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Laura Ruth Talbert

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## COMMENTS

### NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: REQUIRING FEDERAL RECOGNITION DIGS ITS OWN GRAVE

Laura Ruth Talbert\*

#### *I. Introduction*

The desire to bury our loved ones is a concept that dates back to the beginning of humankind. The Bible introduces burials in the Book of Genesis with Abraham requesting land from the Hittites to bury his wife, Sarah.<sup>1</sup> Apart from literary records of burial practices, archaeologists have discovered physical evidence of the sacredness of burial sites. For example, a 12,000-year-old burial was discovered near Natufian land of Southern Levant.<sup>2</sup> Ancient Egyptian tombs of pyramid laborers (dating back to 2575 B.C.) have also been discovered.<sup>3</sup>

Human burial is a physical portrayal of respect dedicated to the deceased.<sup>4</sup> Depending on a group's religion, the region of the burial, the societal rank of the deceased, and the time period, a burial can take many different forms. Also, ceremonial burial practices change over time. At one point, certain groups believed that burials were meant to protect the community's survivors from death-causing spirits.<sup>5</sup> In an attempt to soothe the spirits, survivors would make "deals" with the gods and use special charms and ceremonies to accomplish the same.<sup>6</sup> Most modern rituals have little to do with deal making and much to do with comforting surviving

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\* Third-year student, University of Oklahoma College of Law.

1. *Genesis* 23:1-4.

2. *12,000 Year Old Shaman Burial Site Discovered in Northern Israel – and It Was a Woman*, SCI. BLOGGING: SCI. 2.0 (Nov. 5, 2008, 12:00 AM), [http://www.science20.com/news\\_releases/12000\\_year\\_old\\_shaman\\_burial\\_site\\_discovered\\_northern\\_israel\\_and\\_it\\_was\\_woman](http://www.science20.com/news_releases/12000_year_old_shaman_burial_site_discovered_northern_israel_and_it_was_woman).

3. *Egypt Discovers Workers' Tombs Near Pyramids*, NBCNEWS.COM (Jan. 10, 2010, 4:08 PM) [http://www.msnbc.msn.com/id/34794254/ns/technology\\_and\\_science-science/t/egypt-discovers-workers-tombs-near-pyramids/#.TwS4eZjUq\\_Y](http://www.msnbc.msn.com/id/34794254/ns/technology_and_science-science/t/egypt-discovers-workers-tombs-near-pyramids/#.TwS4eZjUq_Y).

4. TIMOTHY TAYLOR, *THE BURIED SOUL: HOW HUMANS INVENTED DEATH* 28-29 (2002).

5. Curtis D. Rostad, *History of Funeral Customs*, WYO. FUNERAL DIRS. ASS'N, [http://www.wyfa.org/basics\\_2.html](http://www.wyfa.org/basics_2.html) (last visited Oct. 30, 2012).

6. *Id.*

family members and friends. Burial practice is a process in grieving, coping with death, and remembering the deceased.

Each Native American tribe has their own unique reasons and methods for burying their dead. As with other cultures throughout the world, Native American burial customs vary widely. Indian burial rituals are largely influenced by the regional location and religious practice of the tribe. Many tribes bury their loved ones with symbolic items.<sup>7</sup> These distinct pieces of property are an essential aspect of not only the burial ritual, but also the tribe itself.

One particular piece of legislation has significant impact on Indian burial and cultural items: the Native American Graves and Repatriation Act ("NAGPRA"). This comment discusses NAGPRA and its shortcomings.<sup>8</sup> NAGPRA is a federal law that protects Native American burial sites by not allowing burial property to be confiscated by non-tribal individuals. It also allows culturally affiliated items to be repatriated (or returned) to the appropriate tribes.

Part II of this comment includes a background discussion of Native American tribes and the development of burial practices. Part III of this comment provides an overview of legislation and historical events that laid the foundation for NAGPRA. It is important to note the vast history of legislation regarding tribal repatriation and the government's efforts to protect tribal property. This discussion especially emphasizes how NAGPRA is different from previous legislation.

Because tribes must be federally recognized to make use of NAGPRA's protection, Part IV discusses the overall process of federal recognition and its inherent obstacles. Tribes must be recognized by the federal government in order to maintain a legal relationship with the United States government. Unfortunately, the filing process for federal recognition is very time-consuming and expensive. The difficulty of obtaining federal recognition inevitably affects multiple aspects of tribal affairs, such as burial property rights.

Part V covers the purpose behind the NAGPRA legislation as well as its downfalls. NAGPRA requires tribes to be federally recognized to repatriate their rightful, cultural property.<sup>9</sup> The extensive, time-consuming federal recognition process leaves deserving tribes without the right to recover their culturally affiliated items.

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7. *Native American Turquoise Jewelry*, NATIVE NET, <http://www.native-net.org/na/native-american-turquoise-jewelry.html> (last visited Dec. 28, 2012).

8. 25 U.S.C. § 3001-3013 (2006).

9. *Id.* § 3001.

Part VI proposes the thesis of this comment — that federal recognition should not be a barrier to a tribe’s right to receive their culturally affiliated items. Federal recognition should no longer be the threshold requirement for repatriation rights under the NAGPRA. Instead, a new method of defining tribal property interests ought to be instated.

Removing the federal recognition requirement when repatriating items under NAGPRA would not be without issues. Part VII addresses potential problems with this proposition, including additional cost to the government. Another concern is how to distinguish between two tribes with legitimate claims to one item. It is important to note that this comment only focuses on federal recognition as it pertains to repatriation offered through NAGPRA.<sup>10</sup>

This comment concludes in Part VIII.

## *II. Background: Native American Burial Practices*

“North American indigenous religions are, in their organizational structure and choice of religious imagery, dependent on the nature around them and on their ecological use of this nature.”<sup>11</sup> Tribal religions differ depending primarily on the regions in which they are located and whether the tribe practices hunting or gathering.<sup>12</sup> Religious practices also vary based on the time period in which the tribe emerged.<sup>13</sup> For example, the Mimbres people were a village-inhabiting tribe from southwest New Mexico. As a result of their culture and lifestyle, the Mimbres had a burial practice of entombing the deceased under the floors of their houses.<sup>14</sup> Each individual was laid to rest with their knees and elbows bent and a ceramic pot on their heads.<sup>15</sup> Interestingly, “the pot . . . was killed by making a small hole in the bottom . . . so that the human spirit and the spirit of the pot would be joined in the next world.”<sup>16</sup>

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10. This comment does not propose that non-federally recognized tribes should enjoy benefits outside of NAGPRA.

11. ÅKE HULTKRANTZ, *NATIVE RELIGIONS OF NORTH AMERICA: THE POWER OF VISIONS AND FERTILITY* 1 (1987).

12. *Id.*

13. *Burial Customs and Cemeteries in American History*, NAT’L PARK SERVICE, U.S. DEP’T OF THE INTERIOR, [http://www.nps.gov/nr/publications/bulletins/nrb41/nrb41\\_5.htm](http://www.nps.gov/nr/publications/bulletins/nrb41/nrb41_5.htm) (last visited Nov. 1, 2012).

14. ANDREW GULLIFORD, *SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS* 46-47 (2000).

15. *Id.*

16. *Id.* at 47.

Certain tribes of the Pacific Northwest, including the Plains Indians, buried their people above ground.<sup>17</sup> To accomplish aboveground burial, a variety of mediums were used. These included trees and canoes, which eventually decayed over time.<sup>18</sup> The Indians of the Mississippi drainage area utilized more permanent burial structures, such as chambered or crematory mounds.<sup>19</sup> In the Southeast, tribes created cemeteries of urns containing the cremated remains of loved ones.<sup>20</sup> These burial traditions varied with the culture and geography of the tribe, making repatriation a complex undertaking.

### *III. The Foundations of NAGPRA*

#### *A. Pre-NAGPRA*

Tension between the Native Americans and the conquering sovereign began when Christopher Columbus discovered the Americas. When the Europeans migrated to North America, Native Americans were viewed as an inferior people - nomadic savages who "could not be treated the same way as the civilized."<sup>21</sup> Nineteenth century American academics believed that Native Americans would soon face extinction and simply disappear.<sup>22</sup> Instead, the Native Americans continued to thrive, resulting in an uneasy and increasingly hostile relationship. Non-Indians began grave looting in order to claim valuables to sell for profit.<sup>23</sup> They stole items such as ceramic pottery,<sup>24</sup> medicine bags,<sup>25</sup> and hand-carved figurines.<sup>26</sup>

Records indicate Indians even looted their own ancestors' graves.<sup>27</sup> In times of desperation, they would comb through graves, looking for cultural items to sell or trade with the Europeans.<sup>28</sup> The looting took place on both

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17. *Burial Customs and Cemeteries in American History*, *supra* note 13.

18. *Id.*

19. *Id.*

20. *Id.*

21. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 260 (2005).

22. *Id.* at 260-63.

23. KATHLEEN S. FINE-DARE, *GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA* 62 (2002).

24. GULLIFORD, *supra* note 14, at 45.

25. *Id.* at 42.

26. *Id.* at 44.

27. FINE-DARE, *supra* note 23.

28. *Id.*

federal and tribal lands.<sup>29</sup> As grave looting became an increasingly commonplace activity, the government responded by passing the first piece of legislation addressing the issue: The Antiquities Act of 1906.<sup>30</sup>

The Antiquities Act protected archaeological sites on federal and tribal land by making it a crime (subject to punishment) to alter, damage, or destroy any “object of antiquity.”<sup>31</sup> Although the Antiquities Act did protect Native American graves and the items found within from sale or destruction, the items recovered were given to scientists, not Native Americans.<sup>32</sup> Thus, unlike the modern-day NAGPRA, the Antiquities Act had no repatriation provision, and cultural items ultimately ended up in the hands of non-Indians.

Also during this time, assimilation of Indians into general society was seen as the ideal way to solve the “Indian Problem.”<sup>33</sup> In the eyes of the government, the “problem” was that Native Americans continued to live on reservations and defended their land from intrusion.<sup>34</sup> Because of Indian resistance, westward expansion became more and more difficult. To break down tribal unity and allow for non-Indian settlement of reservation land, the General Allotment Act of 1887 was signed into law.<sup>35</sup>

The Allotment Act took away the majority of collective land belonging to Native Americans in an effort to assimilate the Native Americans into mainstream society.<sup>36</sup> The government believed that Indian possession of communal land was a barrier to Indian assimilation into American culture. By stripping Indians of their communal land, the government forced the concept of individual property ownership upon them.<sup>37</sup> The communal land

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29. *Id.*

30. 16 U.S.C. §§ 431-433 (2006); FINE-DARE, *supra* note 23, at 62.

31. 16 U.S.C. § 433.

32. FINE-DARE, *supra* note 23, at 62.

33. MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS 27 (2004). The goal of assimilation was to turn tribal members into Americans. Native Americans were restricted from hunting, taught to farm, and Native children were sent to boarding schools to become civilized.

34. See Clifford Duncan, *Creation and Migration Stories of the Utes*, UTAH HISTORY TO GO, [http://historytogo.utah.gov/people/ethnic\\_cultures/the\\_history\\_of\\_utahs\\_american\\_indians/chapter5.html](http://historytogo.utah.gov/people/ethnic_cultures/the_history_of_utahs_american_indians/chapter5.html) (last visited Dec. 28, 2012).

35. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 166 (6th ed. 2011). This act is also known as the Dawes Severalty Act of 1887. FINE-DARE, *supra* note 23, at 58.

36. FINE-DARE, *supra* note 23, at 58-59.

37. *History of the Allotment Policy: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 428-85 (2d Sess. 1934) (statement of Delos Sacket Otis), reprinted in GETCHES ET AL., *supra* note 35, at 167-69.

taken from the Native Americas, in many cases, was given to non-Indians.<sup>38</sup> This Act resulted in the loss of millions of acres of land belonging to Native Americans,<sup>39</sup> including the loss of Indian ancestral burial sites. Sixty-five percent of Native American land was lost through the General Allotment Act.<sup>40</sup>

The General Allotment Act of 1887 and the era that followed were an enormous failure, resulting in widespread Native American poverty.<sup>41</sup> In 1934, the Indian Reorganization Act (“IRA”) was passed.<sup>42</sup> The IRA, also known as the Wheeler-Howard Act, effectively put an end to the General Allotment Act.<sup>43</sup> The goal of the IRA was to return Indian governance to the Native Americans.<sup>44</sup> The IRA made it possible for Native American tribes to write their own constitution<sup>45</sup> and, for the first time, tribes were able to choose whether they wanted to “opt in” to the Act.<sup>46</sup>

During the Reorganization Era, governmental policy began to tilt in favor of Native Americans. Proposed legislation during this era also seemed to favor the tribes, such as the Historic Sites Act and the Reservoir Salvage Act.<sup>47</sup> The Historic Sites Act was passed in 1935 as part of President Roosevelt’s New Deal.<sup>48</sup> Although the law did not directly deal with Native Americans or Native American artifacts, the Act put the Secretary of the Interior (via the National Park Service) in control of federal preservation.<sup>49</sup> As a supplement to the Historic Sites Act, the Reservoir Salvage Act of 1960<sup>50</sup> required written notice to the Secretary of the Interior prior to any dam construction in order to protect archeological sites.<sup>51</sup> Regrettably, the

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38. GULLIFORD, *supra* note 14, at 8.

39. FINE-DARE, *supra* note 23, at 59.

40. GULLIFORD, *supra* note 14, at 8.

41. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955-79 (1972), reprinted in GETCHES ET AL., *supra* note 35, at 189.

42. FINE-DARE, *supra* note 23, at 65.

43. *Id.*

44. Comment, *supra* note 41, at 191-92.

45. FINE-DARE, *supra* note 23, at 65.

46. Comment, *supra* note 41, at 191.

47. 16 U.S.C. §§ 461-467 (2006); 16 U.S.C. § 469a (2006).

48. 16 U.S.C. §§ 461-467 (2006); FINE-DARE, *supra* note 23, at 66.

49. 16 U.S.C. §§ 461-467; FINE-DARE, *supra* note 23, at 66. This is significant, because NAGPRA later also falls under the command of the National Park Service.

50. Yasaitis, *supra* note 21, at 264. This act has been amended six times and is now known as the Moss-Bennett Act or the Archeological Recovery Act. *Federal Historic Preservation Laws*, NAT’L PARK SERV., 28, [http://www.cr.nps.gov/local-law/fhpl\\_archhist pres.pdf](http://www.cr.nps.gov/local-law/fhpl_archhist_pres.pdf) (last visited Nov. 4, 2012).

51. 16 U.S.C. § 469a (2006).

Reservoir Salvage Act “only applied to areas of ‘exceptional significance,’ which did not include most Native American burials.”<sup>52</sup>

The next piece of relevant legislation was the Archaeological Resources Protection Act of 1979, which protected “any material remains of past human life or activities which are of archaeological interest” found on federally owned lands.<sup>53</sup> The Act failed to define the exact definition of “archeological interest,” but did state that it will be determined “under uniform regulations promulgated” pursuant to the Act.<sup>54</sup> Among other things, the Act also increased violation penalties<sup>55</sup> and required “[n]otification to Indian tribes of possible harm to or destruction of sites having religious or cultural importance.”<sup>56</sup> Although notification was required, Native American tribes had no right to repatriation when the items were found on federally owned land.<sup>57</sup>

#### *B. The Bureau of Indian Affairs and Federally Recognized Tribes*

It wasn't until the 1960s that the Bureau of Indian Affairs began to distinguish between federally and non-federally recognized tribes.<sup>58</sup> From the 1950s until the 1960s, the government terminated the trust relationship between Native Americans and the United States.<sup>59</sup> The goal of the Termination era was yet again assimilation of the Native Americans into non-Indian society.<sup>60</sup> When assimilation did not result as planned, the Termination policy was abandoned and Congress began reinstating the tribes' statuses.<sup>61</sup> This process, known as the restoration of tribal status, was well supported by the tribes who had demanded federal recognition for many years.<sup>62</sup>

The distinction between federally and non-federally recognized tribes became significant due to increased tribal claims for land and identity

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52. Yasaitis, *supra* note 21, at 264 (quoting MARCUS H. PRICE III, *DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS* 26 (1994)).

53. 16 U.S.C. § 470bb (2006).

54. *Id.*

55. Yasaitis, *supra* note 21, at 265.

56. 16 U.S.C. § 470cc(c).

57. *See id.* § 470cc (protecting items from destruction or sale but not repatriating to the tribe).

58. GETCHES ET AL., *supra* note 35, at 302.

59. RENÉE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGEMENT* 7 (2005).

60. *Id.*

61. *Id.* at 7-8.

62. *Id.* at 8.



brought in federal district courts.<sup>63</sup> As the federal courts became increasingly overwhelmed with this litigation, the government thought it was necessary to limit the influx of cases by distinguishing whether litigants had tribal standing in courts.<sup>64</sup>

The first Act to make a distinction between tribes with standing in federal court and tribes without was the National Museum of the American Indian Act of 1989.<sup>65</sup> It allowed for repatriation of Native American remains and funerary objects to the respective federally recognized tribe.<sup>66</sup> Although a step in the right direction, the National Museum of the American Indian Act only applied to the Smithsonian's discoveries.<sup>67</sup> The Act required the Smithsonian to inventory all human remains and funerary objects as well as identify the origins of the items.<sup>68</sup>

If the Smithsonian was able to identify that a specific item belonged to a Native American tribe, it was required to notify the specific tribe.<sup>69</sup> Excluding human remains, any funerary object removed from a burial site was subject to this Act.<sup>70</sup> If it was determined that the item was culturally affiliated with the tribe, the Secretary of the Interior, upon request of the Tribe, required the Smithsonian to return the object to the tribe.<sup>71</sup> This is the first piece of legislation that required repatriation of any sort, even though it only applied to the Smithsonian's finds.<sup>72</sup>

Another legislative act that focused on preserving Native American cultural items was the National Historic Preservation Act. The National Historic Preservation Act (originally passed in 1966 and amended through 2006) had the purpose of preserving the Nation's historic heritage.<sup>73</sup> A 1992 amendment to the Act "brought Native American perspectives into consideration by requiring consultation with the relevant tribe . . . affected by a federal undertaking."<sup>74</sup> The purpose behind this consultation

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63. *Id.*

64. *See id.*

65. 20 U.S.C. §§ 80q-1 to 80q-15 (2006).

66. Yasaitis, *supra* note 21, at 264-65.

67. *Id.* at 265.

68. National Museum of the American Indian Act, Pub. L. No. 101-185, § 11(a), 103 Stat. 1336 (1989) (codified as amended at 20 U.S.C. § 80q-9).

69. *Id.* § 11(b).

70. *Id.* § 11(c)-(d). The item must be identified by a preponderance of the evidence from being removed from that specific site. *Id.*

71. *Id.*

72. Yasaitis, *supra* note 21, at 264-65.

73. 16 U.S.C. § 470(b) (2006); Yasaitis, *supra* note 21, at 264-65.

74. Yasaitis, *supra* note 21, at 264.

requirement was to provide tribes with notice and an opportunity to be heard regarding their historical items.<sup>75</sup> However, this ultimately required the tribes to prove the cultural relevance and sacredness of the object.<sup>76</sup> This was a heavy burden of proof for the tribes to bear.<sup>77</sup> Thus, up until 1992, only one act required repatriation of cultural items to the appropriate tribe.<sup>78</sup>

### C. *The Birth of NAGPRA*

President George H.W. Bush signed the Native American Graves Protection and Repatriation Act into law on November 16, 1990.<sup>79</sup> NAGPRA required “[f]ederal agencies and museums and universities receiving federal funding to provide opportunities for federally recognized tribes to obtain culturally affiliated Native American human remains and artifacts.”<sup>80</sup> The purpose of NAGPRA is to protect all Native American human remains, funerary sacred objects, and cultural patrimony, as well as return the items found on federal or tribal lands to their respective tribes.<sup>81</sup>

NAGPRA defines an Indian tribe as “any tribe, band, nation or other organized group or community of Indians, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”<sup>82</sup> This definition requires a tribe to be federally recognized in order to be eligible for repatriation through NAGPRA.

## IV. *Federal Recognition*

### A. *Background on Federal Recognition*

The Bureau of Indian Affairs (“BIA”), an agency within the United States Department of the Interior, is in charge of determining federal recognition. The BIA was established in 1824.<sup>83</sup> The Office of Federal Acknowledgement (“OFA”) is the office within the BIA responsible for implementing “Procedures for Establishing that an American Indian Group

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75. FINE-DARE, *supra* note 23, at 72.

76. *Id.*

77. *Id.*; Yasaitis, *supra* note 21, at 265.

78. *See supra* Part I.

79. 25 U.S.C. §§ 3001-3013 (2006).

80. Elizabeth Weiss, *NAGPRA: Before and After*, FRIENDS OF AMERICA’S PAST, 1 (2006), <http://www.friendsofpast.org/nagpra/06WeissNAGPRA.pdf>.

81. 25 U.S.C. § 3002.

82. *Id.* § 3001(7).

83. *Who We Are*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/index.htm> (last updated Oct. 29, 2012).

Exists as an Indian Tribe.”<sup>84</sup> These procedures first became effective on October 2, 1978,<sup>85</sup> and establish the Federal Acknowledgement Process.<sup>86</sup>

Before these procedures were enacted, the BIA evaluated federal recognition requests using an ad hoc system.<sup>87</sup> Tribes could also gain federal recognition through treaties (by Congress) or through the executive branch (by administrative decisions).<sup>88</sup> In the 1960s, tribes began demanding federal recognition,<sup>89</sup> “organiz[ing] sit-ins and land takeovers, testif[ying] at congressional hearings, and us[ing] the legal system . . .” to make claims in federal court across the nation.<sup>90</sup> Since there was no consistent policy for determining federal recognition, the ad hoc system was unsuccessful.<sup>91</sup>

The Federal Acknowledgement Process is “the Department’s administrative process by which petitioning groups that meet the criteria are ‘acknowledged’ as Indian tribes and their members become eligible to receive services provided to members of federally recognized Indian tribes.”<sup>92</sup> These services include administration of tribal trust funds and lands by the BIA, law enforcement, health care, and education.<sup>93</sup>

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84. 25 C.F.R. §§ 83.1-83.13 (1994); *Office of Federal Acknowledgement*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm> (last updated Oct. 29, 2012). The Office of Federal Acknowledgement was formerly known as the Branch of Acknowledgement and Research. Testimony of R. Lee Fleming, Director of Office of Federal Acknowledgement for the Hearing Before the Committee on Indian Affairs on the Federal Acknowledgment Process 2 (May 11, 2005), available at <http://www.bia.gov/cs/groups/xocl/documents/text/idc008238.pdf>. The Branch was realigned and renamed in 2003. *Id.* at 3.

85. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280-01 (Feb. 25, 1994) (codified at 25 C.F.R. pt. 83).

86. Jennifer P. Hughes, *Primer on Federal Recognition and Current Issues Affecting the Process*, MORISSET, SCHLOSSER, & JOZWIAK, <http://www.msaj.com/papers/fedrecnov.htm> (last updated Nov. 21, 2001).

87. CRAMER, *supra* note 59, at 8.

88. NAT’L CONGRESS OF AM. INDIANS, AN INTRODUCTION TO INDIAN NATIONS IN THE UNITED STATES 1, 14 (n.d.), available at [http://www.ncai.org/about-tribes/Indians\\_101.pdf](http://www.ncai.org/about-tribes/Indians_101.pdf) (last updated 2012).

89. CRAMER, *supra* note 59, at 8.

90. *Id.*

91. *Id.*

92. *Office of Federal Acknowledgement*, *supra* note 84.

93. CRAMER, *supra* note 59, at 6.

*B. The Federal Acknowledgement Process and the Seven Criteria*

A tribe must first apply for the Federal Acknowledgement Process, which requires filing a letter of intent with the Assistant Secretary of Indian Affairs within the Department of the Interior.<sup>94</sup> Once the letter of intent is filed, the Assistant Secretary may contact the tribe periodically to “request clarification, in writing, of its intent to continue with the petitioning process.”<sup>95</sup> The Department will also provide advice to the tribe, if requested, on the petitioning process.<sup>96</sup>

After the letter of intent is filed, there are seven criteria a tribe must satisfy to receive federal recognition.<sup>97</sup> Each criterion must be met for the tribe to be eligible for federal recognition.<sup>98</sup> The Assistant Secretary makes the final decision as to whether a tribe has met the required criteria.<sup>99</sup> The Assistant Secretary must summarize the evidence in a report, which includes the reasoning and analysis behind his decision.<sup>100</sup> The procedures do not provide any guidelines to aid the Assistant Secretary in the decision-making process.<sup>101</sup>

The first of the seven criteria requires that the petitioning tribe is an American Indian entity and has been identified as such continuously since 1900.<sup>102</sup> For this specific criterion, continuously means “extending from first sustained contact with non-Indians throughout the group’s history to the present substantially without interruption.”<sup>103</sup> This must be proved through acceptable forms of evidence, which include identification as an Indian entity by federal authorities, newspapers, or books, but the list is not exhaustive.<sup>104</sup> Non-members and non-Indians can also offer evidence to bolster the tribe’s petition.<sup>105</sup>

The second criterion requires that a majority of the petitioning tribe qualify as a distinct community that has continued to exist as such since historical times.<sup>106</sup> The word “historical” is defined here as “dating from

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94. 25 C.F.R. § 83.4 (1994).

95. *Id.* § 83.5(e).

96. *Id.* § 83.5(c).

97. *Id.* § 83.7.

98. *See id.* § 83.10.

99. *Id.*

100. *Id.*

101. *See id.*

102. *Id.* § 83.7(a).

103. *Id.* § 83.1.

104. *Id.* § 83.7(a).

105. *Id.*

106. *Id.* § 83.7(b).

first sustained contact with non-Indians.”<sup>107</sup> This criterion will be satisfied if the tribe can demonstrate certain facts,<sup>108</sup> such as “evidence of strong patterns of discrimination or other social distinctions by non-members,”<sup>109</sup> or that there were “shared sacred or secular ritual activit[ies] encompassing most of the group.”<sup>110</sup> This criterion also provides methods for the tribe to prove that they were a distinct community at a specific point in time, such as evidence that at least half of marriages in the tribe were to other members of the tribe.<sup>111</sup>

The third criterion requires that “[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.”<sup>112</sup> Under this criterion, political influence or authority means:

[A] tribal council, leadership, internal process or other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence. This process is to be understood in the context of the history, culture social organization of the group.”<sup>113</sup>

The statute lists widespread involvement of members in the petitioning tribe’s political processes as an example.<sup>114</sup> Another example would be if “most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.”<sup>115</sup> Similar to the second criterion, the third also lists ways for the tribe to prove they maintained political influence or authority over its members at a specific point in time.<sup>116</sup> This criterion, however, could be more difficult to prove than the others due to the lack of material evidence. For example, it would be challenging to prove that most of the membership considers actions taken by group leaders to be important. Proving subjective intent or

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107. *Id.* § 83.1.

108. *Id.* § 83.7(b)(1).

109. *Id.* § 83.7(b)(1)(v).

110. *Id.* § 83.7 (b)(1)(vi).

111. *Id.* § 83.7(b)(2)(ii).

112. *Id.* § 83.7(c).

113. *Id.* § 83.1.

114. *Id.* § 83.7(c)(1)(iii).

115. *Id.* § 83.7(c)(1)(ii).

116. *Id.* § 83.7(c)(2).

members' attitudes towards their leaders is unlikely to be proved by direct or even circumstantial evidence.

Fourth, the statute lists "[a] copy of the group's present governing document including its membership criteria."<sup>117</sup> If the tribe does not have a written document, "the petitioner must provide a statement describing in full its membership criteria and current governing procedures."<sup>118</sup> Each tribe controls their requirements for membership.<sup>119</sup> Although membership criteria differ from tribe to tribe, being a lineal descendant of an original member is a fairly common membership requirement.<sup>120</sup> Some other common requirements include tribal blood quantum and tribal residency.<sup>121</sup>

The fifth criterion also deals with membership, but is much harder to prove than the fourth.<sup>122</sup> This criterion requires evidence that the "petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."<sup>123</sup> Any group that has separated from the main body of a currently acknowledged tribe, such as a splinter group, political faction, or other type of community, may not be acknowledged under the Federal Recognition Process unless the group can clearly establish they have "functioned throughout history until the present as an autonomous tribal entity."<sup>124</sup>

The fifth criterion lists several acceptable forms of evidence, but the list is not exhaustive. An example the list provides is official records or other evidence that identifies current members or their ancestors as decedents of a historical tribe that "combined and functioned as a single autonomous political entity."<sup>125</sup> Under this criterion, the petitioning tribe must also provide an official membership list, including each member's full name, date of birth, and current address.<sup>126</sup> In addition to this list, the petitioning tribe must also provide a copy of any former membership lists, along with a

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117. *Id.* § 83.7(d).

118. *Id.*

119. See Gregg L. Lewis, *Indian Ancestry – and How to Enroll or Register in a Federally Recognized Tribe*, NATIVE-AMERICAN-ONLINE.ORG, <http://www.native-american-online.org/tribal-enrollment.htm> (last visited Oct. 28, 2012).

120. *Id.*

121. *Id.*

122. Compare 25 C.F.R. § 83.7(d) (1994) with § 83.7(e).

123. *Id.* § 83.7(e).

124. *Id.* § 83.3(d).

125. *Id.* § 83.7(e)(1)(ii).

126. *Id.* § 83.7(e)(2).

statement of the membership requirements governing the former list.<sup>127</sup> Further, a statement that describes the preparation of any former list and, if possible, the circumstances surrounding any former list is also required.<sup>128</sup>

The sixth criterion requires the membership of the petitioning tribe to be primarily composed of individuals who are not members of any other federally recognized tribe.<sup>129</sup> However, the sixth criterion can be waived if the following conditions are met: the petitioning tribe "establish[es] that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group."<sup>130</sup>

The final criterion for federal recognition requires that neither "[t]he petitioner nor its members, are the subject of congressional legislation which has expressly terminated or forbidden the federal relationship."<sup>131</sup> When the BIA began distinguishing between federally recognized and non-federally recognized tribes in the 1960s, there were many tribes already receiving the benefits of federal recognition.<sup>132</sup> Some tribes receiving those benefits were terminated by the federal government through policies aimed at reducing the number of dependent tribes.<sup>133</sup> In all, sixty-one tribes were terminated by 1976.<sup>134</sup> If the petitioner is one of the sixty-one terminated tribes, they will not become federally recognized through this process.

### C. Average Time Period

The process of becoming a federally recognized tribe is a difficult one. Once all of the evidence is collected as to each of the seven criteria, the petitioning tribe is ready to file its petition with the Assistant Secretary of Indian Affairs. For a tribe to gather all documents needed to even file their petition is especially time-consuming. Gathering the proof required for each criterion is not something easily accomplished and can take years to achieve.

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127. *Id.*

128. *Id.*

129. *Id.* § 83.7(f).

130. *Id.*

131. *Id.* § 83.7(g).

132. RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 196 (1990).

133. *Id.* at 195-96.

134. *Id.*

One of the biggest problems is much of the evidence required by the criteria is not tangible or recoverable. Some of the evidence is grounded in oral tradition, of which tribes simply do not keep written records.<sup>135</sup> Not only can the entire federal recognition process take decades to complete, but also swarms of tribes are petitioning for recognition.<sup>136</sup> On top of all of this, the OFA is underfunded, which almost guarantees a slow pace for new petitioners.<sup>137</sup> For example, as of April 29, 2011, the OFA only had nine cases open and active.<sup>138</sup> Fortunately, once the OFA deems a case active, the Assistant Secretary of Indian Affairs must make a decision on the tribe's status within one year.<sup>139</sup> When that decision is made, it must then be published in the Federal Register.<sup>140</sup> "If a tribe disagrees with the BIA's finding, it may file an appeal with the Interior Board of Indian Appeals."<sup>141</sup> If the Interior Board of Indian Appeals confirms the BIA's finding, the process is over and the tribe has exhausted all available remedies.

Although an appeal is the last step in the Federal Recognition Process, some groups, like the Chinook tribe, have refused their appeal to be the final remedy. Located in parts of Oregon and Washington, the Chinook nation has been trying to become federally recognized for ages.<sup>142</sup> In 2002, the Chinook tribe was denied federal recognition by the BIA.<sup>143</sup> In response to this denial, the Chinooks have petitioned lawmakers for support in their

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135. See Lorinda Riley, *Federal Recognition for Indian Tribes*, UNIV. OF ARIZ. NATIVENET, 12 [http://www.uanativenet.com/sites/default/files/Federal%20Recognition\\_0.pdf](http://www.uanativenet.com/sites/default/files/Federal%20Recognition_0.pdf) (last visited Dec. 28, 2012).

136. NAT'L CONGRESS OF AM. INDIANS, *supra* note 88, at 12. "Since 1978, more than 250 groups have notified the BIA that they intended to petition for federal recognition. As of September 2010, seventeen had received acknowledgment of tribal status, twenty-nine were denied, and seven petitions were awaiting final BIA action." GETCHES ET AL., *supra* note 35, at 9.

137. See MILLER, *supra* note 33, at 50.

138. *Status Summary of Acknowledgment Cases*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/idc/groups/xofa/documents/text/idc013624.pdf> (last visited Sept. 30, 2012).

139. GETCHES ET AL., *supra* note 35, at 304.

140. *Id.*

141. *Id.* (citing 25 C.F.R. § 83.11 (1994)).

142. Tyler Graf, *Chinook Tribe Ramps Up New Campaign for Federal Recognition*, DAILY ASTORIAN (Dec. 15, 2011, 2:00 PM), [http://www.dailyastorian.com/free/chinook-tribe-ramps-up-new-campaign-for-federal-recognition/article\\_299c674c-2759-11e1-baf9-0019bb2963f4.html](http://www.dailyastorian.com/free/chinook-tribe-ramps-up-new-campaign-for-federal-recognition/article_299c674c-2759-11e1-baf9-0019bb2963f4.html).

143. *Id.*



quest to become federally recognized.<sup>144</sup> While this issue has not yet been settled, it may lead to some alternative options for petitioning tribes.

### V. NAGPRA & Its Shortcomings

#### A. NAGPRA Fails to Fulfill Its Intended Purpose

In addition to benefits such as tax-exempt status, federal recognition also ensures that a tribe will receive protection under NAGPRA. NAGPRA allows repatriation of cultural and burial items belonging to federally recognized tribes. But why should federal recognition be a prerequisite to receiving what already belongs to tribes? Over the years, the federal government has worked very hard to keep Native American items safe from destruction or sale. It makes little sense to expend such protective efforts to simply allow the items belonging to non-federally recognized tribes to collect dust on museum shelves. The federal recognition requirement is not in accordance with the purpose of NAGPRA.

The given purpose behind the NAGPRA legislation is two-fold. First, it is intended to protect Native American burial sites, which can include remains, funerary and sacred objects, and objects of cultural patrimony on federal lands. The second purpose is to repatriate those items to the appropriate tribe.<sup>145</sup> Repatriation is “bringing something or someone back to the homeland from which it or him or her was alienated.”<sup>146</sup> It is the second purpose that is of greatest concern to tribes, and it is this second purpose that has not been accomplished through NAGPRA.

Currently, NAGPRA only provides protection and repatriation to federally recognized tribes. The reasoning behind the federal recognition requirement does not align with the original intent of NAGPRA. Because the federal acknowledgement process has become more and more difficult to achieve over the years,<sup>147</sup> fewer tribes are eligible for NAGPRA protection. Thus, the purpose of protecting and repatriating tribal items to the appropriate tribe has little practical significance.

#### B. Difficulty of Federal Recognition Process

While it is very difficult for U.S. tribes to become federally recognized, the benefits of federal recognition are expansive. The BIA therefore requires strict proof of each petitioning tribe’s legitimacy. Proving

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144. *Id.*

145. *Id.*

146. FINE-DARE, *supra* note 23, at 148.

147. *See id.* at xiii.

legitimacy is a heavy burden that the tribe must bear through the seven criteria.<sup>148</sup> “Each of the criteria demands exceptional anthropological, historical, and genealogical evidence.”<sup>149</sup> Often, the tribe will be required to retain a field expert in order to reach these demands.<sup>150</sup>

Not every tribe will have access to this type of information, for various reasons. Some of the required evidence may no longer exist or may be in the hands of another faction of the once-united tribe. Tribes may have a good deal of the evidence required, but may not have all of it. “The vast majority of petitioners do not meet these strict standards, and far more petitions have been denied than accepted.”<sup>151</sup>

The process of becoming federally recognized is also extremely time-consuming. On average, it takes six to ten years to collect all the evidence needed to file a petition.<sup>152</sup> Once the petition is filed, it can then take the OFA the same amount of time to review the petition.<sup>153</sup> Unluckily, the OFA has discretion to ignore deadlines<sup>154</sup> or extend them indefinitely.<sup>155</sup> Jack Campisi, an anthropologist who has worked on several acknowledgment claims, opines that the OFA is a “bureaucratic mill that makes the continental drift look like a speedy process.”<sup>156</sup>

Further, garnering the evidence required to file a petition is an expensive endeavor. Since 1994, the cost per petition has rivaled \$1 million.<sup>157</sup> Even on the extremely low-end, a petition can cost \$50,000 to \$100,000.<sup>158</sup> Acquiring evidence may cost tribes more money if specialists or other experts must be involved. It is also not uncommon for anthropologists and lawyers to be hired to help a tribe prepare its petition. Many tribes seeking federal recognition are poverty-stricken and simply do not have the money required to submit a successful petition.<sup>159</sup>

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148. *See supra* Part II.

149. NAT'L CONGRESS OF AM. INDIANS, *supra* note 88, at 12.

150. *Id.*

151. *Id.* (“[O]nly about 8 percent of the 562 federally recognized tribes have been individually recognized since 1960.”).

152. CRAMER, *supra* note 59, at 51.

153. *Id.*

154. *Id.* at 51-52.

155. *Id.*

156. *Id.* at 52.

157. *Id.* at 54.

158. *Id.*

159. *See id.* at 54-55.

The BIA is not in the business of financially funding the petition process for tribes.<sup>160</sup> The tribes are responsible for raising the money on their own or through their sponsors.<sup>161</sup> As Renee Ann Cramer, a “sociolegal” scholar and author on topics related to Native Americans stated, “resources affect acknowledgement claims.”<sup>162</sup>

*C. An Added Layer of Difficulty to Becoming Federally Recognized: The Negative Effect of Indian Gaming*

Another major issue that has impacted the federal acknowledgement process is the gaming industry.<sup>163</sup> While gaming is big business for the tribes involved, it muddles the federal recognition application pool. Since the first gaming facility opened in 1990, there has been a drastic increase in the number of petitions for federal recognition.<sup>164</sup> The influx of tribal petitions (from tribes that desire gaming benefits) raises questions of legitimacy as to all petitions, placing increased scrutiny on legitimate tribal petitions.<sup>165</sup>

The Seminole tribe in Florida opened the first bingo hall in the late 1970s.<sup>166</sup> Florida challenged the Seminoles’ bingo hall in district court, but the court held that governing Indian bingo halls on reservation land would be a civil regulatory action over which the State had no control.<sup>167</sup> Florida appealed and almost immediately after losing their Fifth Circuit challenge, bingo halls began popping up on reservations across the country.<sup>168</sup>

California was another state to legally challenge reservation bingo halls. *California v. Cabazon Band of Mission Indians* eventually made its way to the United States Supreme Court.<sup>169</sup> A majority of the Supreme Court “affirmed the inherent, sovereign rights of Indian tribes to engage in their chosen path to economic development, even if that path was bingo or card gaming.”<sup>170</sup> This ruling caused States to feel helpless, unable to touch Native American tribes and their bingo halls. Meanwhile, the tribes turned their attention to an even more profitable venture — full-fledged casinos.

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160. *Id.* at 54.

161. *Id.*

162. *Id.* at xv.

163. *Id.* at xiv.

164. *Id.*

165. *See id.* at 94.

166. *Id.* at 86.

167. *Id.* at 86-87.

168. *Id.* at 87.

169. 480 U.S. 202 (1987); CRAMER, *supra* note 59, at 87.

170. CRAMER, *supra* note 59, at 87.

A year later, the Indian Gaming Regulatory Act (“IGRA”) was passed, which gave states the power to regulate Indian gaming enterprises.<sup>171</sup> Among other things, IGRA allowed non-gambling states to enter into agreements with federally recognized tribes who wished to operate gaming facilities.<sup>172</sup> In states where gaming was already legal, through lotteries or other games of chance,<sup>173</sup> the IGRA allowed Indian tribes to have “the exclusive right to regulate gaming activity on Indian lands. . . .”<sup>174</sup> This exclusive right came with different restrictions, including how profits can be used.<sup>175</sup> Since IGRA was enacted, twenty-four states have some type of casino run by tribes and over 360 tribes offer some sort of Indian gaming.<sup>176</sup>

Indian gaming (as it relates to federal recognition status) has struck a nerve. Some states have proposed bills to tax Indian casino profits and “relieve tribes of their sovereign immunity from suit.”<sup>177</sup> While it may not affect the discretion of the individuals sitting within the OFA, Indian gaming has sparked public criticism, particularly from anti-recognition and anti-gaming organizations.<sup>178</sup> The increase in Indian gaming protestors translates to more protesting against federal recognition of new tribes. States have aligned with non-Indian residents to fight tribal acknowledgement petitions, which makes the background and research process more extensive and expensive for the OFA.<sup>179</sup>

Another major issue that has impacted the federal acknowledgement process is the Jack Abramoff scandal. Jack Abramoff, a former lobbyist for a law firm in Seattle, worked with Native American tribes to secure casino interests.<sup>180</sup> To accomplish this, the Native American tribes would “pay for campaigns that would shut out potential competition from state lotteries or new casinos.”<sup>181</sup> In total, the six Native American tribes who dealt with

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171. CRAMER, *supra* note 59, at 88-89.

172. *Id.* at 89.

173. *Id.* at 90.

174. 25 U.S.C. § 2701 (2006); CRAMER, *supra* note 59, at 90.

175. CRAMER, *supra* note 59, at 91.

176. *Id.* at 93-94.

177. *Id.* at 98-99.

178. *Id.* at 103.

179. *Id.*

180. Geov Parrish, *Making Sense of the Abramoff Scandal*, ALTERNET (Dec. 20, 2005), [http://www.alternet.org/story/29827/making\\_sense\\_of\\_the\\_abramoff\\_scandal](http://www.alternet.org/story/29827/making_sense_of_the_abramoff_scandal).

181. *Id.*

Jack Abramoff<sup>182</sup> shelled out over \$66 million in fees, a vast amount of which were possibly due to overbilling.<sup>183</sup>

Although the tribes were defrauded, this scandal unearthed the enormous amount of money tribes were able to pay for the mere purpose of lobbying for casino interests. The deep pockets of the tribes have made people very distrustful of Indian gaming. After this lobbying scandal came to light, the public called for federal campaign finance regulations to apply only to Indians,<sup>184</sup> as well as changes to other procedures dealing with Indian gaming and federal recognition. This scandal has no doubt polluted the reputation of tribes who participate in Indian gaming, and has made the federal acknowledgement process even more difficult for tribes seeking recognition.

While neither the Indian gaming industry nor the Jack Abramhoff scandal are directly related to the NAGPRA legislation, both issues highlight the immense difficulty faced by tribes petitioning for federal recognition. The negative impact that gaming and lobbying has on the federal recognition process makes it even more difficult for tribes to be eligible for repatriation under NAGPRA.

#### *D. Other Inherent Problems with NAGPRA*

Ignoring the obstacles associated with the federal recognition requirement, there are also temporal problems with NAGPRA. The Act applies retroactively, meaning that anything a federally funded museum currently has in its possession belonging to a newly federally recognized tribe must be repatriated to them, upon request of the tribe.<sup>185</sup> However, while a tribe is in the thick of the federal recognition process, time doesn't stand still.

Although museums generally do not sell exhibits, they do participate in other forms of deaccessioning.<sup>186</sup> When a museum deaccessions an exhibit,

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182. John McCarthy, *Indian Tribes Not to Blame for Abramoff Scandal*, INDIAN GAMING, <http://www.indiangaming.com/regulatory/view/?id=20> (last visited Nov. 1, 2012).

183. Parrish, *supra* note 180.

184. McCarthy, *supra* note 182.

185. 25 U.S.C. § 3005(a)(1) (2006).

186. Telephone Interview with Tony Chavarria, Curator, Museum of Indian Arts and Culture (Oct. 27, 2011) (selling exhibits discourages donorship and affects museums' credibility). See generally Marlon Bishop, *Art Deaccessioning: Right or Wrong?*, CULTURE.WNYC.ORG (Oct. 20, 2010), <http://culture.wnyc.org/articles/features/2010/oct/20/deaccessioning-right-or-wrong/>.

they remove it from the museum<sup>187</sup> in order to trade with another museum. Reasons for deaccession vary, but a common reason is that museums need extra space for a new exhibit.<sup>188</sup> Rotating exhibits is crucial to maintaining public interest and encouraging return visits. When a federally funded museum (one required to abide by NAGPRA's regulations) trades an artifact belonging to a non-federally recognized tribe, they may trade with federally funded or non-federally funded museums alike.<sup>189</sup> This could move the item outside the protections of NAGPRA.

For example, a federally funded museum acquires an artifact belonging to a non-federally recognized tribe in March. It then trades that artifact with a museum that is not federally funded in April. The non-federally recognized tribe finally becomes federally recognized in May. Unfortunately, repatriation of that artifact will not occur, because it is now in the hands of a museum that is not federally funded.

## *VI. Proposed Approach*

### *A. Cut the Requirement of Federal Recognition*

NAGPRA should use separate criteria for determining a "tribe." Federal recognition is too strict for the purposes of returning cultural items to their appropriate tribes. It is appropriately strict for determining other benefits. As previously discussed, the process to become federally recognized is quite long and extensive. If a tribe is unable to achieve federal recognition, they will not be reunited with their cultural items. These artifacts are an important part of their history as they help define their culture and are used to educate future generations of the tribe. Repatriation under NAGPRA should be available to all tribes, regardless of federal recognition. This proposed approach would open the doors to an abundance of tribes who are unable to achieve federal recognition, but who still have legitimate claims to items in possession of federal museums and agencies. By making every tribe eligible for repatriation, survival of a tribe's history, tradition, and culture is more likely.

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187. *Deaccession*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/deaccession?show=0&t=1320424655> (last visited Oct. 29, 2012).

188. Telephone Interview with Tony Chavarria, *supra* note 186.

189. *Id.*

### B. Interested Claimants

Under the current structure of NAGPRA, only federally recognized tribes are eligible for repatriation of items.<sup>190</sup> However, if federal recognition were no longer a requirement for NAGPRA, there would undoubtedly be many more types of claimants interested in the human remains and other objects repatriated by NAGPRA. The first type of claimant is what is currently in existence: the federally recognized tribe. This is a tribe who was either recognized through treaty, by Congress, by administrative decision through the executive branch,<sup>191</sup> or they could have also been recognized through the lengthy Federal Acknowledgement Process.<sup>192</sup>

Another type of claimant is a state-recognized competitor of a federally recognized tribe. An example of this would be the Cherokees of Southeast Alabama, a state-recognized tribe located in Alabama.<sup>193</sup> The Cherokee Nation is a federally recognized tribe, based in Oklahoma.<sup>194</sup> If human remains identified as belonging to a Cherokee are found, both the Cherokee Nation and the Cherokees of Southeast Alabama would be competing with each other for those remains.

A third type of claimant is a state-recognized, non-competitor tribe. A good example of this is the Upper Mattaponi Tribe of Virginia.<sup>195</sup> The Upper Mattaponi Tribe is documented as a tribe dating back to the 1600s.<sup>196</sup> No other band of Mattaponis is federally recognized.

Non-recognized groups with colorable claims are an additional type of claimant. There are many examples of this in non-recognized bands of Cherokee, Choctaw, and Creek Nations. Some of these groups claim that instead of following the Trail of Tears, their ancestors cut off the trail and settled outside of Oklahoma.<sup>197</sup> Once settled, they either lived in isolation or assimilated with the non-Indian society, but either way, these groups have

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190. 25 U.S.C. § 3001.

191. NAT'L CONGRESS OF AM. INDIANS, *supra* note 88, at 12.

192. See CRAMER, *supra* note 59, at 54 (discussing hurdles that must be overcome in order to obtain federal acknowledgement).

193. *Federal and State Recognized Tribes*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/?tabid=13278> (last visited Oct. 30, 2012).

194. *Id.*

195. *Id.*

196. *Virginia Indians Today: Mattaponi*, VIRGINIA'S FIRST PEOPLE: PAST & PRESENT, <http://virginiaindians.pwnet.org/today/mattaponi.php> (last visited Oct. 29, 2012).

197. See CRAMER, *supra* note 59, at 7.

no way to trace their ancestry to removed tribes.<sup>198</sup> As previously discussed, groups that separated from the main band of the tribe, such as splinter groups, are currently not eligible for federal recognition, without alleging specific circumstances.<sup>199</sup> Because of this, the number of interested claimants from this category is predictably quite large.

The final type of claimant is a non-recognized group without colorable claim. These claimants amount to false claimants, and can be anyone from amateur anthropologists to civil war re-enactors who want the items for their own reasons.

### C. *What Is a Tribe?*

One of the biggest dilemmas in this proposed approach is how to distinguish between these different claimants. The relevant question is what is a tribe? If federal recognition is no longer included in NAGPRA's definition, any tribe will be eligible for repatriation consideration. This could lead to questions of legitimacy. Thus if the federal recognition standard is removed, a new standard must be put in place. Otherwise, individuals requesting repatriation who do not have a colorable claim, such as amateur anthropologists or extreme hobbyists, would overburden the NAGPRA process. To control for this, a new framework of what constitutes a tribe must be established; thus, the word 'tribe' must be defined.

There are many differing definitions of 'tribe'. As previously discussed, NAGPRA currently defines an Indian tribe as "any tribe, band, nation or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."<sup>200</sup> For purposes of NAGPRA, this is not a workable definition. The *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, the regulations which determine who becomes federally recognized, defines an Indian tribe as "any Indian . . . tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe."<sup>201</sup> This definition requires BIA involvement and Secretary of the Interior approval. Because the goal of NAGPRA is to be self-governing, this is another definition that is not workable.

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198. *Id.*

199. 25 C.F.R. § 83.3(d) (1994).

200. 25 U.S.C. § 3001(7) (2006).

201. 25 C.F.R. § 83.1.



According to the Merriam-Webster dictionary, a tribe is “a social group comprising numerous families, clans, or generations together with slaves, dependents, or adopted strangers.”<sup>202</sup> This definition is also too vague for NAGPRA purposes. If the standard is as formless as this definition, there will be no way to stop a group without a colorable claim from receiving items through NAGPRA.

Simply searching through definitions of “tribe” does not provide the best material. If the term is narrowed to “Indian tribe,” definitions come closer to the objective. For example, a popular legal dictionary defines “Indian tribe” as “a separate and distinct community or body of the aboriginal race of men found in the United States.”<sup>203</sup> This definition gets close to being a useful standard for NAGPRA because it includes more about the history of Native Americans, which would assist in restricting groups without colorable claims from being eligible for repatriation.

However, this definition equates an Indian tribe with the race of the individual, something that not all tribes require as membership criteria. The definition used should include language that addresses the practices of traditional rituals or assembling as a united group. There should not only be an historical aspect to the definition, but also a behavior one.

The fact is that no definition would accomplish the purpose behind NAGPRA. Regardless of the definition, there is still the possibility that some groups with legitimate claims will be excluded from exercising repatriation rights. But requiring federal recognition for protection under NAGPRA excludes far too many groups with legitimate claims. By eliminating the federal recognition requirement, tribes with legitimate claims would become eligible. However, removing the requirement for federal recognition and replacing it with a broader definition would not solve the problem. It would simply replace one arbitrary standard for another. Fortunately, there is another standard already in place. NAGPRA guidelines already dictate which tribes may receive cultural items. Before discussing those guidelines, it is important to note the different types of items that can be repatriated.

#### *D. Repatriation-Eligible Items*

NAGPRA specifically lists five different types of items that can be repatriated: human remains, associated funerary objects, unassociated

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202. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1335 (11th ed. 2003).

203. *Indian Tribe*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Native+American+tribe> (last visited Oct. 30, 2012).

funerary objects, sacred objects, and objects of cultural patrimony.<sup>204</sup> Providing the definition to each type of item helps one understand what the guidelines require. The term “human remains” is fairly self-explanatory, so that definition will not be included. NAGPRA defines funerary objects as “objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.”<sup>205</sup> An example of a funerary object is the pot that the Mimbres people ‘killed’ and buried along with their dead.<sup>206</sup> As discussed earlier, including the pot with the buried individual was a death ritual of that culture.<sup>207</sup>

Funerary objects are further defined based upon whether they are associated or unassociated, and this distinction depends on what group has current control of the object. Associated funerary objects are in the possession of a federal museum or agency.<sup>208</sup> Unassociated funerary objects are not in the possession of any federal museum or agency.<sup>209</sup> Unassociated funerary objects must also be identified to relate to human remains of a specific group or as “having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.”<sup>210</sup>

Sacred objects are another type of item that can be repatriated to the associated tribe. NAGPRA defines sacred objects as “specific ceremonial objects[,] which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”<sup>211</sup> To be determined a sacred object, the item must have been devoted to a specific ceremony.<sup>212</sup> Some examples of sacred objects include ceremonial headdresses, sacred drums, medicine bundles, masks, and pipes.<sup>213</sup>

The final type of item that is eligible for repatriation is any object of cultural patrimony. NAGPRA defines objects of cultural patrimony as:

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204. 25 U.S.C. § 3005(a)(1)-(2).

205. *Id.* § 3001(3)(A)-(B).

206. GULLIFORD, *supra* note 14, at 46-47.

207. *Id.*

208. 25 U.S.C. § 3001(3)(A).

209. *Id.* § 3001(3)(B).

210. *Id.*

211. *Id.* § 3001(3)(C).

212. Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 513 (2010).

213. *Id.*

An object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe . . . and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.<sup>214</sup>

Some items that have been deemed objects of cultural patrimony are the Zuni War Gods and the Wampum Belts of the Iroquois.<sup>215</sup> The Zuni War Gods, hand-carved wooden figurines, are part of continuing religious tradition and vital to Zuni spirituality.<sup>216</sup> Because the War Gods are communal property of the tribe, sacred caves and shelters within the Zuni Pueblos are proper display areas for these figurines.<sup>217</sup> The War Gods are placed in the natural elements to be able to deteriorate naturally, which “reaffirm[s] the cyclical nature of all Zuni-made objects and the power of the spirit world.”<sup>218</sup> The Zuni War Gods have ongoing cultural importance to the Zuni group and should not be alienated from them.

The Wampum Belts of the Iroquois are another example of an object of cultural patrimony. Reminders of treaties’ past, wampum belts are “ritual objects of great spiritual significance.”<sup>219</sup> As applied to the definition of objects of cultural patrimony, the Wampum Belts of the Iroquois have historical importance to the tribe, and should not be appropriated to a non-tribal individual.

#### *E. NAGPRA Guidelines*

Just because a tribe would be eligible to receive the above-listed items through repatriation under the current form of NAGPRA does not mean it will. The tribe will still have to prove that the items should be repatriated to them. The NAGPRA legislation provided for a Committee that is responsible for monitoring and reviewing the inventory system, the identification system, and the required repatriation.<sup>220</sup> The Committee is the

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214. 25 U.S.C. § 3001(3)(D).

215. Gunn, *supra* note 212, at 513.

216. GULLIFORD, *supra* note 14, at 43-44.

217. Gunn, *supra* note 212, at 513.

218. GULLIFORD, *supra* note 14, at 44.

219. Gunn, *supra* note 212, at 514 (citation omitted).

220. 25 U.S.C. § 3006(c)(3) (2006).

fact-finder responsible for determining whether to repatriate cultural items to the requesting Indian tribes.<sup>221</sup> Thus, the tribe must prove to the Committee that an item should be repatriated to them.

At times, a museum or agency will oppose a tribe's request for repatriation of an item. If there is a competing claim against the Indian tribe from the possessing museum or agency, the Committee is required to use the following standard for repatriation to the Indian tribe:

If a known lineal descendant or an Indian tribe . . . organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony . . . and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.<sup>222</sup>

This sufficient evidence standard favors the tribe, requiring the rival federal agency or museum to bear the burden of proving why they should keep possession over the requesting tribe.

Regardless of whether there are opponents to tribal repatriation, there are steps the tribe must take to ensure the item will be repatriated to them. The steps required to prove that an item should be repatriated to a particular tribe depend on what the item is. Before a tribe can receive any item, they must first request the item.<sup>223</sup> If a tribe never requests an item be repatriated to them, it will not be. If the item to be repatriated is human remains or an associated funerary object, the requesting tribe can show lineal descendancy and receive the item — if the tribe can establish that the item was culturally affiliated with it.<sup>224</sup> If the item to be repatriated is an unassociated funerary object, sacred object, or object of cultural patrimony, the item shall be given to the requesting tribe if the tribe can prove the item was previously culturally affiliated with it.<sup>225</sup>

But there are times when the cultural affiliation of items cannot be established upon the discovery of the items. NAGPRA provides guidelines for such an event. Where cultural affiliation has not been established for

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221. *Id.*

222. *Id.* § 3005(c).

223. *Id.* § 3005(a)(1).

224. *Id.*

225. *Id.* § 3005(a)(2).

human remains of funerary objects, either associated or unassociated, the tribe shall receive the requested item if they are able to show cultural affiliation “by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion.”<sup>226</sup>

Where cultural affiliation has not been established for sacred objects and objects of cultural patrimony, the requesting tribe must show it is a direct lineal descendant of the original owner of the object<sup>227</sup> and the object was once owned by or controlled by the tribe.<sup>228</sup> In the instance that there is no identifiable lineal descendent, the requesting tribe can show they once owned or controlled the sacred object.<sup>229</sup>

The case of the Kennewick Man is an example of an eligible tribe unable to meet the burden of proving the item was culturally affiliated to it. The human remains in this case were close to 9500 years old and found near the Columbia River in Kennewick, Washington on July 28, 1996.<sup>230</sup> Once found, the federally recognized tribe in the region, the Umatilla Indians, claimed the remains, aiming to rebury them.<sup>231</sup> The remains were originally returned to the tribe; however, later examinations found the American Indian tribe had no cultural association with the remains.<sup>232</sup> As one anthropologist commented, “[NAGPRA] has no more applicability to this skeleton than it would if an early Chinese expedition had left one of its members here.”<sup>233</sup> The skeleton was delivered to scientists to study, which the Umatilla Indians vehemently opposed.<sup>234</sup> The Ninth Circuit agreed with the later examinations, holding the remains of the Kennewick Man be turned over to the scientists, due to no “cognizable link” between the remains and the Umatilla Indians.<sup>235</sup>

Although the subject is surrounded in controversy, it remains an example of how the NAGPRA guidelines for repatriation were used, whether right or wrong.

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226. *Id.* § 3005(a)(4).

227. *Id.* § 3005(a)(5)(A).

228. *Id.* § 3005(a)(5)(B).

229. *Id.* § 3005(a)(5)(C).

230. FINE-DARE, *supra* note 23, at 149.

231. GULLIFORD, *supra* note 14, at 30.

232. *Id.*

233. *Id.* at 30-31 (citation omitted).

234. GETCHES ET AL., *supra* note 35, at 759.

235. *Id.* (citing *Bonnichsen v. United States*, 367 F.3d 864, 880 (9th Cir. 2003)).

### *VII. Potential Criticisms of Proposed Approach*

The proposal to remove the federal recognition requirement from NAGPRA coverage is not without criticism. One of the concerns of this alternate approach to eligibility for NAGPRA repatriation is the additional cost to the government if they have to return everything to every tribe, regardless of federal recognition status. But there should be no additional cost to the government because NAGPRA already requires all federally funded museums and agencies to inventory their items and, if possible, identify the “geographical and cultural affiliation” of each item.<sup>236</sup> For unassociated funerary objects, sacred objects, or cultural patrimony, a written summary is required, which details the geographical location and cultural affiliation, if determinable.<sup>237</sup> Regardless of who is requesting repatriation, the inventory or written summary process is still required.<sup>238</sup>

Another concern is allowing the NAGPRA Committee to be the ultimate decision maker for repatriation. On the surface, it would appear that eliminating the federal recognition requirement would not solve any problems because Native Americans would still have to appear before the Committee and prove they are the appropriate beneficiaries for the cultural items. But appearing before the Committee would not create such strict, burdensome, and unfair outcomes as requiring federal recognition would. This is due to the structure of the Committee.

The Committee is composed of seven members, all appointed by the Secretary of the Interior.<sup>239</sup> Three members come from Indian tribal nominations, Native Hawaiian organizations, and religious leaders, and at least two of those members are required to be actual traditional Indian religious leaders.<sup>240</sup> An additional three members are nominated by national museum organizations and scientific organizations.<sup>241</sup> The Secretary of the Interior also appoints the final member of the Committee, but all other members must consent to this final member.<sup>242</sup> If the Committee members do not consent to the final member appointed by the Secretary of the Interior, he must continue to appoint until everyone on the Committee agrees to the addition.<sup>243</sup>

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236. 25 U.S.C. § 3003(a) (2006).

237. *Id.* § 3004(a).

238. *Id.* §§ 3003, 3004.

239. *Id.* § 3006(b)(1)(A)-(C).

240. *Id.* § 3006(b)(1)(A).

241. *Id.* § 3006(b)(1)(B).

242. *Id.* § 3006(b)(1)(C).

243. *Id.*

Having the Committee review the repatriation process is not equivalent to the federal recognition requirement. Unlike the federal recognition process, which is determined only by the Assistant Secretary of Indian Affairs, the Committee created under NAGPRA has seven different individuals collectively deciding whether an item should be repatriated. Of those seven, three are guaranteed to be either from Indian tribes or traditional Indian religious leaders. NAGPRA is designed to protect historical items and repatriate those items to the appropriate tribe. Unlike the federal recognition requirement, the reviewing Committee is more in line with the purpose of NAGPRA.

The final concern with the proposed approach is what to do when there are two legitimate claims for the same object. How will NAGPRA alone determine who is the more deserving party? Under the current form of NAGPRA, the federal museum or agency is the first determiner of which tribe should receive the item being repatriated,<sup>244</sup> and thus decides who has the more legitimate claim. If they are unable to make a decision between the two claimants, they must keep the item until the two parties agree on the disposition of the item, or the dispute is resolved in some other manner.<sup>245</sup> Those other avenues can be a review by the Committee or adjudication in a court of law.<sup>246</sup> This will ensure that a neutral third-party is involved, which will make it more likely that the item is eventually repatriated to the appropriate tribe.

### VIII. Conclusion

Human burial is an integral part of humanity, with differing burial rituals across the globe. Native American burials vary, but many tribes bury their dead with important cultural and symbolic items, each carefully chosen based on the religion, region, and time period of the Indian burial. These artifacts have as much value to the tribes as the actual remains. They act as cultural bridges to the tribes' past and allow them to preserve ancestral traditions for the future.

In the last hundred years, the federal government has tried, not always successfully, to protect Native American historical items. As with all historical items, a lack of protection could lead to their destruction or sale to a non-beneficiary. Not until recent history have there been any policies to reunite the artifacts with their rightful owners. NAGPRA is the only piece

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244. *See id.* § 3005(e).

245. *Id.*

246. *Id.*

of legislation to come close to accomplishing that task; however, NAGPRA falls short. By requiring federal recognition for the repatriation of artifacts, NAGPRA creates an unnecessary and extreme barrier to tribal repatriation.

The federal recognition process is an uphill battle for the petitioning tribe. Each requirement of the federal recognition process requires extensive research and time. To accomplish these requirements, financial resources are essential, something that not all tribes have available to them.

The proposition of this comment is simple: all tribes should be covered under NAGPRA, whether federally recognized or not. The process to become federally recognized, which has been compounded in recent years by Indian gaming and scandals, is too difficult a prerequisite for repatriation under NAGPRA. The hurdles that the federal recognition process present may be appropriate for other venues, but they are too demanding for repatriation of culturally affiliated artifacts and ancestral remains. During the time that it takes to become federally recognized, the items could be lost. NAGPRA intends to reunite these items with their rightful owners because of their importance to tribal history.

Removing federal recognition from NAGPRA's definition of a tribe could be the simplest amendment. There would be many groups that would be interested in the repatriation of cultural items. The non-recognized groups without colorable claims may attempt to collect items that are not associated with them. However, NAGPRA already includes guidelines that guard against this. As NAGPRA stands today, there is already a process in place for determining an appropriate owner for these items.

The Committee formed under the NAGPRA guidelines has the responsibility of monitoring and reviewing the inventory system and identification system that the federal museum or agency has in place. They also have the responsibility of reviewing the repatriation procedures. With the proposed approach, the Committee would be in charge of determining whether the requesting tribe proves they are the appropriate tribe for repatriation. Although the Secretary of the Interior appoints every person of the seven-member Committee, it is more diverse than the sole decision-maker in the federal recognition process, the Assistant Secretary of Indian Affairs. The diverse appointment process of the Committee helps to ensure fairness in its decisions. After reviewing the four categories of repatriation-eligible items, this diverse Committee makes a decision based upon the evidence the requesting tribe submits.

The proposition of this comment will undoubtedly and understandably face criticism. There will an opportunity for human error, but with the Committee-based approach, more tribes are given the prospect of collecting



their cultural items. It is important to understand that by removing federal recognition, repatriation decisions under NAGPRA will belong to a Committee of experts. As such, all deserving tribes, not just the federally recognized ones, will enjoy the important repatriation protections of NAGPRA.