000 (OCU Call # E98.M34 R46 2000 (Native American Collection, 3rd floor). This book contains essays representing the many different and conflicting religious, moral, political, and philosophical views on repatriation that exist among various Native American tribes, anthropologists, archeologists, scientists, and other interested parties.

Echo-Hawk, Roger C. and Walter R. Echo-Hawk. *Battlefields and Burial Ground: The Indian Struggle to Protect Ancestral Graves in the United States*. Minneapolis: Lerner Publications Co., 1994 (available through interlibrary loan). With many well-selected photographs to accompany the text, this book examines the historical development of the double standard concerning Native American burial sites and remains versus non-Indian burial sites and remains. Benefits of anthropological and archeological studies are explained, as are the grave-robbing, skeleton-collecting, and racial profiling that developed in the 1800's. The Reburial Movement is reviewed. The second half of the book focuses on the mistreatment of the Pawnees in Nebraska, Kansas, and Oklahoma, and the quest for repatriation of Pawnee remains from the Nebraska Historical Society, the Smithsonian, and, after passage of NAGPRA, from the Army Medical Museum.

Benedict, Jeff. *No Bone Unturned: The Adventures of a Top Smithsonian Forensic Scientist and the Legal Battle for America's Oldest Skeleton*. New York: HarperCollins, 2003. OCU Call # KF 8210.A57 B46 2003 (Native American Collection, 3rd floor). This book recounts the interesting career of Dr. Doug Owsley, Smithsonian scientist and archeologist whose expertise with skeletons and human remains has been sought by the U.S. State Department, the FBI, the Defense Department, the U.S. Embassy in Guatemala, by Native American tribes, and others needing identification of human remains. Dr. Owsley was one of the scientists asked to examine the Kennewick Man skeleton, and one of the plaintiffs involved in the Kennewick Man litigation against the Army Corps of Engineers. The book recounts the Kennewick Man controversy and trial in detail.

Thomas, David Hurst. *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity*. New York: Basic Books, 2000 (available through interlibrary loan).

Law Review Articles

C.Timothy McKeown, and Sherry Hutt. "In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After." *UCLA Journal of Environmental Law & Policy* 21, no. 1 (2002-2003): 153-212. This article gives a thorough overview of NAGPRA's provisions based on the final rule promulgated by the Dept. of the Interior and published in the CFR, along with other administrative and judicial opinion from 1990 to 2002. The article briefly summarizes 16 civil cases involving NAGPRA's excavation and discovery provisions and 9 civil cases involving NAGPRA's collection provisions. It discusses the administrative procedures are required when a claim is made for human remains or cultural items.

Seidemann, Ryan M. "Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries." *Louisiana Law Review* 64 (Spring 2004): 545-88. This well-written and balanced article introduces the topic with quotes from Vine Deloria, Jr.'s book, *Custer Died for Your Sins: An Indian Manifesto*, and a brief explanation of the general distrust of

academic anthropology among Native American groups and other indigenous groups, whose religious beliefs conflict with scientific theories of the peopling of the New World and the Pacific. The main focus of the article is to examine international law on the subject of grave and skeletal remains protection. The author reviews the laws in the U.S., South Africa, New Zealand, Australia, and Canada. The author considers NAGPRA to be “arguably the most concise statement on the law related to the treatment of in situ and curated indigenous skeletal remains.” However, two shortcomings are examined: the fact that NAGPRA only applies to remains discovered on federal or tribal lands or curated in federally funded institutions; and the lack of legislation about what is to be done with remains too ancient to be scientifically affiliated.

Wootton, Scarlet. “Tribal Leaders Attend Historic National Repatriation Summit, Oklahoma City, June 8-9, 2000.” *American Indian Law Review* 25 (2000-2001): 153-59. The author describes the historic Native American National Repatriation Summit held on June 8-9, 2000 in Oklahoma City to address NAGPRA issues. Over 250 tribal members from across the nation and federal agency representatives attended the Summit. The Summit objective was to establish a national coalition and create a draft resolution representing the Native American position on repatriation. The key issue discussed at the Summit was the repatriation of “culturally unidentifiable” remains. Attendees drafted a resolution proposing a national coalition composed of regional coalitions to make decisions about this issue. The proposal also calls for Indian-run repositories to hold unidentifiable remains and artifacts until decisions are made concerning repatriation.

Yellowman, Connie Hart. “Naevahoo’ ohtseme – We Are Going Back Home: The Cheyenne Repatriation of Human Remains – A Woman’s Perspective.” *St. Thomas Law Review* 9 (1996-1997): 103. This article describes in remarkable detail the repatriation under NAGPRA of the remains of the Cheyenne victims of the Sand Creek massacre. The author was one of four Cheyenne women selected as a Cheyenne Repatriation Representative, and participated in the traditional ceremony preparing the eighteen human remains for burial at the Smithsonian Institution Museum of Natural History.

From “Symposium: The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation.” *Arizona State Law Journal* 24 (1992): 1-562.

Hutt, Sherry. “Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool.” *Arizona State Law Journal* 24 (Spring 1992): 135–50. This article examines the legislative background and development of Section 4 of NAGPRA, which amends the U.S. Criminal Code to create a felony offense of illegal trafficking in Native American human remains and cultural items.

Trope, Jack F. and Walter R. Echo-Hawk. “The Native American Graves Protection and Repatriation Act: Background and Legislative History.” *Arizona State Law Journal* 24 (Spring 1992): 35-78. This article discusses the origins of the repatriation issue, the failure of the common law and state statutory law to protect Native burial sites, legal

theories supporting protection and repatriation of Native dead, pre-NAGPRA state and federal legislation, NAGPRA legislative intent, definitions, and provisions.

Marsh, Gene A. "Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items." *Arizona State Law Journal* 24 (Spring 1992): 79-134. This lengthy article discusses the issues and groups involved in looting, studying, destroying, and protecting Native American remains and artifacts. Four court cases that deal with Native remains, cultural objects, and burial sites are examined: *Newman v. State*, *Wana The Bear v. Community Construction, Inc.*, *Charrier v. Bell*, and *Lyng v. Northwest Indian Cemetery Protective Ass'n*.

Other Recent Law Review and Journal Articles

Byrne, Christopher S. "Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?" *Journal of Environmental Law and Litigation* 8 (Annual 1993) 109-131.

Crowther, Wendy. "Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA." *Journal of Land, Resources and environmental Law* 20 (Fall 2000) 269-290.

Kossland, Renee M. "The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?" *American Indian Law Review* 24 (Winter 1999) 129-151.

Lynn, Mary. "Assessing NAGPRA: An Analysis of its Success from a Historical Perspective." *Seton Hall Legislative Journal* 25 (July 2001): 499-523.

Painter-Throne, Suzianne D. "Contested Objects, Contested Meanings: Native American Graves Protection and the Interpretation of Culture." *U.C. Davis Law Review* (June 2002) 1261-1301.

Petrick, Matthew J. "Litigating NAGPRA in Hawai'i: Dignity or Debacle? (Reflecting on Justice Scalia's Religion Clause Jurisprudence)" *The University of Hawaii Law Review* 22 (Summer 2000) 545-568.

Riley, Angela R. "Indian Remains, Human Rights: Reconsidering Entitlement under the Native American Graves Protection and Repatriation Act." 34 (Fall 2002) 49-94.

Seidemann, Ryan M. "Time for Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act." *West Virginia Law Review* 106 (Fall 2003) 149-176.

Willingham, Robert Travis. "Holding States and heir Agencies Accountable under the Museum Provisions of the Native American Graves Protection and Repatriation Act." *UMKC Law Review* 71 (Summer 2003) 955-972.

Magazine and Newspaper Articles

Hart, Lawrence H. "Legacies of the Massacre & Battle at the Washita." *Oklahoma Today* 49, (May-June 1999): 59-63. Lawrence Hart, Cheyenne peace chief and Executive Director of the Cheyenne Cultural Center, was on the NAGPRA Review Committee for years. In this article he recounts the massacre of November 27, 1868, in which peace chief Black Kettle and 100 of his band were killed when Col. George Custer attacked their sleeping encampment on the banks of the Washita River. Mostly women and children were killed, leaving an emotional scar and a legacy of mistrust with the Cheyenne survivors, descendants, and tribal members.

Descendants of chief Black Kettle and of the other tribal members who perished in the massacre honored their ancestors in a memorial service in November 1993 on a hill overlooking the Washita Battlefield (*The Sunday Oklahoman* [Oklahoma City], 28 November 1993).

Lawrence Hart and other Cheyenne tribal members visited the Smithsonian Institution's Museum of Natural History to repatriate the skulls of 18 Cheyenne killed in the 1864 Sand Creek Massacre in Colorado (*The Daily Oklahoman* [Oklahoma City], 5 June 2000).

Arapaho tribal members traveled to the Smithsonian to bring home the remains of eight Arapaho Indians, who were buried June 25, 1994 at a Cheyenne-Arapaho burial ground near Concho (*The Daily Oklahoman* [Oklahoma City], 4 July 1994).

26 men, women and children of the Northern Cheyenne tribe were shot and killed while attempting to escape starvation and imprisonment at Fort Robinson, Nebraska in December 1878. Members of a band led by Dull Knife, the band was found leaving Oklahoma to return to Montana when soldiers imprisoned them without food, water, or heat. Their bodies were kept at the Smithsonian and the Peabody Museum at Harvard for study. Under NAGPRA and the National Museum of the American Indian Act, the remains were repatriated and reburial took place in Busby, Montana in October 1993 (*Indian Affairs Newsletter* 129, Winter 1993-1994).

The same event was described in *The Sunday Oklahoman* article dated October 10, 1993. This article reported that Dull Knife's band was kept for two weeks at the stockade at Fort Robinson, and that 57 of the band of 149 were killed during the escape. The article quoted Smithsonian historians as saying that 32 others were executed when they were "trapped in a wallow at the edge of Antelope Creek." Some of the bones were taken for study under orders of the Army Surgeon General and often only the cranium was taken for study. The article reported that 25 craniums were returned, taken from men, women, and children with estimated ages ranging from 3 to 49 years.

The Washita Battlefield National Historic Site near Cheyenne was dedicated 129 years after the Battle of Washita (Washita Massacre). Chief Lawrence Hart spoke at the ceremony. (*The Daily Oklahoman* [Oklahoma City], 2 November, 1997). A map and

description of the site and a detailed description of the massacre by Lawrence Hart are reported in *The Daily Oklahoman*, August 12, 1996.

Momaday, N. Scott. "Disturbing the Spirits: Indian Bones Must Stay in the Ground." *New York Times*, 2 November 1996, page 23. This article discusses attempts by Native Americans to claim remains found on tribal lands under NAGPRA, and discusses the hostility many Native Americans feel toward scientific claims on Native American remains.

DuBrule, Deborah. "Toxic Treasures: Tribes Reclaim their Sacred Items Only to Find Them Laced with Poisons." *American Indian Report* (April 2003), 22-24. This article explains that sacred Native American relics are often laced with poisonous pesticides, including arsenic, lead, and mercury, which were applied to the relics by early museum curators and private collectors to preserve them. The toxicity of the chemicals poses a very real threat to those who come in contact with them. One item repatriated was declared hazardous material by the Arizona Poison Control Center.