

Protecting Native American Graves and Artifacts

An Introduction to Tribal Cultural Resources Law
Hon. Christine Williams

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Introduction

- Speaker Background
- In this session, you will learn the basics of the federal Native American Graves Protection and Repatriation Act (NAGPRA) and the related California statute, CalNAGPRA.
- Attendees will learn about these laws, gain an overview of repatriation procedures, and learn how to approach issues of protection and repatriation with cultural sensitivity.

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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!

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Trauma Advisory

- Trauma Advisory - sensitive and difficult information will be discussed.
- This work is difficult.
- Different people will have different reactions.
- Whatever you're feeling about this presentation or this work, is okay!
- Being brave and strong is not the same as being hard and cold.
- Please practice self care when processing this presentation and the work you do around cultural resources in general.

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Protection and Repatriation

- Tribal Cultural Resources Law focuses on Native American Graves Protection and Repatriation Act.
- Has two main focuses:
 - Protection, prevention and access - Land use & planning and discoveries.
 - Focus today on policies on excavation, discovery and disturbance of Human Remains and Associated Tribal Cultural Resources.
 - Repatriation of cultural resources - Ensuring appropriate treatment for previously violated graves and cultural areas.

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Differing Worldviews

Justifications for Genocidal Actions

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Clash of Worldviews of Cultural Resources

- Differing cultural concepts of
 - Places
 - Natural world
 - Ceremony
 - The body
 - Ownership

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Lyng v. Northwest Indian Cemetery Protective Association (Lyng Case)

- US Supreme Court Case from 1988
- Considers whether the US First Amendment prohibits timber activity and road construction on National forest land that is traditionally used for religious purposes by three northern California Tribes.
- Federal government is not required to satisfy “every citizen’s religious needs and desires...”
- The rights of tribal people to use the area “do not divest the Government of its right to use what is, after all, its land...”
- American Indian Religious Freedom Act - No teeth

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U.S. v. Sioux Nation of Indians (Black Hills Case)

- US Supreme Court Case from 1880
- Black Hills of South Dakota were reserved by treaty as part of the “Great Sioux Reservation”.
- Gold Discovered and the treaty was seen as “the only obstacle to progress”.
- Tribal leaders refused to re-negotiate the treaty or sell the Black Hills.
- Congress passed an Act allowing for intrusion by non-tribal people into the Black Hills.
- Court found this was an illegal taking that required “just compensation” to the Sioux Nation.

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Archaeological Fieldwork versus Grave Robbing

Scientists' Terms

- Pre-historic and Pre-Tribal
- Archeological sites
- Research

Native Americans' Terms

- Ancestors
- Grave sites and cemeteries
- Desecration

Bieder, Robert E. “The Return of the Ancestors.” 1990; “Expropriation of Indian bodies for science”

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Museum Collections

- A museum collection is a group of artwork, artifacts, archives, or scientific specimens which the museum manages, preserves, for the public benefit.
- This has included and does include Native American human remains.
- There are still Native American human remains and other tribal cultural items in museum collections all over the world.
- In California, the University of California maintains a significant collection of hundreds of thousands of remains and cultural items.

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From Burials to “Collections”

- The government encouraged excavations and looting graves of Native Americans at first in the name of science and historic preservation.
- It gained public acceptance.
- Monetary and trade markets evolved, and private individuals and public and private institutions gained pride for amassing “collections”.
- Sales, trades and loans spread burial contents around the country and around the world.
- We aren’t the only ones...international indigenous people acknowledgment.

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Genocidal Myths Justify Collecting

- Race Science: now debunked pseudoscience hypothesis that races exist on a hierarchy with the white race being superior.
- Popularly includes Phrenology, the study of skull size to determine intelligence.
- Historic Preservation: The vanishing Indian myth
- Myth that all Native Americans would be extinct and as much “data” as possible needed to be collected to preserve their “historical existence”
- Invisible minority: Reducing burials to sellable property is an act of genocide

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Tribal Cultural Resources Law Basics

Fundamentals of Accessing Cultural Resources Law

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

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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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Federal Law: NAGPRA

- Native American Graves Protection and Repatriation Act (NAGPRA) of 1990.
- Applies to all “museums” with control over Native American cultural items that receive federal funding.
- California has incorporated all the requirements and responsibilities of NAGPRA into the California Codes through CalNAGPRA and other codes focused on environmental review and protection.
- Generally, these California laws apply to all state agencies and institutions.

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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

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CA Legislative Terminology - AB and SB

- Two houses of California Legislature
 - The Assembly
 - The Senate
- AB = Assembly Bill, is a proposed law originating from an author in the Assembly
- SB = Senate Bill, is a proposed law originating from an author in the Senate
- Examples: AB 52 and SB 18
- These bills amend the codes, I recommend citing to the code sections, not the old bills

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Codes Relevant to Tribal Cultural Resources

- California has 29 “codes”
- They are not numbered
- Listed online in alphabetical order
- These are the codes where most of the protections for tribal cultural resources are found:
 - Government Code
 - Health and Safety Code
 - Public Resources Code

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Timeline of CA Cultural Resource Bills

Year	Bill Number	Topic or Title
1976	AB 4239	Created Native American Heritage Commission
1988	SB 477	Felony to Obtain or Possess Native American human remains
1991	AB 12	Repatriation Policy Statement
2001	AB 978	California Native American Graves Protection and Repatriation Act (Cal NAGPRA)
2002	SB 1816	Native American Historic Resources Protection Act
2004	SB 18	General Planning Tribal Consultation
2014	AB 52	Improved Consultation in California Environmental Quality Act (CEQA) process
2018	AB 2836	UC Systemwide Policy for Repatriation
2020	AB 275	Strengthens repatriation under Cal NAGPRA
2020	AB 168	Cultural Resources Exempt from SB 35 Fast Track (2017)

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Native American Heritage Commission

(NAHC)

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Department of Parks and Recreation

- NAHC is a state government commission established in the law:
- Public Resources Code
- Division 5 “Parks and Monuments”
- Chapter 1.75. Native American Historical, Cultural, and Sacred Sites
- Sections 5097.9 - 5097.991
- Note: Section 5001 subdivision (b) states: The Department of Parks and Recreation has control of the state parks system

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State Parks System

- Why is the NAHC established here in this code, in this division?
- State Parks System not only open space and public recreation...
- This division is where most laws related to historic preservation are found.
- This is where “historic resource” is defined.
- Many of the protections for tribal cultural resources relate back to the framework found here for protection of historic resources.

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Commission

- NAHC is a state government commission with 9 members,
- At least five of the nine members shall be elders, traditional people, or spiritual leaders of California Native American tribes, nominated by Native American organizations, tribes, or groups within the state,
- One Executive Secretary (staff member),
- The commission members are not paid for their time,
- All appointed by the governor.
- (Pub. Resources Code, § 5097.91. - § 5097.93)

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Role of NAHC

- NAHC acts as the liaison for all things cultural resources related at the state level. Includes:
 - Proposing policy and legislation,
 - Mediating disputes between Tribes and landowners or museums,
 - Notification to most likely descendants when a discovery of Native American human remains is made,
 - Most likely descendants' determinations for discoveries listed above,
 - Maintain a list of Federally recognized and Non-Federally Recognized Native American Tribes in California and their corresponding aboriginal territories
- (Pub. Resources Code, § 5097.94, subds. (a) - (p), § 5097.98, Health & Saf. Code § 8013)

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Protection - Excavations & Discoveries

Policies on excavation, discovery and disturbance of Human Remains and Associated Tribal Cultural Resources

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Common Terms

- Trafficking is to deal, sell or trade in something illegal
- Excavate/excavation is to unearth or dig
- Pothunting, looting, grave robbing - all unofficial terms for unearthing, disturbing or excavating Native American burial sites

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Inadvertent v. Intentional

- Inadvertent discoveries: typically, someone is digging for a “project” and accidentally or unexpectedly discovers remains or burial items and then reports it under the law
- Intentional excavations and disturbances, 2 ways:
 1. Someone accidentally discovers remains and does not report it according to the law
 - Starts accidentally, turns into intentional disturbance
 - Applies whether they remove anything from the burial or cover items over
 2. Someone intentionally disturbs a Native American burial

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Right of Possession - National Standard

- 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.
- (NAGPRA, 25 U.S.C. § 3001(13))

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CA Policy Against Obtaining or Possessing Native American Grave Items

- No person shall obtain or possess any Native American artifacts or human remains which are taken from a Native American grave or cairn on or after January 1, 1984, except as otherwise provided by law or in accordance with an agreement reached between descendants and landowners under the law.
- Any person who does obtain or possess Native American burial items as described above is guilty of a felony.
- (Pub. Resources Code, § 5097.99, subds. (a) & (b))

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Possession, Control, Ownership - CA Codes

- Possession - (from the perspective of a museum) means having physical custody of Native American human remains and cultural items.
- Control and Ownership - Control means having legal ownership of the items regardless of physical custody of the items.
- (Health and Saf. Code, § 8012, subds. (e) and (j)).

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Ownership and Control After 1990 - NAGPRA

- The ownership or control of Native American cultural items excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed):
 - 1) Lineal descendants of the Native American; or
 - 2) The Indian tribe on whose tribal land the discovery was made; or
 - 3) The Indian tribe which has the closest cultural affiliation with such remains or objects; or
 - 4) The Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered; or
 - 5) If it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects, in the Indian tribe that has the strongest demonstrated relationship.
- (NAGPRA, 25 U.S.C. § 3002(a))

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Federal Policy Against Intentional Excavation

- The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only with a federal permit or proof of consent from the tribe.
- (NAGPRA, 25 U.S.C. § 3002(c))

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CA Policy Against Intentional Excavation

- Every person who knowingly mutilates or disinters, wantonly disturbs, or willfully removes any human remains in or from any location other than a dedicated cemetery without authority of law is guilty of a felony.
- (Pub. Resources Code, §§ 5097.99 subd. (b), 5097.993; Health & Saf. Code, § 7050.5 subd. (a))

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Federal Policy Against Trafficking Burial Items

- A person who knowingly commits any of the following may be punished by imprisonment, a fine, or both:
- Sells, purchases, uses for profit, or transports for sale or profit Native American human remains or cultural items.
- Criminal violation of NAGPRA, should be reported to the Federal Bureau of Investigations.
- (18 U.S.C. § 1170)

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CA Policy Against Trafficking Burial Items

- Any person who knowingly or willfully obtains or possesses any Native American artifacts or human remains which are taken from a Native American grave or cairn after January 1, 1988, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (l) of Section 5097.94 or pursuant to Section 5097.98, is guilty of a felony which is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.
- (Pub. Resources Code § 5097.99, subd. (b))

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CA Policy Against Disturbance of Other Tribal Cultural Resources

- It is a misdemeanor to lawfully and maliciously excavate upon, removes, destroys, injures, or defaces a Native American historic, cultural, or sacred site if the act was committed with specific intent to vandalize, deface, destroy, steal, convert, possess, collect, or sell a Native American historic, cultural, or sacred artifact, art object, inscription, or feature, or site.
- Individuals committing these crimes are also subject to a civil penalty.
- (Pub. Resources Code § 5097.993, subds. (a) & (b))

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Summary of Ownership and Control of “New” Discoveries

- Relatives and Tribes “Own” Native American burial items
- Not a finders keepers' situation
- This applies to all lands in the United States.
- NAGPRA and Federal laws control on Federal and Tribal Lands (as well as Tribal Laws)
- California Codes control on state and private lands
- Therefore, if you have it, or you find it, you need to report it and give it back to the individual or group it belongs to, unless an agreement is made otherwise.
- Otherwise, it's a theft and a crime.

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Repatriation of Cultural Resources

Ensuring appropriate treatment for previously violated graves and cultural areas

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Mismanagement of Collections - UC Example

- Before the implementation of NAGPRA in 1990, UC campuses lacked adequate controls and oversight related to access to their museum collections of Native American remains and artifacts.
- From the 1950s through the 1980s the honor system was used for students and professors who wanted to borrow from campus museums for research.
- Information from the California State Auditor Report June 2020

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Lost and Stolen Items - UC Example

- Individuals did not always return what they borrowed to the collection and in some cases faculty and graduate students took remains or artifacts with them after leaving the university.
- There are also noted instances of loaning remains or artifacts to institutions nationally and overseas in the 1920s through the 1960s, but not always maintain records of these transfers.
- Information from the California State Auditor Report June 2020

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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.

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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.

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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. *
- *Tribes may not have the resources or the desire to take physical possession of burial contents and may wish to negotiate another disposition

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Ownership and Control of Burial Items

- Under current law...
- Relatives and tribes “own” Native American burial items
- This applies to all Native American burial items ever excavated
- This applies to all lands in the United States
- Reminder: Keeping Native American burial items, you do not own, is theft, a violation of Federal and California policy, and a crime.

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Right of Possession - National Standard

- 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.
- (NAGPRA, 25 U.S.C. § 3001(13))

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Possession, Control, Ownership - CA Codes

- 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.
- (Health and Saf. Code, § 8012, subds. (f) and (j)).

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Federal Repatriation Policy

- (NAGPRA, 25 U.S.C. § 3005)
- 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.

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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

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Barriers to Repatriation

Competing interests between museums and tribes

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Competing Interests

- There are, in some instances competing interests regarding repatriation.
- Museums want to retain their collections.
- Tribes want their ancestors and cultural items repatriated.
- 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.

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Barriers to Repatriation - Affiliation

- 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.
- As an example: some “museums” have required evidence linking each human bone to a specific grave that was part of a specific excavation.
- For some museums, it has not been enough to show that the remains in question are Native American and were excavated within a tribe’s known and undisputed aboriginal or traditional territory.

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Bonnichsen v. U.S. (Kennewick Man Case)

- Ninth Circuit Court of Appeals case from 2004
- Court considered who should have “custody” of 9,000 year-old human remains
- Scientists wanted the right to study the remains and argued they were not tied to a Native American group
- Local tribes wanted to rebury what they believed to be their ancestor
- Court found the tribes could not prove the remains were part of a contemporary Native American tribe.

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Barriers to Repatriation - Classification of Objects

- 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.

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Conclusion

Question and Answer

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