



KRONICK  
MOSKOVITZ  
TIEDEMANN  
& GIRARD

# NAGPRA/CaINAGPRA

## Overview of Legal Requirements & Implications of the Federal & State Repatriation Statutes for the California State University System

---

PRESENTED BY:

Holly A. Roberson, Shareholder

September 27, 2023

[www.kmtg.com](http://www.kmtg.com)

# Trainer Introduction

---

Holly A. Roberson, Shareholder at Kronick

I am not representing or speaking for the CSU System today. San Francisco State University has given permission to share examples from our NAGPRA/CalNAGPRA work together.

I am speaking from unceded Nisenan and Miwok territory in what is today known as Yuba County

Bio: Holly represents San Francisco State University on NAGPRA/CalNAGPRA issues. She also represents government entities, including Universities, sovereign Native American governments, State Agencies, Cities, Counties, Water Districts, and Special Districts, in the areas of repatriation law, tribal cultural resources protection law, tribal law, natural resources law, environmental law, and water law. Holly has experience working on law and policy at the national, state, and local level. Her work on behalf of government entities includes regulatory compliance, legislative reform, government to government consultation, facilitation, mediation, and development of internal guidance documents and external policies.

# Trainer Introduction

---

As appointed Land Use Counsel, Holly led the CEQA Guidelines update process at the Governor's Office of Planning and Research to include Tribal Cultural Resources protection in the CEQA process (AB 52) and is an expert in effective tribal consultation.



# Scope/Trigger Warning/ Legal Terms

---

- This is a high-level, basic legal overview.
  - In-depth NAGPRA/CalNAGPRA training is available
  - Educational resources are provided in the handouts
  - See handouts for important nuances between the two laws
- Repatriation law language is dehumanizing.
  - Ancestors are people & relatives, not items & collections
  - Colonizer mindset vs. empathetic, respectful mindset
- Training uses legal terms for consistency & clarity.

# Key Principles

---

- NAGPRA/CalNAGPRA is a human rights issue.
- Repatriation is a legal & an ethical obligation.
  - Successful repatriation reduces legal risk and costs
- Tribes & Agencies share the same goal: return the Ancestors & their cultural items home.
- Respect, empathy, & relationship building are key.
- Legal compliance is the minimum, supporting Tribal participation helps the Agency meet its obligations.

# Federal & State Laws Require Repatriation

---

- Federal: Museums receiving repatriation requests shall expeditiously return remains and cultural items. (25 USC § 3005) circa 1990
- State: “It is the policy of the State that Native American remains and associated grave artifacts shall be repatriated.” (PRC § 5097.991) circa 2001
- Agencies, Universities, Schools & Museums receiving Federal/State funding are subject to NAGPRA/CalNAGPRA & must repatriate.

# NAGPRA/CalNAGPRA in 3 Sentences

---

- Legal Requirement: NAPGRA and CalNAGPRA require Agencies/Museums to expeditiously repatriate all Native American Ancestors and their cultural items to the Tribes or Lineal Descendants that identify and claim them.
- Legal Process: To facilitate claims, the Agencies/Museums must conduct and disclose timely and legally adequate inventories and summaries of all NAGPRA/CalNAGPRA subject items in their legal control.
- Method: To achieve repatriation outcomes, meaningful, respectful tribal consultation that defers to Tribal knowledge informs identification, inventories, summaries, claims, culturally appropriate handling, storage and care of NAGPRA and CalNAGPRA subject items.

# Repatriate/Human Remains/ Cultural Items

---

## Key Terms

- Repatriate: To return human remains or cultural items to a lineal descendant, Federally Recognized Tribe, or California Indian Tribe affiliated with the state aboriginal territory where they were removed from.
  - Human Remains: Physical remains, bones of people, hair, cremations
  - Cultural Items: Funerary objects, sacred objects, objects of cultural patrimony
    - Cultural Patrimony: Ongoing historical, traditional, or cultural importance to a Tribe



# Repatriate/Human Remains/ Cultural Items

---

## Key Terms:

- **Associated Funerary Objects:** objects placed with an individual as part of a death rite or ceremony, and both the human remains and associated funerary objects are in the possession or control of a Museum. (25 USC 3001 (3)(A))
- **Unassociated Funerary Objects:** Funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of the Museum. (25 USC 3001(3) (B))

# Definition of Tribe: NAGPRA

---

## Key Terms:

- Indian Tribe: 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 serviced provided by the US to Indians because of their status as Indians. (25 USC § 3001(7))
  - Same list as Bureau of Indian Affairs list of Federally recognized Tribes
- Lineal Descendant: Individual tracing their ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descentance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed. (43 CFR §10.2 (b)(1))
  - Repatriation can be to a Tribe or a Lineal Descendant

# Definition of Tribe: CaINAGPRA

---

- California Indian Tribe: a tribe located in California which either:
  - (1) Meets the definition of Indian tribe under NAGPRA
  - (2) Is not recognized by the federal government, but is a Native American tribe located in California & on the Native American Heritage Commission (NAHC) list of Tribes
    - Same list as SB 18 and AB 52 (Cal. Gov. Code § 65352.3)

# Ownership/ Repatriation/ Disposition

---

## Key Terms

- Ownership: Tribes or Lineal Descendants own Native American human remains & burial items
- Repatriation: Return legal control to a Tribe
- Disposition: Return possession or physical custody of remains or artifacts to a Tribe
  - Legal Repatriation can happen without physical disposition if a Tribe is not ready to take physical custody. Commonly known as Held in Trust.

# NAGPRA/CalNAGPRA Training Overview

---

- 1) Document & Disclose
- 2) Repatriate
- 3) Oversight
- 4) Enforcement

# 1) Document and Disclose

---

A) Possession vs Legal Control

B) Summaries and Inventories

C) Disclosure to Federal, State & Tribal Governments

# A) Possession vs Legal Control

---

- Possession= physical custody
  - NAGPRA: 25 USC § 3001
  - CalNAGPRA: Cal. Health & Saf. Code § 8012 (f), (j)
- Control= legal control
  - Responsibility to repatriate
  - Not dependent on physical custody
  - Includes loaned items, consult with Tribes on reunification of Ancestors and Associated/Unassociated Funerary Objects. Minimize transfers and handling.
- Must have clarity re: stewardship duties, culturally appropriate care, and legal control vs physical possession for State & Federal Agency collections when Agency serves as a Repository

# B) Summaries and Inventories

---

- Summaries: General description of Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony (43 CFR 10.8)
- Inventories: Simple, object-by-object list of all Native American human remains and associated funerary objects (43 CFR 10.9)
- NAGPRA & CaNAGPRA procedures differ on specific Tribal Consultation requirements & level of deference to Tribal Knowledge
- Must Consult with Tribes on Inventories and Summaries
- Must Update Inventories & Summaries when acquire new items or discover new items on campus.
- Pro tip: Have a written intake policy developed with tribal consultation.



# C) Disclosure to Tribal Governments

---

- Federal: Submission to National Parks Service (NPS) for posting on Website/ Database
- State: Posting on NAHC for posting on Website/ Database
- Send to relevant Tribes
- Tribal Knowledge and Meaningful Consultation informs Inventories and Summaries
- More deference to tribal knowledge= fewer culturally unidentified items

## 2) Repatriation

---

- A) Consultation requirements
- B) Claim Timelines
- C) Review of Claims/ Exemptions
- D) Notices to NAHC and Federal Register

# A) Consultation requirements

---

- Definition of Consultation
- Tribal Knowledge in CaINAGPRA
  - Types of Tribal Knowledge
  - Tribal Knowledge= Substantial Evidence
  - Deference/ Sufficiency of Tribal Knowledge
- Document thoroughly
- Must maintain confidentiality, do not assume information is public
- Pro Tip: Tribal Hospitality Policy

# A) Consultation Defined: NAGPRA

---

- Consultation is a process involving the exchange of information, open discussion, and joint deliberations with respect to potential issues, changes, or actions by all interested parties (HR 101-877)
- Proposed Regulations likely to update definition of Consultation

# A) Consultation Defined: CaINAGPRA

---

- CaINAGPRA: Consultation means the meaningful and timely process of seeking, discussing, and carefully considering the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, achieving agreement.
  - Same Definition as California Environmental Quality Act (AB 52) and General Plan Law (SB 18)
- Consultation between Agencies/Museums and California Indian Tribes shall be conducted in a manner that is respectful of tribal sovereignty.
- Consultation shall recognize Tribe's potential need for confidentiality with respect to tribal traditional knowledge and all tribal information shared during the consultation. (Cal. Health & Saf. Code, § 8012 (e)).

## B) Claim Timeline

---

- Both Tribes and Lineal Descendants can file claims (Cal. Health & Saf. Code § 8014, 8015)
- Disputed Claim Process?
  - Resources to help: Campus and Systemwide Committees, NAHC, National NAGPRA Program, Ms. Tafoya, CSU Office of the Chancellor, Project Manager for NAGPRA/CalNAGPRA.

## B) NAGPRA Only Simplified Notice and Claim Process, Assumes No Competing Claims

---

### Summaries

- 1) Agency consults with Tribes on Summary
- 2) Agency submits Summary to NPS National NAGPRA Program & Tribe
- 3) Tribe Submits Claim to Agency
- 4) Agency reviews
- 5) Agency submits Federal Notice of Intent to Repatriate to National NAGPRA & Tribes
- 6) National NAGPRA publishes Notice of Intent to Repatriate in Federal Registrar, *30 day wait*
- 7) Agency notifies consulting Tribes Federal Notice has been published
- 8) Coordinate Transfer and Transfer Agreement or Stewardship Agreement
- 9) Repatriate/ Disposition

### Inventories

- 1) Agency consults with Tribes on Inventory
- 2) Lineal descendant identified or determination of cultural affiliation made with Tribe
- 3) Agency submits Inventory to NPS National NAGPRA Program & Tribe
- 4) National NAGPRA publishes Federal Notice of Inventory Completion in Federal Register, *30 day wait*
- 5) Agency notifies consulting Tribe or Lineal Descendant that Federal Notice published
- 6) Tribe submits Claim to Agency
- 7) Coordinate Transfer & Transfer Agreement or Stewardship Agreement
- 8) Repatriate/Disposition

## B) CaINAGPRA Only Simplified Notice and Claim Process, Assumes No Competing Claims

---

- 1) Agency Submits Inventories/ Summaries to NAHC
- 2) Tribe submits Repatriation Claim to NAHC/Agency
- 3) NAHC Publishes Tribe's Request, *30-days to review/wait/object*
- 4) Publication of Notice of Intent to Repatriate for NAGPRA (if applicable)
- 5) If no competing claim, sign Transfer/Repatriation/Stewardship Agreements, send to NAHC
- 6) If competing claim, notify tribes and pause until Tribes reach resolution
- 7) Legal Repatriation or Physical Transfer and Disposition *within 90 days of Claim unless agreed to extend by all parties*

### Resources:

- NPS Guidance for Compliance with NAGPRA, Appendix R, available at: <https://www.nps.gov/orgs/1987/upload/AppendixR-2016-2017-Final-Feb2018.pdf>
- NAHC Training by Judge C. Williams, Part 3, Tribal Cultural Resources Repatriation at: <https://nahc.ca.gov/resources/tribal-cultural-resources-law-training/>
- NPS Guidance on How to Complete NAGPRA and CaINAGPRA Together by M. O'Brien, at: <https://www.nps.gov/subjects/nagpra/upload/NAGPRA-and-CalNAGPRA-Together.pdf>



# B) Process Listening and Timing

---

- The goal is to go through the process correctly to reach repatriation outcomes.
- Listen to Tribes and Lineal Descendants throughout the process.
- Tribes and Lineal Descendants set the pace of consultation and provide cultural directives in the consultation process.
- Timelines are legal requirements and milestones, and at the same time, the process should be nimble and responsive to a Tribe or Lineal Descendant's readiness to consult and repatriate.
- CalNAGPRA, NAGPRA, and NAGPRA Regulations allow for additional time upon request, with appropriate documentation and support of Tribe or Lineal Descendent. (Cal. Health & Saf. Code § 8016 (b))

# C) Review of Claims/ Exemptions

---

- Review for compliance with NAGPRA/CalNAGPRA
- Review evidence of cultural affiliation and ancestry, taking into account tribal expertise
- Review for Narrow Exemptions to NAGPRA (43 CFR § 10.10 (c))
  - If indispensable to specific scientific study, of major benefit to U.S., must still return within 90 days of completion of study.
- Competing Tribal Claims= can retain until dispute resolved

# D) Federal Notices

---

- Federal Notices: Send to NPS for publication in Federal Register
  - Notice of Inventory Completion: Agency determines human remains are culturally affiliated or transfer of human remains not culturally affiliated
  - Notice of Intent to Repatriate: request for repatriation is received and accepted
    - Repatriation may occur 30 days after posting of notice, if no objection received (43 CFR § 10.8 (f) and 43 CFR 10.10 (b)(2), 43 CFR 10.11)

# 3) Oversight

---

A) Federal

B) State

C) Oversight Committees

D) Changing Repatriation Laws & Requirements

# A) Federal Oversight

---



- Congress
  - Senate Committee on Indian Affairs
  - Budget
- Department of the Interior
  - National Parks Service
  - National NAGPRA Program

# B) State Oversight

---



- Legislature
  - Assembly Select Committee on Native American Affairs
  - Joint Committee on Legislative Audits
  - Budget
- State Auditor
- Native American Heritage Commission

# C) Oversight Committees

---

- Repatriation Committees
  - CSU Systemwide Committee
    - State Audit Recommendation
  - CSU Campus Level Committee
    - State Audit Recommendation for Campuses with over 100 Native American human remains
- As Sovereign Nations, Tribal Governments may have their own oversight processes, cultural protocols, or NAGPRA/CalNAGPRA Committees

# 4) Enforcement

---

- A) Good Faith Provision
- B) Federal Consequences
- C) State Consequences
- D) Other Consequences



# A) Good Faith Provision

---

- Federal and State Safe Harbor Provisions for Repatriation in Good Faith
  - Any museum or agency that repatriates human remains or cultural items in good faith is not liable for claims by an aggrieved party. (25 USC § 3002(f), Health & Saf. Code § 8018)
- Documentation to Demonstrate Good Faith
  - Outreach and Engagement
  - Research
  - Consultation Notes
  - Communication Logs

# B) Federal Enforcement & Consequences

---

- Legal: Notice, hearing, appeal process at DOI and Federal District Court, Civil Penalties (43 CFR §10.12)
- Dispute Resolution: Formal and Informal, by DOI Federal Advisory Review Committee (43 CFR §10.17)
- Financial:
  - Penalties (43 CFR §10.12 (g))
    - Each violation a separate offense
  - Legal fees and Court Costs
  - Courts may order additional compliance or compensation

# C) State Enforcement & Consequences

---

- Legal
  - NAHC has enforcement authority, including Repatriation Agreements
  - Civil Penalty (Health & Saf. Code § 8029)
  - Public Hearings
  - State or Federal Court
- Financial
  - Penalty for failure to comply with CalNAGPRA provisions including inventory, summary, claims, repatriation requirements
  - Penalty up to \$20,000 per violation
  - Legal Fees

# D) Other Consequences

---

- Relationship with Tribal Partners
- Media
- Reputational Harm
  - Student perception
  - Alumni perception
- Legal Risk

# Citations to Current Law

---

- Native American Grave Protection and Repatriation Act (NAGPRA) and NAGPRA Regulations
  - P.L. 101-601 and 25 U.S.C. § 3001-3013
- California NAGPRA:
  - Public Resources Code (PRC) § 5097 et. seq., Cal. Health & Safety Code § 7050 & 8010 et. seq.
  - AB 978 (Steinberg, 2001)
  - AB 2836 (Gloria, 2018)
  - AB 275 (Ramos, 2020)

# Evolving Law, Regulations, & Recommendations

---

- NAGPRA Regulations New Proposed Rule
  - Public Comment Closed Jan. 31, 2023
  - See: <https://www.nps.gov/subjects/nagpra/regulations.htm>
- Upcoming CalNAGPRA Regulations
  - NAHC developing CalNAGPRA and Mediation Regulations
- AB 389 (Ramos, 2023) on Governor's Desk
  - Sign or Veto by Oct. 14, 2023
- Implementation of State Audit Recommendations

# Upcoming Changes

---

- NAGPRA Regulations New Proposed Rule
  - Public Comment Closed Jan. 31, 2023
  - See: <https://www.nps.gov/subjects/nagpra/regulations.htm>
- Upcoming CalNAGPRA Regulations
  - NAHC developing CalNAGPRA and Mediation Regulations
- AB 389 (Ramos, 2023) on Governor's Desk
  - Sign or Veto by Oct. 14, 2023
- Implementation of State Audit Recommendations

# Repatriation is Possible

---

- Partnerships and Relationships
  - Tribal Governments and Lineal Descendants
  - Campus Leadership
  - NAGPRA Team
- Ongoing Commitment
  - Results
  - Leadership
  - Policy Development
  - State and Federal Funding



# THANK YOU.

---

For more information, please contact me:  
Holly A. Roberson  
(916) 321-4517  
[hroberson@kmtg.com](mailto:hroberson@kmtg.com)

