




Introduction to Repatriation Laws



Central Valley CalNAGPRA/NAGPRA Workshop
October 30, 2023
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Tribal Court Judge, Legal Counsel and Consultant

Introduction



A little about me, a little about Repatriation Laws
& Policy



Repatriation Defined

- Commonly: to restore or return someone or something to its country of origin
- In the context of human remains and cultural items in collections: to return the human remains or cultural items to lineal descendant or California Indian tribe affiliated with the state aboriginal territory where the remains were removed from.
- We will come back to this.



Trainer Bias Disclosure

- I do not support the notion of “collecting” people from their burial sites for any reason aside from mutually agreed upon preservation.
- If civilization means to be at an advanced stage of social and cultural development, these “collections” represent a blight on our civilization.
- The devaluing of Native American people and the bodies of our ancestors that is required to consider them “collectible” is, to me, a form of genocide.

Offensive Language

- I use terms like “collections”, “objects” and “items” in this series.
- There are, most likely, better, more sensitive, and more accurate terms to describe much of this work.
- I use terms that I acknowledged may be offensive to some people to ensure the participants here are equipped to understand and use the terms that are commonly used in law regarding repatriation.
- Language matters, and the more we understand about what is in the law the better the law can become.
- Terms have evolved in legislation just in the last 20 years!

What is NAGPRA and CalNAGPRA?

- The federal Native American Graves Protection and Repatriation Act (NAGPRA), was enacted in 1990, and its California counterpart (CalNAGPRA), was enacted in 2001.
- These laws establish requirements for the protection of Native American graves and the treatment and return of Native American human remains and cultural items from the collections of government agencies and museums.
- NAGPRA and CalNAGPRA prescribe a process for entities with these collections to repatriate, or return, these remains and cultural items to tribes that have a traceable relationship to them.

Federal Repatriation Policy

- (NAGPRA, 25 U.S.C. § 3005)
- Enacted in 1990
- Subsection (a): The language throughout this section states that museums receiving repatriation requests for remains and cultural items “shall expeditiously return” such remains and cultural items.
- Subsection (c): This subsection makes it clear that there is a presumption that evidence submitted by relatives and tribes showing the museum does not have the right of possession proves this claim and shifts the burden to the Museum to show they have the right of possession.



California Repatriation Policy

- (Pub. Resources Code, § 5097.991)
- Enacted in 1991 by AB 12
- Added a section to the CA Public Resources Code (§ 5097.991)
- “It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.”
- This policy statement remains in the law today, unamended

Historical Barriers to Repatriation



Why are their still “collections” to repatriate



Competing Interests

- Historically there have been competing interests regarding repatriation.
- It's a clash in world views
- Museums want to retain their collections, seen as research data and teaching tools.
- Tribes want their ancestors and cultural items repatriated for cultural and spiritual balance and healing.
- Historically museums have had an unfair advantage in that they have access to their entire collection and get to make determinations and classifications about the collection contents resulting in some contents being excluded from the repatriation process.



Affiliation as a Barrier For Tribes

- The interpretation of evidence standards required to prove cultural affiliation have been a longstanding barrier to repatriation.
- The time and resources that are required to demonstrate what is needed for a successful claim is not available to all relatives and tribes seeking repatriation.

Classification as a Barrier for Tribes

- Only certain objects are considered “cultural items” subject to repatriation.
- It is possible some museums have intentionally or unintentionally classified items on their own determinations, to be not cultural items when actually, according to the tribe, they are cultural items and should be repatriated.
- If these items do not show up in the inventory or summary of a collection, a tribe would never even know to question these determinations.



Resources as a Barrier for Museums

- Large collections with spotty recordkeeping
- No policies in place to guide museum staff
- Lack of qualified staff to make accurate determinations and do tribal outreach



Legislation to Remove Barriers

- Over the years legislation in California has worked to remove some of the barriers to repatriation.
- We will review some of these laws today.

History of CA Repatriation Laws



1976 - 2023



History of CA Repatriation Bills

Year	Bill Number	Topic or Title
1976	AB 4239	Created Native American Heritage Commission
1991	AB 12	Repatriation Policy Statement
2001	AB 978	California Native American Graves Protection and Repatriation Act (Cal NAGPRA)
2018	AB 2836	UC Systemwide Policy for Repatriation
2020	AB 275	Strengthens repatriation under Cal NAGPRA
2023	AB 226	UC Campuses strongly urged to report each institution's progress towards completing repatriation pursuant to the act annually.
2023	AB 389	Requires the California State University to comply with various requirements and systemwide policies regarding the handling, maintenance, use for teaching and research and repatriation of Native American human remains and cultural items.

AB 4239 – The NAHC (!!!)

- Enacted in 1976
- Repealed and added Sections of the CA Public Resources Code (§§ 5097.9 – 5097.97)
- Created the Native American Heritage Commission (NAHC)
- Preserve and ensure accessibility of cultural sites and burials
- Prevention of irreparable harm to cultural sites
- Maintain an inventory of Native American sacred sites located on public lands (Sacred Lands file)
- Duties have changed and expanded over the years



AB 12 – CA Repatriation Policy

- Enacted in 1991
- Added a section to the CA Public Resources Code (§ 5097.991)
- “It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.”
- This policy statement remains in the law today, unamended

AB 978 – Cal NAGPRA

- Enacted in 2001
- Added Sections to the CA Health and Safety Code (§§ 8010-8021, 8025-8030)
- California Native American Graves Protection and Repatriation Act of 2001 (Cal NAGPRA)
- Repatriation Oversight Committee (§ 8025)
 - Was never active or funded
 - Since then, decommissioned, duties transferred to NAHC by AB 2836 in 2018

AB 2836 – UC Repatriation Policy

- Enacted in 2018
- Amended a section of the CA Health and Safety Code (§ 8014) and added several sections to the CA Health and Safety Code (§§ 8025 – 8028.5)
- Amended a section of the Public Resources Code (§ 5097.94)
- Requires the University of California (UC) system to adopt a systemwide and campus wide policy and process for repatriation of cultural resources.
- Focuses on items labeled as culturally unidentifiable and requires tribal consultation
- ROC, decommissioned, duties transferred to NAHC

AB 275 – Repatriation Process Fix

- Enacted in 2020
- Added a section the CA Government Code (§ 8318)
- Repealed and added sections to the CA Health and Safety Code (§§ 8011 – 8017, 8025, 8026)
- Redefines “State Agency” in the Government Code to specifically include the University of California and requires state agency liaisons for consultation with tribes
- Modifies almost all sections of Cal NAGPRA to improve repatriation process for tribes

AB 226 – UC Annual Reporting

- Enacted in 2023
- Added an article to Title 3 of the Education Code (Art. 2.9 commencing with §§ 92618) and amended a section of the Health and Safety Code, relating to the University of California (§§ 8028).
- UC Campuses strongly urged to report each institution's progress towards completing repatriation pursuant to the act annually.

AB 389 – CSU Repatriation Policies

- Enacted in 2023
- Added an article to Chapter 5 of the Health and Safety Code, (Art. 3.5 commencing with §§ 8028.7) and amended a section of the Public Resources Code, relating to Native American repatriation (§§ 5097.94).
- Requires the California State University to comply with various requirements and systemwide policies regarding the handling, maintenance, and repatriation of Native American human remains and cultural items.
- Prohibits the use of Native American human remains and cultural items for teaching and research.

Key Definitions



Language Matters

Right of Possession - Ownership

- (NAGPRA, 25 U.S.C. § 3001(13))
- Relying on the federal definition.
- Possession is the physical custody of burial items.
- “Right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation.
- Applies to all burial items, from any time, found anywhere.
- Meaning, descendants and tribes have the “right of possession” unless they voluntarily consent to “alienate”, relinquish or give away that right to another entity.
- Presumption is that relatives and tribes “own” Native American burial items.

Possession, Control, Ownership

- (Health and Saf. Code, § 8012, subds. (f) and (j)).
- Possession (from the perspective of a museum) means having physical custody of Native American human remains and cultural items.
- Control means having legal control of the items regardless of physical custody of the items.
 - One museum may have “control” of an item but another museum may have “possession” of that item if it was borrowed or loaned.
- Ownership or Legal Custody means having the right of possessing and controlling the items.

Critical for Dispositions Discussions

- The “right of possession” is not the same as physical possession
- For various reasons a tribe may want to reclaim legal custody/ownership (right of possession and control) of human remains or cultural items but may not want transfer physical possession
- There are options the tribe and the museum can consider as part of the Repatriation Agreement and disposition plan
- A tribe’s reasons for this do not need to be disclosed in order to discuss alternatives to physical transfer



Repatriation Defined

- Commonly: to restore or return someone or something to its country of origin
- In the context of human remains and cultural items in collections: to return the human remains or cultural items to lineal descendant or California Indian tribe affiliated with the state aboriginal territory where the remains were removed from.

What is subject to repatriation?

- Human Remains: Physical remains, including bones, of people of Native American ancestry.
- Cultural items:
 - Funerary object: Objects placed with or near remains as part of a death rite or ceremony.
 - Sacred object: Objects used for ceremonial purposes.
 - Objects of cultural patrimony: Objects that have ongoing historical, traditional or cultural importance to a tribe.

Remains and Objects Defined

- (NAGPRA, 25 U.S.C. § 3001(3); Health & Saf. Code, § 8012, subd. (g))
- Human Remains: Physical remains, including bones, of people of Native American ancestry.
- Cultural items:
 - Funerary object (associated and unassociated): Objects placed with or near remains as part of a death rite or ceremony.
 - Note: “associated” means the funerary objects and the corresponding human remains are both in the possession of the museum
 - Sacred object: Objects used for ceremonial purposes.
 - Objects of cultural patrimony: Objects that have ongoing historical, traditional or cultural importance to a tribe.

Museum Defined

- (NAGPRA, 25 U.S.C. § 3001(8); Health & Saf. Code, § 8012, subds. (a) & (i))
- Museum (federal NAGPRA): is any state or federal agency that receives federal funds*
- Museum (CalNAGPRA): is any agency, museum, person, or entity, including higher education, that receives state funds or are part of a larger entity that receives state funds.
- Agency (CalNAGPRA): is a division, department, bureau, commission, board, council, city, county, city and county, district, or other political subdivision of the state.
- The Smithsonian Institution has a separate law regarding repatriation: National Museum of the American Indian Act (NMAIA)



Repatriation Process Key Actions

- Affiliation: Identifying remains or artifacts as belonging to a tribe or tribes.
- Repatriation: Returning legal control or ownership of remains or artifacts to the affiliated tribe.
- Disposition: Generally, returning possession or physical custody of remains or artifacts to a tribe claiming ownership, or another mutually agreed upon course of action.

Cultural Affiliation

- (Health & Saf. Code, § 8012, subd. (n))
- “State cultural affiliation” means that there is a reasonable relationship of shared group identity that can reasonably be traced historically or precontact between members of a present-day California Indian tribe and an identifiable earlier tribe or group.
- Established based on one or more of the following: (1) Geography. (2) Kinship. (3) Biology. (4) Archaeology. (5) Linguistics. (6) Folklore. (7) Oral tradition. (8) Historical evidence. (9) Tribal traditional knowledge. (10) Other information or expert opinion that reasonably leads to that conclusion.

Consultation and Confidentiality

- (Health & Saf. Code, §§ 8012, subds. (e), 8013, subd. (b)(1)(f); Gov. Code § 65352.4)
- “Consultation” means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, achieving agreement.
- Consultation between agencies or museums and California Indian tribes shall be conducted in a manner that is respectful of tribal sovereignty.
- Consultation also shall recognize the tribes’ potential need for confidentiality with respect to tribal traditional knowledge and all tribal information shared during the consultation.
- Tribes must be provided with the original and updated catalogues as part of consultation.

Disposition and Transfer



Approaching Repatriation Respectfully

Return and Potential Alternatives

- Repatriation is the return of legal custody of human remains and cultural items to their rightful “owners”
 - (which are ___ & ___)
- Tribes may not have the resources or the desire to take physical possession of burial contents
- Tribes may wish to negotiate another disposition

Disposition and Transfer Alternatives

1. The Tribe loans the human remains or cultural items back to the museum for a certain period of time with specific curation requirements
2. The Tribe requests assistance with reburial of the human remains or cultural items on non-tribal land
3. The Tribe requests transfer to another museum or agency with the intent of uniting a larger collection of human remains or cultural items that were at one time buried together but has been distributed among many agencies
4. The tribe wants the items destroyed according to specific requirements



Relinquishment of Control

- (Health & Saf. Code, § 8019; NAGPRA, 25 U.S.C. § 3002 (e))
- Any tribe can under CalNAGPRA or NAGPRA relinquish control over any human remains or control or title to any cultural item
- Trainor recommends this is done in writing and recorded with the museum and the NAHC