NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts
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NAGPRA REVISITED: A TWENTY-YEAR REVIEW OF REPATRIATION EFFORTS

Julia A. Cryne*

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Introduction

The Native American Graves Protection and Repatriation Act¹ (NAGPRA) is but one facet of the great conflict between religion and science faced by governments when making decisions and creating legislation. Both sides are concerned with the human identity and defining our place in the universe, but

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the methods employed in achieving these goals are often diametrically opposed. Science uses a specific deductive methodology, valuing the use of demonstrated facts and quantifiable information leading to conclusions supported by evidence. Religion pursues discovery using faith, complex belief systems, and longstanding traditions supported by cultural awareness. Neither is wrong, and both pursuits are invaluable to the lives of human beings both in the past and today. Our society can ill afford to reject one over the other, and so a conflict is born, and our government is forced to make choices about priorities.

The specific conflict examined in this comment concerns the value placed on the human remains, funerary and sacred objects, and objects of cultural patrimony that are defined within NAGPRA. The religious perspective—voiced before Congress by lineal descendants, tribes, and Native American groups—sees human remains as the remnants of a once-living, once-breathing person deserving of respect and a proper burial. Failure to treat these people and their sacred possessions with the respect and importance they deserve has religious and social consequences. All cultures value the importance of funerary rites for the dead, and treating human remains as clinically detached “specimens” is sacrilegious—offensive both to the individual and family, as well as to the broader culture among many Native Americans.

It is part of the universal human experience to acknowledge our dead and dispose of their bodies in some particular and reverent fashion, and it is human to seek treatment of our ancestors’ remains with respect. Certain cultures vary as to specific practices, but respecting these remains is unquestionably an important goal. Traditional Jewish mores require burial on the same day as death in order to uphold the mandate to respect the dead, known as Kevod Hamet. Native Hawaiians traditionally value the bones of an ancestor as sacred for eternity, and their removal is both a defiance of the wishes of that person and a means by which the spiritual power of the individual can be stolen. Modern Lakota burials include a viewing of the body no matter its condition, and relatives will often embrace and kiss their loved one before the

4. Mims, supra note 2, at 126.
closing of the casket. It is a commonplace belief across multiple Native American groups that the disturbance of the dead (either by desecration or grave-robbing) forces the spirits of those individuals to wander without rest. Congress has recognized this viewpoint as socially valuable by enacting NAGPRA with a focus on repatriating remains and sacred objects to their descendants and tribes.

The other viewpoint, voiced before Congress by many scientists (including archaeologists, anthropologists, and biologists, as well as the scientific community at large), values these remains and objects as critical to increased historical and scientific understanding. Historically important remains and objects can provide vast quantities of information about past and present peoples, evolution, social and cultural beliefs, and the world climate and environment at the time of death. The remains themselves also offer a wealth of information about the individual—including age, gender, race, physical characteristics, and cause of death. Although science has given us great advances in many fields, it is ever-evolving and must be supplemented by new research and learning. Without such continuing work, our knowledge would become stagnant, and no new advancements would be possible.

Many physical anthropologists feel not only that unique and valuable remains should be examined, but also must stay available for testing with the advancement of future technologies. Congress has both in NAGPRA and in other pieces of legislation codified support for scientific study by preserving some access to remains and objects as a national policy. Problems between scientists and tribal interests occur when their interests collide. This is especially true because many people are on the polar extremes of this issue—either believing in continued possession for research purposes or insisting on immediate burial without study.

8. Arlene Hirschfelder & Paulette Molin, ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS 33 (2000); see, e.g., id. at 99 (describing traditional Navajo beliefs).
9. Myriam Nafta, Flesh and Bone: An Introduction to Forensic Anthropology 27, 32 (2000); see also Quigley, supra note 3, at 74-75.
10. Nafta, supra note 9, at 32.
11. Quigley, supra note 3, at 205.
NAGPRA was passed by Congress in 1990. Before this legislation, there existed almost no legal protection for treatment, repatriation, or study of Native American human remains and sacred funerary objects.\textsuperscript{14} American Indian groups had long lobbied for protections because museums and governmental agencies were in possession of vast quantities of remains and objects, many of which were not well-organized.\textsuperscript{15} In the Smithsonian Institute alone, the government possessed roughly 18,000 pieces of Native American human remains in 1989.\textsuperscript{16}

Additionally, many of these remains and objects were taken from tribes and Native American families without their consent during times before Native American rights were as respected as they are today. There were long-existing allegations by tribes of government theft of bodies from battlefields and graveyards.\textsuperscript{17} Some of this behavior came as a result of direct orders from senior government officials to collect remains for study in the early field of eugenics.\textsuperscript{18} The treatment of remains differed depending on their race: unlike European-American remains, those of Native Americans were often collected and held without concern for the families of the dead.\textsuperscript{19}

Additional problems rectified by the Act included grave-robbing and burial-site desecration.\textsuperscript{20} Before NAGPRA, the only means of redress for such acts was a lawsuit based on tort doctrines such as conversion, and even then a claim would be actionable only when the remains were not found on federal land.\textsuperscript{21} This left almost no recourse for tribes to request a return of remains. NAGPRA


\textsuperscript{17} See Hirschfelder & Molin, supra note 8, at 33, 243; see also NATHPO Report, supra note 15, at 6.

\textsuperscript{18} NATHPO REPORT, supra note 15, at 6.


\textsuperscript{20} NATHPO REPORT, supra note 15, at 6.

\textsuperscript{21} Law pre-NAGPRA provided that American Indian human remains found on federal land were federal property. See 136 Cong. Rec. 31,937 (1990) (statement of Rep. B. Campbell).
was a key component of the growing body of Indian civil-rights legislation because, for the first time, tribes as well as families could seek to reclaim their ancestors' bodies and possessions from the government.\textsuperscript{22}

The purpose of NAGPRA as stated in its legislative history is twofold: to protect Native American graves and to repatriate Native American remains.\textsuperscript{23} The goal behind repatriation is to allow individuals and tribes to give remains proper burials and religious rites.\textsuperscript{24} Congress's intent with regard to the purpose of NAGPRA is also evident in the statutory language. Ownership of remains is given (in descending order of preference) to: lineal descendants, the tribe in whose territory the remains were discovered, the tribe with the closest cultural affiliation to the remains, and the tribe in the aboriginal area where the remains were discovered.\textsuperscript{25} The law requires agencies to catalogue their collections in order to identify possible Native American remains or objects.\textsuperscript{26} Once the remains are identified as possible Native American remains, they go through a two-step process. First, the remains must be determined to be Native American within the meaning of the statute.\textsuperscript{27} If they do not meet the requirements, they are not considered Native American, and NAGPRA does not apply. If they do meet the requirements, the second step is utilized to identify either their descendants or the appropriate tribe to take possession of the remains. If such individuals or groups are identified, the remains must be appropriately repatriated as prescribed by the statute.\textsuperscript{28} If neither descendants nor a tribe can be identified, the repatriation provision does not apply.

Since its enactment in 1990, NAGPRA has facilitated the return of human remains and sacred objects to tribes. Nevertheless, there is some concern in certain communities that the number of remains returned is only a small percentage of those actually held by the government. A recent report released by the National Association of Tribal Historic Preservation Officers (NATHPO) discussed problems it identified regarding achieving compliance with the statute.\textsuperscript{29} This comment will address the NATHPO Report, along with opposing opinions, and examine the causes for the failures alleged. This comment argues that the NATHPO Report alleging governmental failure to enforce NAGPRA seems to raise valid concerns and that these problems are

\textsuperscript{22} Daniel K. Inouye, \textit{Foreword} to NATHPO REPORT, \textit{supra} note 15, at 4, 4.
\textsuperscript{24} Id.
\textsuperscript{26} Id. § 3003.
\textsuperscript{27} Id. § 3001(9).
\textsuperscript{28} Id. § 3005.
\textsuperscript{29} NATHPO REPORT, \textit{supra} note 15.
likely caused by a lack of congressional enforcement mechanisms, by judicial misinterpretations, and by agencies’ failed implementations.

I. The NATHPO Report: Does This Study Raise Valid Concerns About Non-compliance with NAGPRA?

NATHPO is a non-profit organization of tribal leaders that implements and monitors federal and tribal preservation laws. In 2008, NATHPO, in accordance with its monitoring duties, released a study regarding government implementation of NAGPRA. The goal of the study was to “assess[] the implementation of [NAGPRA] and identify[] where improvements might be made.” The study looked at inventory notices, the process of determining cultural affiliation, and surveys returned from federal agencies and tribes about a variety of NAGPRA issues. This report is critical to any meaningful NAGPRA review because it is the only one of its kind in the two decades following the passage of NAGPRA to take a comprehensive look at the Act’s effectiveness.

A. Determining Cultural Affiliation

Agencies are given some discretion by Congress to determine whether remains or sacred objects can be culturally affiliated with descendants or tribes. Congress defines cultural affiliation as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” The tools used in this analysis include Native American oral histories, archaeological studies, geographical studies, historical analysis, and other similar means. The tribes requesting the return of items following a notice of possession need to show cultural affiliation by a preponderance of the evidence.

The NATHPO Report noted cases where agencies made determinations of affiliation based on pre-determined objectives. Some of the agencies were

31. NATHPO REPORT, supra note 15, at 5.
32. Id. at 9.
35. Id. § 3005(a)(4).
36. Id.
37. NATHPO REPORT, supra note 15, at 41.
found by courts to have acted arbitrarily and capriciously in their conclusions.\textsuperscript{38} Furthermore, an agency's determination of cultural affiliation can take into account any number of factors, any of which it can prioritize or dismiss at its discretion. Lastly, determinations of cultural affiliation have been made more complicated by judicial decisions attempting to resolve "ambiguous" language in the Act.\textsuperscript{39}

The findings and examples given in the Report seem to have at least some merit. The "arbitrary and capricious" standard as applied to agencies under the Administrative Procedure Act is generally a high burden to prove, especially given the deference afforded to agency decisions by the courts.\textsuperscript{40} An agency decision cannot be overturned unless it is directly contrary to the terms of the statute or the agency completely failed to address the evidence in rendering a reasonable decision.\textsuperscript{41} This is likely the cause of the limited amount of suits regarding agency decisions on cultural affiliations of remains. Additionally, agency decisions of cultural affiliation made without greater study can cause remains to be affiliated with the wrong tribe, misidentified as Native, or misidentified as non-Native. The results of poor decisions that fail to take certain types of evidence into account can be disastrous (and almost irreversible) to affected parties. The problem of agency decisions erroneously finding lack of cultural affiliation appears to be validly raised by the Report.

\textbf{B. Priority of NAGPRA Within Agencies}

Federal agencies are responsible for vast amounts of rulemaking, adjudications, investigations, and program execution all under the authority of many congressional mandates. As a result, the amount of resources provided to agencies to perform certain functions is a good indication of those functions' relative importance. One of the major problems NATHPO identified with agency implementation of NAGPRA is that compliance with the Act is often a low priority of the agency, as evidenced, for example, by the survey responses indicating there is a lack of both training and resources.\textsuperscript{42} Resource needs also include personnel to implement the statute and training for those


\textsuperscript{39} See infra Part II-B.

\textsuperscript{40} See, e.g., Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 481-82 (W.D. Wash. 1988).


\textsuperscript{42} NATHPO REPORT, supra note 15, at 24.
employees. The resources needed to implement the statutory requirements of NAGPRA are subject to competing demands. In addition to their work on NAGPRA-related activities, agencies must also pay employees, work on mandated activities, provide facility maintenance, and maintain any other agency activities that require funding.

NATHPO reported that several government agencies’ survey responses listed the following problems: small amount of resources, little or no training, and few-to-no employees designated to work on NAGPRA. Furthermore, each agency is responsible for securing the funds it needs to implement NAGPRA; only tribes and private organizations are eligible for federal grants. Of the agencies replying to the survey, approximately forty percent indicated low resource priority as one of their two greatest negative factors in complying with NAGPRA.

The Report thus raises a valid concern. If agencies do not have the resources needed to implement NAGPRA, it should come as no surprise that agencies are not treating it as a priority. Furthermore, lack of funding can contribute to slow and unorganized inventory work and sloppy research to determine cultural affiliation. This problem, however, is more easily rectified than those in other areas. Congress need only authorize more funding in agency appropriations to NAGPRA in order to ensure that a lack of resources cannot be used as an excuse for failed compliance.

C. Lack of Means to Force Action (Including Cataloguing, Providing Notice to Tribes, and Delineating Remains)

With the exception of a provision for civil penalties against museums that fail to comply with NAGPRA, the Act lists no other penalties for non-compliance. No federal agency can be penalized for failing to meet deadlines, to provide the requisite notice to tribes of the existence of remains subject to NAGPRA, or to provide notice of a change in the delineation of the status of remains. The only option the courts have in these situations is to remand the case to the agency for further review or explanation. Because neither NAGPRA nor the Administrative Procedure Act allows for any other penalty, agencies are thus subject only to procedural review to ensure implementation.

43. Id. at 21-24.
44. Id. at 23.
45. Id. at 24.
NAGPRA provides that all inventories were to be completed by 1995.48 The NATHPO survey responses from federal agencies indicated that several of them had not completed the required inventory as of May 2008.49 Without completing the full inventories, it is impossible to know which remains and sacred objects in government possession should be repatriated. It is a clear failure that some of these agencies are more than a decade past the statutory deadline. Yet there is no remedy for the delay, and no reviewable action can occur until the remains are completely inventoried, identified, and delineated.

Once remains are identified as “Native American” after discoveries and completed inventories, tribes must be given notice.50 This allows tribes to be part of the identification process, to submit any relevant evidence, and to make repatriation requests. If notice is withheld or given too late, such participation naturally becomes more difficult. In surveys returned from tribes, several reported knowing of particular remains held by agencies but indicated they had not yet been notified of possession or delineation activities.51 Congress included the notice and inventory provisions in NAGPRA in order to facilitate the repatriation process. The repeated failures in these areas are troubling in light of the Act’s purposes.

D. Concerns About NAGPRA from a Different Perspective

Indian tribes are not the only groups concerned about NAGPRA. NAGPRA takes into account the importance of science by allowing for ongoing studies of remains requested by the lineal descendant or tribe when the items are “indispensable” to completion and their study “would be of major benefit to the United States.”52 But despite the existence of this provision, the Act favors repatriation absent the existence of a critical ongoing study. Because of the limitations on studies under NAGPRA, scientific groups have actively sought to prevent repatriation where further study was possible.53 The Society for American Archaeology made several statements in the late 1980s during some of the large debates in this field:

Research in archaeology, bioarchaeology, biological anthropology, and medicine depends upon responsible scholars having collections

49. NATHPO REPORT, supra note 15, at 15.
51. NATHPO REPORT, supra note 15, at 15.
52. 25 U.S.C. § 3005(b).
of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques . . . .

. . . . Whatever their ultimate disposition, all human remains should receive appropriate scientific study, should be responsibly and carefully conserved, and should be accessible only for legitimate scientific or educational purposes.54

Interestingly, some in the scientific community agree with the concerns raised by the NATHPO Report—notably that NAGPRA’s statutory language needs to be clarified and that agencies need to make bias-free interpretations.55 Even so, it remains important to distinguish the goals of the scientific community from those of the tribes since their desired means of achieving those ends differ wildly. Scientists want more access to remains for their collection and study in order to bolster our cumulative knowledge.56 Tribes generally want their ancestors’ remains returned for reburial without further study.57 It is apparent why these groups have such direct conflicts: further study and collection cannot be done if the bodies are returned to the tribe and reburied.

Despite the concerns of scientists and the academic community, NAGPRA was primarily designed to correct the wrongs of the past and allow for repatriation, not to enable continued study. Ultimately, some of the scientific community’s concerns are moot now that NAGPRA is law. The only means by which NAGPRA’s critics can hope to alter this reality is to lobby Congress for change.

II. Why the Law Has Failed to Fulfill the Purposes of NAGPRA and Caused the Concerns Established in the NATHPO Report

The NATHPO Report has raised serious concerns about agencies failing to carry out the primary requirement of NAGPRA: repatriating the remains of


56. Garza & Powell, supra note 54, at 38.

Native Americans currently held in government collections to their tribes. There is neither a single reason for this failure nor any one branch of government to blame. The responsibility lies with the multi-branched government and the bureaucracy within it. Congress is responsible for the actual wording of the law, the courts are responsible for how those words are interpreted, and the agencies must implement the law and make each case's determination. Flaws exist because of problems with each group, and those problems must be collectively addressed to ensure that the implementation of NAGPRA complies with the spirit of the law.

A. Congress

Congress enacted NAGPRA and established as a national policy the repatriation requirements to correct the long-standing practices of abuse and disrespect of American Indian remains.58 As discussed above, this legislation was designed to allow descendants and tribes to have their ancestral remains returned to them and to allow these remains to be properly buried.59 But although one of the leading supporters of this bill in the Senate called it a "human rights" law,60 the holes and vague language left in the Act are greatly problematic in light of the purposes for which it was designed.

1. Limited Scope and Lack of Enforcement for Failed Implementation

NAGPRA is limited in many ways, but perhaps most critically in the realm of enforcement. No internal enforcement mechanism addresses the failures of agencies to implement the Act. NAGPRA imposes civil penalties only on museums,61 remaining silent as to enforcement against any other actors. NAGPRA contains many mandates for actions by federal agencies, but no provisions for their enforcement. It is a law almost entirely without teeth. The complete lack of mechanisms to ensure compliance is counterproductive to the core purpose of the Act: to allow for repatriation of Indian remains and sacred objects.

The scope of the Act also makes its application so limited that a significant portion of existing artifacts are not subject to any requirements under NAGPRA. Essentially, remains or sacred objects will be subject to the NAGPRA provisions only if they are discovered on property owned by the

58. See Trope & Echo-Hawk, supra note 19, at 9.
59. Id. at 22.
60. Id. (quoting 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye)).
In the inventories provision, only federal agencies and federally funded museums are required to go through an inventory of their collections to determine whether they hold any remains subject to NAGPRA. The Smithsonian Institution, for example, is entirely exempt from NAGPRA (although it is covered separately in another Act).

Another problem with the scope of NAGPRA is that, besides proven lineal descendants, only federally recognized tribes may request repatriation of their people’s remains. Muwekma Tribe v. Babbitt involved the Bureau of Indian Affairs and an unrecognized Indian tribe that had sought federal recognition for more than ten years. The court noted that not having a recognized status is harmful in many ways, including being ineligible for repatriation of ancestral remains. The Muwekma people knew of several collections of their ancestral remains, but they were left unable even to attempt to claim them until their recognition process was completed.

Because of its construction, the language of NAGPRA itself is responsible for many of the problems associated with achieving the primary purpose of the Act. As with all legislation, Congress must make political choices when multiple interest groups are involved, and many such choices have the effect of handicapping the goals behind the legislation. This seems to be the case here, and only Congress can fix these problems by passing a new law or by amending NAGPRA in order to allow it to better serve its primary purpose.

2. Vague Language and Processes

The language used in NAGPRA is problematic in that the critical definitions used are too vague to provide agencies with much guidance. The most critical function of NAGPRA is identifying remains that are subject to the statute. Only those remains that are both “Native American” and “culturally affiliated” with a present-day tribe will be eligible for repatriation. "Native American" is defined under the statute as “of, or relating to, a tribe, people, or culture that is..."
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indigenous to the United States.” As discussed more in-depth below, the Ninth Circuit has interpreted this provision to require that the remains have a link to a presently existing tribe. Although this interpretation is not obvious in the statute, it raises another question if true: to what degree must the remains be linked? That question remains unanswered.

The second step, determination of “cultural affiliation,” requires “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” Essentially, this step requires (1) a specific group to which the remains belonged, (2) a modern group that shares some type of identity with the previous group, and (3) some minimal degree of evidence of a link to reach a level that is “reasonable.” Congress provided a list of factors that may be considered in determining cultural affiliation, including evidence based on geography, kinship, folklore, anthropology, biology, linguistics, and oral traditions. Although Congress provided for many types of evidence, establishing or determining what constitutes a “link” is patently vague. With ancient remains, the ability to prove the Act’s requirements will be more difficult. Despite such difficulty, ancient remains were certainly contemplated by Congress as indicated by the word “prehistorically.”

Because such vagueness exists in the statute, it is left to the agencies to make determinations of eligibility. Such unfettered discretion without guidance or checks will inevitably lead to agencies making decisions on whatever grounds they choose as long as they are reasonably explained. Congress provided for a review committee to make recommendations to the agencies. NAGPRA established the Committee (made up of persons nominated by tribes, museums, and scientific organizations) and empowered it to review identification and repatriation cases at the request of interested parties. The findings of the committee, however, are only advisory, and agencies are free to come to differing conclusions. No review or decision given by the Committee is binding on any party.

72. Bonnichsen v. United States, 367 F.3d 864, 876 (9th Cir. 2004).
73. 25 U.S.C. § 3001(2).
74. Id. § 3005(a)(4).
75. Id. § 3001(2).
76. Id. § 3006.
77. Id.
78. 43 C.F.R. § 10.16(b) (2009). See also 25 U.S.C. § 3006(e) and the statute’s use of the term “recommendations.”
Congress has left open too many holes in drafting the language of this statute and is undoubtedly responsible for many of the concerns raised in the NATHPO Report. Congress is solely in charge of appropriations and therefore controls the amount of money given to agencies for particular programs. Not only has NAGPRA been underfunded, but the statutory scheme leaves agencies without limiting standards or guidance. Such failures are the result of the inability of Congress to pass an Act that has adequate enforcement mechanisms or sufficient standards to limit agency discretion.

B. The Judiciary

In the famous words of Chief Justice John Marshall, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." After Congress creates a law, the courts are left to interpret its meaning. In the issue at hand, the courts have had understandably varied reactions to this law and the necessarily complicated fact scenarios that have arisen under it. In this specialized field of law, there is little guidance from appellate courts on these issues. The Supreme Court has yet to issue an opinion on a NAGPRA issue, and only two circuit courts have addressed the issue of NAGPRA repatriation. With such little guidance, it is obvious why lower courts have reached differing results on the issues. Courts have resolved some of the vague wording used in the statute, especially surrounding the issue of cultural affiliation and NAGPRA eligibility. They have also placed strict boundaries on the application of the statute.

1. Interpretations of the Language of the Statute: Cultural Affiliation

The single most important case in this field of law, famously known as the Kennewick Man case, was decided by the Ninth Circuit Court of Appeals in 2004. This case revolved around the inadvertent discovery of ancient human remains dated between 8340 and 9200 years old. The remains were originally in the possession of the U.S. Army Corps of Engineers, which holds the federally owned land where the body was discovered. Early studies revealed the date estimate and postulated that the physical characteristics of the bones were not identical to modern Native Americans. A coalition of local tribes

81. Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).
82. Id. at 869.
83. Id. at 870.
requested the remains for reburial, and the Corps halted study and published a notice of repatriation. A group of scientists opposed the repatriation and asked for further study. When their request was denied, they sued and won a remand to the Corps for further evidentiary hearings on the matter.

Subsequently, the Corps agreed to allow the Secretary of the Interior to make the NAGPRA determinations. Following a non-destructive examination, the Secretary decided the remains were both Native American and culturally affiliated with the tribal coalition and ordered repatriation. The scientists filed an amended complaint, and the district court found that the Secretary had acted arbitrarily and capriciously in violation of the Administrative Procedure Act in making the determination to repatriate. The Ninth Circuit affirmed. The appellate court reasoned that the Secretary, who used only the age of the remains, failed to follow the language provided by Congress in making the determination to repatriate. Note that this conclusion was premised on the language in the definition of “Native American” found within the statute: “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” The court held that because Congress used the present-tense “is,” Congress intended that only remains bearing some relationship to a presently existing tribe can be Native American. The Secretary of the Interior’s decision was deemed arbitrary because it stood contrary to congressional intent. Under the test formulated by the U.S. Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., agencies must be given due deference for their expertise, except where Congress has directly spoken to the issue. Due to a lack of substantial evidence, the court set aside the Secretary’s determination that the remains were “Native American.”

84. Id.
85. Id.
86. Id. at 871.
87. Id. at 871-72.
88. Id. at 872. The district court also held that the requirements of NAGPRA were not met, but the Ninth Circuit did not review this portion of the decision because it held that NAGPRA did not apply to the remains. Id. at 872 n.11.
89. Id. at 876.
91. Bonnichsen, 367 F.3d at 877.
92. Id. at 876.
Additionally, the court examined the evidence in the record and made the final determination that the remains are not Native American.\(^\text{94}\) Because the "remains are so old" and the court found no reliable evidence of a cultural link between Kennewick Man and modern tribes, they are not "Native American" under NAGPRA.\(^\text{95}\) The court thus implied that any ancient remains will likely fail the same criterion for the same reasons and thus be exempt from NAGPRA.\(^\text{96}\) Although there were oral histories presented, the court dismissed these as "just not specific enough or reliable enough or relevant enough" to consider,\(^\text{97}\) claiming that the histories often contained "myths" and were "limited by concerns of authenticity, reliability, and accuracy."\(^\text{98}\) Lastly, the court stated that because the remains failed the first prong of the NAGPRA test, there was no need to address specific tribal affiliation.\(^\text{99}\)

The court's interpretation of the language of the statute, as well as the independent decision it reached on the merits of the NAGPRA affiliation issue, is troubling in light of the NATHPO Report's findings on the failure to implement NAGPRA. First, Congress has expressly provided for the consideration of oral-history evidence along with a wide range of scientific evidence and "other relevant information."\(^\text{100}\) The fact that the Ninth Circuit simply brushed aside this evidence is questionable in the face of its claim that it held steadfastly to the intent of Congress. The court should not have simply dismissed the oral evidence in this case. The statute expressly allows for the consideration of these tribal histories, as they can potentially indicate an affiliation between the current tribe and the remains.

Next, within the definition of "Native American" itself, the court failed adequately to address the potential implications of the words "of, or relating to."\(^\text{101}\) Although the court is correct that the word "is" implies present-day cultures or tribes, the definition does not elaborate on the clause "or relating to." It is the realm of the agencies to make interpretations of language not clearly explained by Congress.\(^\text{102}\) The Department of the Interior did so in this case, not by ignoring the express wording of "is," but by interpreting the words "or relating to." Such an interpretation is expressly within its power, and under the

\(^{94}\) Id. at 882.
\(^{95}\) Id.
\(^{96}\) Id.
\(^{97}\) Id. at 881.
\(^{98}\) Id. at 882.
\(^{99}\) Id. at 877.
\(^{101}\) Id. § 3001(9).
Chevron test the agency does not have to arrive at the same interpretation as the court, just a reasonable one.\textsuperscript{103}

It is reasonable that an agency’s interpretation of “or relating to” can be based on oral histories, age, and other evidence. As long as the agency takes all of the information into account and adequately explains its decision as reasonable, deference must be given to that decision.\textsuperscript{104} The court in the Kennewick Man case briefly acknowledges this point before concluding that NAGPRA is designed only to aid in the return of actual close genetic kin—and essentially no one else.\textsuperscript{105} This view is inconsistent with the plain language of the Act.\textsuperscript{106}

Ownership, after passing to lineal descendants, passes to a tribe.\textsuperscript{107}

Next, if the court’s interpretation stands, the determination of cultural affiliation (the second prong of NAGPRA analysis) becomes superfluous. If an agency determines that remains are “Native American” under the Ninth Circuit’s framework, then it necessarily has shown that the remains bear “some relationship to a presently existing tribe.”\textsuperscript{108} Thus, the cultural-affiliation prong has already been proved. It defies common sense to suggest that Congress would intend the result reached by the Ninth Circuit: the creation of a two-step process where both findings were achieved within a single step. The court acknowledges the counterpoint, but dismisses it by claiming the two steps remain distinct: the first step is more “general” because it includes more than federally recognized tribes, and the second step is “specific” because it requires a federally recognized tribe.\textsuperscript{109} Even though the first step advocated by the court is broader, as a practical matter there would be no reason for a non-federally recognized tribe to bring a NAGPRA claim and meet the first prong because

\begin{itemize}
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} See Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 482 (W.D. Wash. 1988).
  \item \textsuperscript{105} Bonnichsen v. United States, 367 F.3d 864, 879 (9th Cir. 2004).
  \item \textsuperscript{106} Note that the court believes the term “ancestor” to refer only to closely related kin. Id. That is not necessarily the correct usage of the term in context. The court uses the term as associated with Western (“white”) cultural norms. The court lacks both the expertise and the evidence to determine the meaning of “ancestor” to different tribes—even though the sources quoted by the court utilize tribal members’ usage of the term. Id. at 866-67 (using quotations from the following sources: H.R. REP. NO. 101-877, at 9 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 4367, 4369; H.R. REP. NO. 101-877, at 13, \textit{reprinted in} 1990 U.S.C.C.A.N. 4367, 4372).
  \item \textsuperscript{107} 25 U.S.C. § 3002(a)(2) (2006). After the lineal descendants, ownership passes to the tribe on whose land the remains are discovered, then to the tribe with the closest cultural affiliation, and then to the tribe that has aboriginal (or pre-discovery) ties to the land. Id.
  \item \textsuperscript{108} Bonnichsen, 367 F.3d at 879.
  \item \textsuperscript{109} Id. at 877.
\end{itemize}
only recognized tribes can have remains repatriated under the second prong.110 The court’s reasoning in distinguishing the two steps disappears in light of practical application, again blending the two steps into one amorphous and disorganized analysis.

Lastly, the court’s decision that the Kennewick Man is not “Native American” is potentially problematic in a logical sense. It implies that, in the case of ancient remains, it is “almost impossible to establish any relationship... [with] presently existing American Indians.”111 If remains are found from pre-discovery (and pre-European) times and no DNA or similar bulletproof link is found, then NAGPRA cannot apply because the remains are “too old” to be Native American. Under this reasoning, the time period for the application of NAGPRA to remains could potentially be as narrow as from the nineteenth century to present day for some groups. Furthermore, if the definition of “Native Hawaiians” is used for comparison, it seems odd that Native Hawaiians could claim remains outdating Kennewick Man when other Native American tribes would hold no such claim to similarly dated remains.112 It is more logical to conclude that Congress intended that each group’s occupants in their respective territories would have similar timelines, as opposed to imposing an arbitrary timeline on one. Additionally, it seems illogical for Congress to provide for tribes the ability to claim remains that have “aboriginal” ties to the land113 if no ancient remains can even be classified as “Native American.”

If the court had reached the same decision based on the second prong for failure to show cultural affiliation rather than the first, then there would not be as much of a problem with circumventing the primary purpose of NAGPRA. The result of the decision as it stands, however, is that older remains, whether actually Native American or not, will not be classified as such under the statute. The problems with this decision will likely include the exemption from NAGPRA of Native American remains that under the spirit of the Act should be eligible for repatriation. This case demonstrates why the judiciary has been a part of the failure to achieve the purpose of NAGPRA.

In Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management, also known as the Spirit Cave case, the U.S. District Court for the

110. See the definition of “Indian tribe” under NAGPRA, 25 U.S.C. § 3001(7) and the subsequent use of the term in NAGPRA’s repatriation section, id. § 3005.
111. Bonnichsen, 367 F.3d at 879.
112. “Native Hawaiian” is defined by the Act as “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” 25 U.S.C. § 3001(10).
113. See id. § 3002(a)(2)(C).
District of Nevada took a different direction than did the Ninth Circuit Court in the Kennewick Man case. The Spirit Cave case revolved around the 10,000-year-old body of a Native American man discovered in a famed cave adjoining Fallon-Paiute Shoshone tribal lands and the question of whether he was related in any way to the modern tribe. Although the Spirit Cave decision briefly addressed the Kennewick Man case (which was only recently issued at the time), the court did not automatically exclude the ancient remains as non-Native (as did the Ninth Circuit). In fact, the parties in the Spirit Cave case had already stipulated that the remains were “Native American” and were only concerned with the determination of tribal cultural affiliation. The court found that there was no problem with the substantive decision made by the agency (that the remains lacked cultural affiliation), but it did find that the agency had erred in failing to consider all evidence before it and in inadequately addressing why it chose to value some evidence over other evidence. In failing to take all of the required procedural steps, the agency acted arbitrarily and capriciously in violation of the Administrative Procedure Act.

2. Territorial Limits of NAGPRA

The second area of NAGPRA-repatriation case law where the courts have had some influence centers around the Act’s territorial limits. Specifically, as stated under the “Federal lands” provision, NAGPRA applies only to remains and objects found on federally “controlled or owned” land, on tribal land, or in existing collections in federal agencies and federally funded museums. The word “controlled” has been applied narrowly, ensuring that only lands wholly under the authority of the federal government qualify.

For example, the U.S. District Court for the Northern District of New York has found that even where federal agencies exercise power over state land, including through the issuance of permits that control use or access, the federal presence and power does not meet the statutory requirements: “federal lands’ denotes a level of dominion commonly associated with ownership, not funding

115. Id. at 1216.
116. Id.
117. Id. at 1224.
120. Id. § 3001(15).
121. Id. § 3001(4).
122. Id. § 3001(8).
pursuant to statutory obligations or regulatory permits."\textsuperscript{123} The Western Mohegan tribe had an additional claim that their purported right-of-way, which supposedly granted access to the land in question, should be construed as “tribal lands” under the statute—an argument that was similarly dismissed.\textsuperscript{124} Thus, lands controlled or owned by the states are ineligible, even where the federal government controls their use or access.

Additionally, lands owned privately or by municipal authorities have been held similarly ineligible under NAGPRA. In one case, the Fifth Circuit Court of Appeals concluded that even the presence of a “federal agency . . . involved in a supervisory role . . . does not convert the land into ‘federal land’ within the meaning of the statute.”\textsuperscript{125} This area of law has had far fewer cases—and so less widespread impact on NAGPRA—than the interpretation of cultural affiliation, mostly because the wording used by Congress is far clearer in defining territorial limitations than in its definitions of statuses. The courts could construe “control” more liberally, but the main thrust of the problem in this area is Congress’s word choice.

C. Agencies

Agencies have adopted the functions of all three branches of government, but have retained their subservient role to Congress’s guidance in establishing law and agency duties. It is their quasi-executive and quasi-judicial functions that are most discussed for the purposes of this comment because the implementation of NAGPRA and the agencies’ decisions in individual cases most affect the issue at hand. Although the agencies are the actual bodies given the task of complying with and implementing NAGPRA, the responsibility for any failures of purpose cannot rest solely with them. Agencies are not “bad guys,” conspiratorially withholding remains because they view NAGPRA as a bad law. Instead, agencies are beholden to the power of Congress and must act within the law.

Congress has given agencies many laws to implement, and each agency has a primary mission, which it views as its first priority. Such primary missions include managing and conserving federal public lands (Bureau of Land

\textsuperscript{123} W. Mohegan Tribe & Nation v. New York, 100 F. Supp. 2d 122, 125-26 (N.D.N.Y. 2000), \textit{aff'd in part and vacated in part}, 246 F.3d 230 (2d Cir. 2001). Note that this decision was partially vacated on separate First Amendment grounds, but the material discussed here was left untouched because the matter was not argued at the appellate level.

\textsuperscript{124} \textit{Id.} “[T]ribal lands” under NAGPRA are less inclusive than the more common “Indian country,” defined at 18 U.S.C. § 1151 (2006).

\textsuperscript{125} Castro Romero, Jr. v. Becken, 256 F.3d 349, 354 (5th Cir. 2001).
Management)\textsuperscript{126} and protecting human health and the environment from pollution (Environmental Protection Agency).\textsuperscript{127} The most significant reason behind the failure of the agencies to achieve the purpose of NAGPRA is that NAGPRA’s purpose conflicts with their primary missions. As with all bureaucracies, agencies often move slowly and inefficiently toward a primary mission. Conflicting minor missions are often pushed aside as part of a necessary and conscious choice to fulfill the primary mission above any impedimentary laws because competing resource demands require prioritization. Often it is the smaller or competing programs like NAGPRA that are set aside, as the primary mission requires the greatest budget and resource allocations.

1. Failures of Implementation

No agency has been completely unresponsive to NAGPRA’s mandate, but more than a few have failed to implement aspects of the Act. Agencies’ compliance with statutory mandates is especially important because their actions represent the United States and therefore must demonstrate legitimacy. Agencies have consistently failed to meet all of the requirements imposed on them by NAGPRA. Several agencies reported that they had yet to complete their NAGPRA-required inventories of Native American remains and sacred objects.\textsuperscript{128} Federal agencies have “lag[ged] far behind . . . the federally funded institutions and museums also subject to the law,”\textsuperscript{129} mostly because the museums are subject to sanctions for failures while federal agencies are not.\textsuperscript{130} In 2001, the Bureau of Indian Affairs reported that, of 4185 sets of human remains in its known possession, 3890 had yet to be evaluated.\textsuperscript{131}

When an agency has only limited amounts of funding and employees, it is limited in what it can achieve. Nevertheless, this excuse only goes so far. When an agency so clearly deprioritizes certain projects as being of lower value, there is a problem. In the case of the Bureau of Indian Affairs, NAGPRA should actually be in line with the agency’s primary mission, leaving little

\begin{thebibliography}{99}
\bibitem{128} NATHPO REPORT, \textit{supra} note 15, at 15.
\bibitem{130} \textit{Id.} at 192.
\bibitem{131} \textit{Id.}
\end{thebibliography}
reason for why the agency has not implemented the requirements of NAGPRA within a reasonable timeline.

In Yankton Sioux Tribe v. United States Army Corps of Engineers, a case involving an inadvertent discovery of Native American remains and artifacts on a construction site, the U.S. Army Corps of Engineers failed to provide adequate notice of the discovery to the affected tribes. The Corps also failed to protect the remains it did not remove, leaving some of them exposed. Furthermore, the removal of some of these remains occurred without consulting the tribe. The Corps also failed to halt construction when it became apparent that further remains were being threatened and actually "crushed" by such activities. The court, after reviewing a long list of failures on the part of the Corps to follow its legal duties under NAGPRA, issued a preliminary injunction halting construction and requiring the Corps to abide by NAGPRA. All of these actions by the Corps were illegal and in direct violation of NAGPRA regulations, and the court clearly articulated the list of problems with the Corps's actions. Despite this, a final decision about the ultimate disposition of the construction project will not be made until the Corps makes a substantive decision about the cultural affiliation of the remains. Although the court was able temporarily to halt the destruction and removal of remains, the construction was not permanently addressed because the substantive decision to be made by the agency will ultimately be the primary factor in allowing or disallowing the continued project. This case is but one example of an agency failing in its legal obligations under NAGPRA, without any sanction other than a temporary injunction.

2. The Interpretations Made Are Not in the Spirit of NAGPRA

The Spirit Cave case, where ancient remains were found on Bureau of Land Management (BLM) property adjoining the Fallon-Paiute Shoshone tribe's reservation and on that tribe's traditional lands, is most demonstrative of the spirit of NAGPRA being ignored. The dispute in this case centered on the

133. Id.
134. Id.
135. Id. at 1022.
136. Id. at 1025.
137. See id. at 1027 (ordering that the Corps "expeditiously and formally determine whether the human remains . . . are Native American cultural items . . . and if so, which Indian tribe is culturally affiliated with those items").
BLM's determination that the remains were not "culturally affiliated" with the tribe in question and that the body could therefore be studied. 139 The court found that the agency had acted arbitrarily by failing to consider all of the evidence before making the decision that the remains were not NAGPRA-eligible. 140 The agency's decision was made less tenable by the fact that the agency, after "apparently ignoring" the evidence the tribe submitted and referring the case to the NAGPRA Review Committee, then proceeded to ignore the Committee's finding in its final decision. 141

The Nevada federal district court further noted that

NAGPRA requires BLM to fully and fairly consider this evidence and to uphold or reverse its determination of non-affiliation based on a reasoned and coherent discussion of the evidence and BLM's reasons for believing or disbelieving it. This discussion never occurred, necessitating a finding that BLM's determination was arbitrary and capricious. 142

It seems as though the agency sought to achieve a pre-determined outcome and was willing to review only evidence that it felt supported that decision. Not only are such actions patently in violation of NAGPRA and the Administrative Procedure Act, but they completely violate the spirit of NAGPRA: to end the practice of taking remains without respect for the tribes and bodies involved.

The actions of agencies are often the only exposure the public has to actions of the United States, and it is those agencies' responsibilities to represent the nation in a positive light by complying with the law not only when it suits them, but in all circumstances. Although some of the problems with agency implementation of NAGPRA are caused by inadequate resources and expertise, agencies can rectify other problems by allowing for a full and fair presentation of evidence before deciding an issue. Agencies can also rearrange their internal priorities and take it upon themselves to comply with the law even without fear of penalties. As the primary actors, it is important that they present themselves as fair and comporting with the spirit of NAGPRA—especially in light of the history the Act sought to correct.

139. Id. at 1211-12.
140. Id. at 1225.
141. Id.
142. Id. (emphasis added).
Conclusion

Science and religion do not have to be mutually exclusive, but each should respect the other. When remains are discovered that have potential religious significance and also potentially important scientific value, NAGPRA stands at the intersection of these two public values but has not sufficiently established as a national policy how these values should be compared and preserved while giving priority to the claims of American Indians having an affiliation with the remains. Amending NAGPRA to better allow for the best interests of each community is the only way to ensure justice and maintain the rights of both. More thought must go into how remains are classified and affiliated to prevent error. There should be a special provision for ancient remains to correct the interpretation of the Ninth Circuit Court of Appeals. Lastly, agencies should be given the resources to see that this Act can be practically implemented without sacrificing other priorities.

NAGPRA was passed by Congress for policy reasons that have not been fully implemented by the federal government. The failures to ensure that remains actually become repatriated lie in the hands of many, as is common in a bureaucracy. The responsibility falls on all three branches of government, and none of them can be distinctly isolated. Congress is responsible for not making the language clear enough to achieve its goals, and it is responsible for allowing too many loopholes that agencies may utilize to avoid compliance with the purposes of NAGPRA. The courts are responsible for interpreting language inconsistently with the clear purposes of the statute and for failing to hold agencies accountable. Agencies are responsible for not following the spirit of the Act through more thorough implementation and for disregarding the interests at stake by giving lower priority to allocating scarce resources to this work.

Ultimately, laying blame will not create the solution. It is up to Congress to give NAGPRA the teeth it needs and to clear up ambiguous language. It is up to agencies to follow the mandates of the law to achieve the most just results. It is up to the courts to uphold the will of Congress and ensure the intent of the Act is carried out through adequate implementation. It is up to all of us to see that all of these things happen. The final check must always remain the power of the vote.