

TRIBAL CULTURAL RESOURCES LAW IN CALIFORNIA
A TRAINING SERIES FOR TRIBES
 By Hon. Christine Williams

Logos for the American Indian Heritage Commission, UC Davis School of Law, Aoki Center, and Tribal Justice Project.

1

Unit 7: Collections and Repatriation Claim Process
 Tribal Cultural Resources Law in California: A Training Series for Tribes

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2

What is NAGPRA and CalNAGPRA?

- (NAGPRA, 25 U.S.C. § 3001 et seq.; CalNAGPRA, Health & Saf. Code, § 8010 et seq.)
- 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.

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3

Smithsonian Institution – Washington D.C.

- The Smithsonian Institution collections are large and diverse
- Focusing on collections in California today but be aware that California tribes have been/are represented in these collections
- The Smithsonian Institution collections are covered by a separate law
- National Museum of the American Indian Act (NMAIA), 20 U.S.C. §80q (Public Law 101–185), as amended by the NMAIA Amendment of 1996 (Public Law 104–278).
- Website with process and guides for repatriation: <https://americanindian.si.edu/explore/repatriation>

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4

State Agency Collections
 Inventories, Summaries and Tribal Consultation

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5

Inventory and Summary of Collection

- (NAGPRA, 25 U.S.C. §§ 3003 & 3004; Health & Saf. Code, § 8013)
- All museums are required to create:
- An inventory (simple itemized list) of human remains and associated funerary objects, and
- A summary (instead of object by object inventory) of unassociated funerary objects, sacred objects and objects of cultural patrimony of their collections containing Native American human remains and cultural items.

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6

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.



7

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)



8

U.C. NAGPRA Committee

- (Health & Saf. Code, § 8026)
- Requires UC Regents to establish a systemwide Native American Graves Protection and Repatriation Implementation Committee (NAGPRA Committee) and one at each campus.
- Purpose to oversee all repatriation claims, disputes and violations of law.
- All NAGPRA Claims and Disputes go to the campus NAGPRA Committee for determination



9

Inventory & Summary Process Timeline (1/3)

- (Health & Saf. Code, § 8013, subds. (c), (d), & (j))
- Preliminary Inventory and Summary due on or before January 1, 2022
- Museum provides a copy to the NAHC within 90 days of completing the preliminary document
- NAHC publishes the document on their internet website for a 30 day review period
- Museum consults with potentially culturally affiliated tribes about Inventory and or summary



10

Inventory & Summary Process Timeline (2/3)

- (Health & Saf. Code, § 8013, subd. (j) (1)-(2))
- End of 30 day review NAHC notes tribal concurrence, disagreement or non-response
- If a consulting tribe disagrees with the preliminary document, museum can make revisions or the NAHC can offer to initiate the dispute resolution process in Section 8016.
- The NAHC changes the status of the inventory from preliminary to complete once all responding tribes concur with the document.



11

Inventory & Summary Process Timeline (3/3)

- (Health & Saf. Code, § 8013, subds. (i) & (j) (3)-(4))
- An inventory or summary that has been finalized can be moved back to preliminary status at the request of the tribe if errors are identified.
- Museum shall complete a new/updated preliminary inventory upon receiving possession or control of human remains or cultural items not listed in the last completed inventory.
- Tribes can make repatriation claims prior to the completion of an inventory or summary



12

Preliminary Inventory

- (Health & Saf. Code, § 8013, subd. (b)(1))
- Preliminary Inventory prepared in consultation with tribes regarding the inventory process and cultural affiliation, with deference to tribal expertise.
- Use Tribal traditional knowledge to determine cultural affiliation.
- List human remains and cultural items that are (in this order):
 1. Clearly culturally affiliated.
 2. Not clearly culturally affiliated but determined by reasonable belief to be affiliated with one or more tribes.
 3. Not clearly culturally affiliated but determined by reasonable belief to be have been removed from one or more tribes' aboriginal territory.

13

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.

14

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.

15

Inventory Process – Consultation/NAHC

- (Health & Saf. Code, § 8013, subd. (b)(1)(E)(2))*
- Must engage in consultation with tribes as part of the completion of the inventory, NAHC may assist but it remains the museum's obligation.
- Note: To avoid any confusion, this citation is to Section 8013 subdivision (b)(1)(E)(2), however, there is no subdivision (b)(1)(E)(1). You will find (E)(2) listed after the first paragraph at (E). Trainer suspects this subdivision was supposed to be subdivision (b)(2) as it does not flow from (E) which is the end of a list. This note is just to aid in finding and citing this subdivision, as needed

16

Preliminary Summary

- (Health & Saf. Code, § 8013, subd. (c))
- Summaries must include all unassociated funerary objects, sacred objects and objects of cultural patrimony,
- Including **ALL** museum collections of Native American ethnographic or archaeological object.
- The Agency must engage in tribal consultation as part of the completion of the summary, NAHC may assist but it remains the museum's responsibility.
- Broad categorical identifications are permitted: example "identification of everything from a specific site as a sacred object because that site is a sacred site."

17

Request for Additional Documentation

- (Health & Saf. Code, § 8013, subd. (g))
- A lineal descendant or tribe may request and receive additional documentation relating to an inventory or summary including:
 - A summary of agency or museum records, including inventories or catalogs, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and cultural items.
 - This section does not authorize the initiation or completion of any academic, museum, or scientific study of human remains or cultural items.

18

Repatriation Claim Process

Process and Timeline



19

Federal and State Repatriation Requirements

- (Health and Saf. Code, § 8016, subd. (a)(5)).
- Some museums that are state museums in California also qualify as Federal agencies
- These museums and agencies must comply with NAGPRA and CalNAGPRA
- We will focus on CalNAGPRA process
- California law recognizes Federal Regulation Requirements for repatriation for "Federal" museums including, among other things...
- Prior transferring human remains or cultural items to a non-Federally recognized tribe the museum must obtain the concurrence of the U.S. Department of the Interior



20

NAGPRA

- (NAGPRA, 25 U.S.C. § 3001 et seq.)
- Applies to Federal agencies – departments and agencies of the United States (except the Smithsonian Institution)
- Applies to any institution or State or local government receiving Federal funds
- National Museum of the American Indian Act (NMAIA), 20 U.S.C. §80q (Public Law 101–185), as amended by the NMAI Act Amendment of 1996 (Public Law 104–278)



21

NAGPRA Regulations

- (43 CFR Part 10)
- Code of Federal Regulations – NAGPRA Regulations
- These regulations provide more guidance on how museums and agencies should implement NAGPRA
- Electronic Code of Federal Regulations:
- https://www.ecfr.gov/cgi-bin/text-idx?SID=913a018b2e6e6b978b0040e805b8e6fe&tpl=/ecfrbrowse/Title43/43cfr10_main_02.tpl



22

CalNAGPRA

- Enacted in 2001 by AB 978
- Added Sections to the CA Health and Safety Code (§ 8010-8021, 8024-8030)
- California Native American Graves Protection and Repatriation act of 2001 (Cal NAGPRA)
- Created the Repatriation Oversight Committee (§ 8025)



23

CalNAGPRA Regulations

- (Pub. Resources Code, § 5097.94, subs (n)(1)(I))
- The NAHC is charged with establishing rules and regulations for the administration of CalNAGPRA as necessary
- The NAHC is engaged in developing these regulations currently



24

Summary of Claim Procedure - Timeline

1. Museum or NAHC receives a claim or request – 90-day repatriation period starts
2. NAHC publish claim on website
3. 30 Day review of claim for museum objection to claim
4. Publication of Notice of Intent to Repatriate for NAGPRA – Must be published for 30 days prior to actual repatriation – If applicable
5. Transfer of control within 90 days of claim
6. Transfer of possession as agreed to by the museum and the tribe
7. Send repatriation agreements to the NAHC

25

Claims Generally – Who Files the Claim?

- (Health & Saf. Code, § 8014)
- Who Files: Either
 - ✓ Lineal descendants, or
 - ✓ California Indian Tribes

NOTE: Tribal Governments can authorize a group or committee of California Indian Tribes to accept repatriation of human remains (Health & Saf. Code, § 8017)

26

Claims Generally – What can be claimed?

- (Health & Saf. Code, § 8014)
- What: Native American human remains or cultural items, either
 - ✓ Listed in the inventory or summary, or
 - ✓ Believed to be in the possession or control of the museum

27

Claims Generally – Who receives the claim?

- (Health & Saf. Code, § 8014)
- To Whom: Both
 - The museum, and
 - The NAHC

28

Lineal Descendants Claims - § 8014 (a)

- Claims must:
 - ✓ Be written (§ 8015)
 - ✓ List human remains or cultural items being claimed
 - ✓ Demonstrate the claimant can trace their ancestry directly and without interruption to a known individual whose human remains, or cultural items are being claimed according to tribal tradition

29

California Indian Tribe Claims - §§ 8014 (b)

- Claims must:
 - ✓ Be written (§ 8015)
 - ✓ List human remains or cultural items being claimed
 - ✓ Demonstrate one (or both) of the following:
 - A. A relationship with an earlier identifiable group from which the human remains or cultural items originated. (A published NAGPRA cultural affiliation determination is sufficient evidence of cultural affiliation), or
 - B. The human remains or cultural items were removed from the state aboriginal territory of the claiming California Indian tribe.

30

NAHC Claims List and Status - Website

- (Health & Saf. Code, § 8013, subd. (j)(5))
- NAHC shall maintain a list of all claims on their website
- The status of each claim shall be noted as:
 - Pending
 - Disputed; or
 - Accepted

31

NAHC Repatriation List and Status - Website

- (Health & Saf. Code, § 8013, subd. (j)(6))
- After a claim has been accepted, it will move to the repatriation list
- The status of each repatriation will be noted as:
 - In process; or
 - Completed
- A claim is considered in process until the museum has transferred control of the claimed items
- After transfer of control a claim is considered completed
- Physical transfer can happen simultaneously or after transfer of legal control, as applicable (see Unit 8)

32

Submitting or Withdrawing a Claim - Timing

- (Health & Saf. Code, § 8013, subd. (j)(7) & (8))
- A claim may be submitted or withdrawn at any time (prior to transfer of control)

33

Museum Review of Claim

- (Health & Saf. Code, § 8016, subd. (a))
- Museum Review Checklist
 - ✓ Confirm items requested are human remains or cultural items by definition
 - ✓ Review evidence of ancestry or cultural affiliation
 - ✓ Museum can not prove right of possession
 - ✓ No federal NAGPRA exemptions apply (see 43 CFR § 10.10 (c))
 - ✓ All NAGPRA requirements have been met

34

Federal NAGPRA Exemptions (1/4)

- (43 CFR, §10.10 (c))
- These requirements for repatriation do not apply to:
 - (1) Human remains or cultural items are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States.
 - Human remains, funerary objects, sacred objects, or objects of cultural patrimony in such circumstances must be returned no later than ninety (90) days after completion of the study; or

35

Federal NAGPRA Exemptions (2/4)

- (43 CFR, §10.10 (c))
- These requirements for repatriation do not apply to:
 - (2) There are multiple requests for repatriation of the same human remains or cultural items and the museum or Federal agency, can not determine by a preponderance of the evidence which competing requesting party is the most appropriate claimant.
 - In these circumstances, the museum or Federal agency may retain the cultural items in question until the dispute is otherwise resolved pursuant to these regulations or by a court of competent jurisdiction; or

36

Federal NAGPRA Exemptions (3/4)

- (43 CFR, §10.10 (c))
- These requirements for repatriation do not apply to:
- (3) A court has determined that the repatriation of the human remains or cultural items would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution, in which event the custody of the objects must be as provided under otherwise applicable law.
- Meaning the museum can prove they have right of possession by gift from the tribe with original right of possession

37

Right of Possession – National Standard

- (NAGPRA, 25 U.S.C. § 3001(13))
- Possession is the physical custody
- "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.

38

Federal NAGPRA Exemptions (4/4)

- (43 CFR, §10.10 (c))
- These requirements for repatriation do not apply to:
- (4) Repatriation is not consistent with other repatriation limitations identified in §10.15 of these regulations
- Basically, applies to claims made after repatriation is completed to another tribe or person.

39

Multiple Claims

- (Health & Saf. Code, § 8016, subds. (b) & (d))
- If there are claims by more than one tribe or person for the same human remains or cultural items the claim the dispute must be resolved before the repatriation can be completed.
- The museum will keep physical possession until the dispute is resolved
- The dispute process will be covered more fully in Unit 8

40

Repatriation – Transfer of Control

- (Health & Saf. Code, § 8016, subd. (a))
- If there are no other claims or museum objections
- The museum shall repatriate the human remains and cultural items requested
- Within 90 days of the date the claim is made

41

Repatriation Agreements

- (Health & Saf. Code, § 8015, subd. (b))
- If the museum and the tribe filing the claim agree on repatriation, they should document the terms of the repatriation in a Repatriation Agreement
- A copy of this agreement should be sent to the NAHC for their records
- The terms of all Repatriation Agreements are enforceable by the NAHC

42

Repatriation – Transfer of Possession

- Transfer of physical possession does not have to be immediate and may not be desired by at all by the claiming party
- The terms for the treatment and disposition of the physical possession of the human remains or cultural items should be recorded in the Repatriation Agreement, along with any relevant timelines
- This will be covered more fully in Unit 8

43

Museum Objections

- (Health & Saf. Code, § 8016, subd. (c))
- The museum has 30 days after the claim is made to object to the request for repatriation based on a good faith belief that either:
 - The human remains and cultural items are not affiliated with the tribe or person making the claim (and therefore are affiliated with another tribe), or
 - The human remains or cultural items are not subject to repatriation
- The dispute process will be covered more fully in Unit 8

44