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# Improving Cal NAGPRA: Honoring Native American Rights

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Improving Cal NAGPRA:  
Honoring Native American Rights

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by  
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## **ABSTRACT**

The California Native American Graves Protection and Repatriation Act (Cal NAGPRA) became state law in 2001. Its purpose was to create a process whereby California tribes could seek to repatriate human remains and objects from their cultural heritage from museums and custodial institutions. Cal NAGPRA includes a number of shortcomings that have impeded the ability of tribes to successfully reclaim objects from their heritage. The ethical implications of museums retaining cultural objects and human remains, often confiscated from Native peoples or their tribal lands, has been a principal social justice topic of USF's museum studies program. This capstone describes a legislative advocacy plan to amend Cal NAGPRA to address many of its statutory deficiencies, thereby honoring the spirit of this civil rights law and promoting full implementation of repatriation activities.

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## INTRODUCTION

The California Native American Graves Protection and Repatriation Act (Cal NAGPRA) was enacted in state law in 2001, following a concerted legislative advocacy effort led by California Native tribes. Legislative advocacy is the most commonly used strategy to influence the introduction, enactment or modification of legislation. Also called lobbying, legislative advocacy is among the most effective tools in a representative democracy for members of interest groups or the general public to have an impact on laws and rules at all levels of government. Abuses by special interests and the influence of vast sums of money in our legislative process have tarnished the perception of this strategy in recent years. However, the legislative advocacy process, when used by constituencies to advance issues that support the public good and social justice, is still the best available strategy to bring about changes that can have a positive influence on social mores and promote an ethical and just society.

At its most fundamental level, Cal NAGPRA was a human rights law, seeking to redress the cultural devastation of Native populations resulting from European colonial expansion into California. It provided legal mechanisms for Native peoples to reclaim cultural objects and human remains that were confiscated from their lands over several hundred years by scientists, explorers, artifact seekers and others and that are now held by museums and other custodial institutions. Although some progress toward repatriation of objects has occurred, it became apparent early on that Cal NAGPRA included statutory shortcomings that have impeded the opportunity for a return of a significant number of objects to their rightful Native owners. This capstone proposes a new legislative advocacy effort to rework those sections of Cal NAGPRA that failed to fulfill the aspirations of this

legislation and transform it into a more robust human rights referendum for Native populations. If successful, the amended law could serve as a model legal framework for other states that have enacted, or are planning to create, statutes to address repatriation of human remains and cultural heritage objects to indigenous peoples.

The ethical issues surrounding rightful ownership of objects in museums and the return of cultural objects and human remains acquired in violation of ethical codes adopted by national and international museum organizations are at the heart of the work of many modern museums. As institutions of public trust, grounded in the values of serving the public and fostering respect for and appreciation of a rich and diverse world, it would be antithetical for museums to evade their moral obligations to Native peoples regarding the return of ancestral remains and objects from their cultural heritage. If poorly drafted statutory language in Cal NAGPRA is an impediment to museums engaging in the important work of repatriation, it is imperative that the law be amended to effectuate meaningful progress in these efforts.

A review of the literature regarding federal NAGPRA and its implications for Cal NAGPRA opens this paper. It lays out the underlying reasons why full implementation of the legislative goals has not been achieved and articulates the arguments in favor of legislative advocacy and amending Cal NAGPRA, providing relevant background and history of the law as well as making the case for legislative action in the near future, while a favorable political climate exists in California. The section outlining the proposed solution summarizes the need for this project and sets forth goals and objectives to accomplish it. The action plan and the appendix describing project stakeholders should be reviewed together to gain a sense of the timeline, the expected roles of stakeholders, the importance

of strong project management and how this advocacy effort will be orchestrated to potentially achieve a positive outcome. Finally, the summary and conclusions section will offer some final observations on the opportunities and obstacles that exist in the current political environment and will underscore the replicable nature of this project plan, both for NAGPRA efforts in other states and for other types of legislative efforts on behalf of museum institutions and associations.

Key sources upon which this capstone relies for its success are as follows. First, interviews with experts in the field of legislative advocacy in Sacramento have provided a comprehensive understanding of the bill-making process, from bill introduction through policy committee hearings and floor votes to bill enrollment for the Governor's signature. Second, individuals with practical experience working with Cal NAGPRA's existing law have provided valuable insight into its shortcomings. These individuals are experts in Cal NAGPRA from the California Department of Parks and Recreation and tribal leaders that have actively engaged in repatriation efforts. If Cal NAGPRA is ultimately amended, it will be in no small part due to the assistance and insights of these subject matter experts. A victory for this legislative advocacy effort would constitute a significant advancement in long-term efforts to redress the injustices that have characterized government relations with Native Americans since California was settled.

## LITERATURE REVIEW

### Introduction

On November 16, 1990, the Native American Graves Protection and Repatriation Act (“NAGPRA” or “Act”) became federal law. Much has been written about how NAGPRA fulfilled its legislative aspirations as a human rights law for Native Americans<sup>1</sup>, providing legal mechanisms for federally recognized Native American tribes to reclaim sacred and cultural objects that were confiscated from their lands. In many instances, these objects ended up in the inventories of museums and scientific and educational institutions. NAGPRA mandated a process, called consultation, in which custodial institutions were directed to engage in collaborative negotiations with federally recognized tribes about repatriation of cultural objects and human remains to these tribes, a process that has been problematic in its practice.

Scholars have chronicled the uneven and often disappointing progress of NAGPRA’s implementation, which reflect political compromises that led to unclear and somewhat piecemeal statutory language (Fine-Dare, 2002; Cryne, 2009; Hemenway, 2010). The record showed, early on, that these compromises created adverse consequences for Native Americans and custodial institutions. In 2001, the California Legislature passed Cal NAGPRA, a version of NAGPRA intended to address the needs of tribal communities in California unrecognized by the federal government. However the Legislature failed to address most known shortcomings in the federal Act. This literature review focuses on five

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<sup>1</sup> For the purposes of this literature review, “Native Americans”, “Native peoples”, “Native tribes”, “Native representatives” and “American Indians” may be used interchangeably to describe descendants of the first known inhabitants of North America.



of these deficient areas and offers an approach to ameliorate them and strengthen Cal NAGPRA for California's Native peoples.

California is home to the largest number of Native tribes in the United States. Rob Wood (2015), staff to the Native American Heritage Commission, reported that California has one hundred and ten federally recognized tribes and sixty-four federally unrecognized tribes, making the exclusion of unrecognized tribes in the Act particularly consequential for California's Native peoples. U.S. Department of the Interior defines federally recognized tribes as sovereign legal entities, eligible for funding and services through the Bureau of Indian Affairs (BIA), including participation in NAGPRA. But, the federal recognition process is lengthy for tribes seeking this designation; it can take years and even decades to complete (Toensing, 2012). Given this protracted process, many Native tribes have given up on the idea of attaining federal recognition. Those federally unrecognized tribes have no participation rights under NAGPRA.

In the 1990s, Native tribal leaders urged California legislators to draft Cal NAGPRA to ensure that federally unrecognized tribes would have access to repatriation opportunities. While California's law authorized participation of unrecognized tribes in repatriation activities, increased civil sanctions and created a new oversight entity, California's version of NAGPRA otherwise adopted, nearly verbatim, the language of the federal Act. Attorney Ryan Seidemann (2010) notes that, "California's law is a virtual incorporation of NAGPRA at the state level."

A review of scholarly writings and other sources revealed pervasive and troubling NAGPRA deficiencies, including how it failed to achieve its legislative goals. However, little has been published about Cal NAGPRA since its passage; in fact, there has not been a single

government-mandated progress report since its enactment. Since Cal NAGPRA resembles the Act, for the purposes of this review, discussion of five of NAGPRA's deficiencies will serve as a proxy for Cal NAGPRA's related failings. Ideally, Cal NAGPRA could have:

1. clarified definitional ambiguities in the Act and defined the term "consultation" (Wiley, 2012);
2. simplified bureaucratic procedures, which have been burdensome on Native tribes and institutions that hold Native American objects (Graham & Murphy, 2010; Hemenway, 2010);
3. strengthened compliance enforcement provisions for resistant institutions (DeMeo, 1994; McLaughlin 2004);
4. appropriated funding for tribes and custodial institutions to demonstrate California's commitment to achieve compliance (Nash & Colwell-Chanthaphonh, 2010; Hemenway, 2010); and
5. included statutory language that gave greater weight to Native tribes' traditional oral narratives and defined a "balancing of interests" legal standard for asserting defensible claims in consultations and legal proceedings (O'Laughlin, 2013).

Pew Research Center published a December 2015 summary of Congressional productivity, reporting the last five Congresses have been among the least productive in twenty years. Therefore, it appears unlikely that Congressional improvements to NAGPRA are feasible in the foreseeable future. However, as of this writing the California legislative climate appears more favorable. Legislative amendments could potentially transform Cal NAGPRA into a stronger human rights referendum to achieve goals expressed by

California's Native populations. Official notes from the California Assembly's Business and Professions Committee hearing on April 16, 2001 reflected, "the ultimate goal of this legislation is to empower California Indians to take responsibility, as is their expressed wish and duty, for the burial of their dead and the proper care of their ancestors" (Gallardo, 2001).

### **A Review of Five NAGPRA Deficiencies**

A fundamental problem with NAGPRA was that Congress defined the Act through a Western lawmaking prism, which emphasized empirical written evidence. Congress disregarded Native American oral traditions and beliefs that form the bases of their culture and heritage. Julia Cryne (2009) captured this inherent conflict, observing, "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." Anthropologist Ann Kakaliouras (2012) characterized repatriation as, "a struggle between science and religion, not unlike the evolution/creation debate in the United States." Beyond this overarching issue, five main areas in NAGPRA have diminished its effectiveness.

#### **1. Definitional Ambiguities and A Key Term Not Defined**

NAGPRA defines many of the terms used in the Act but interpretation of those meanings has generated controversy. The words used to define "Native American" became an early subject of consternation for the Native community. This definition formed the basis for a court decision in *Bonnichsen v. United States*, a case concerning the fate of Native remains estimated to be approximately 9,000 years old. The court opined (9<sup>th</sup> Cir. 2004) that, "the statute unambiguously requires that human remains bear some relationship to a

*presently existing* tribe, people or culture to be considered Native American.” This narrow interpretation made it impossible for tribes to successfully repatriate ancestral remains older than a few hundred years.

Definitions of subcategories of “cultural items” have also proven difficult to interpret, as Native tribes and custodial institutions may view sacred and funerary objects differently (Wiley, 2012). These ambiguities have resulted in institutions retaining many cultural objects that Native tribes believe should have been repatriated.

Moreover, Congress failed to define the term “consultation” to add clarity to the repatriation process. Resistant institutions may have used the absence of this definition to their advantage, defining consultation with Native tribes as any cursory interaction. If institutions refuse to consult in good faith, there is little Native tribes can do. Tribal Repatriation Specialist Eric Hemenway (2010) described the consultation requirements as having, “enough loopholes ... to allow for stubborn museums not to comply with the law.”

Offering a more optimistic perspective, anthropologist Bruce Bernstein (2010) has viewed the consultation process as initiating important dialog between Native tribes and institutions. He stated, “As the spirit of NAGPRA suggests to us, the inclusion of native voices will help in moving static, essentialist objects to reunions with their indigenous intellectualism, helping to transform museums into fertile grounds of negotiated meanings and space.” Nonetheless, many participants in these consultations have agreed that they are often unsatisfying.

## 2. Overly Bureaucratic Procedures

Native Americans and institutions agree that NAGPRA’s procedural requirements are burdensome. Museum directors Martha Graham and Nell Murphy (2010) characterized

these procedures as daunting tasks of organizing collections, sometimes a century or more old. Hemenway (2010) criticized the amount of documentation tribes were required to include in their claims and noted that the volume of objects that remain unclaimed or that cannot be identified with any tribe is significant.

### 3. Weak Enforcement Provisions

Congress recognized the need for sanctions for noncompliant institutions, but it exempted federal agencies from sanctions. Anthropologist Robert McLaughlin (2004) noted that this has led to significant delays in government agency compliance. Moreover, civil penalties described in NAGPRA lack sufficient legal or financial heft to induce compliance. Claims of non-compliance are subject to excessive levels of due process and provide many opportunities for institutions to receive clemency. From the Native perspective, these enforcement mechanisms must be improved so that laws will provide real protection for cultural property (DeMeo, 1994).

### 4. Inadequate Funding

Congress did not initially appropriate any funds to assist institutions in complying with NAGPRA. Museum anthropologists Stephen Nash and Chip Colwell-Chanthaphonh (2010) characterized the sentiments of their colleagues about NAGPRA as “a nuisance and an unfunded mandate.” Congress also authorized only meager funding to help Native populations engage in repatriation. Few Native tribes or museums have the financial resources or in-house expertise to comply with the multi-step repatriation process (Hemenway, 2010).

### 5. Absence of Legal Standard to Balance Interests/Acknowledge Oral Evidence

Native Americans have maintained their cultures for centuries based on oral histories and traditions. This oral documentation is problematic when Native Americans seek relief in court. In a repatriation dispute, the Ninth Circuit Court opined (9<sup>th</sup> Cir. 2004) that NAGPRA's intent was "to strike a balance between the needs of scientists, educators and historians on the one hand, and American Indians on the other." However, Native American attorney Shannon O'Laughlin (2013) noted, "Where ... the interests are not incommensurable, balance cannot be achieved. And when the courts have reviewed decisions made by museums and science, institutional interests always win." NAGPRA scholar Kathleen Fine-Dare (2002) challenged whether a "balancing of interests" standard should be used at all, as NAGPRA does not mention any such standard and directs that Native objects shall be repatriated upon presentation of legitimate claims.

### **Cal NAGPRA – Potential for Statutory Improvements in Five Areas**

A review of the scant analysis of Cal NAGPRA reveals three areas where legislative language did improve upon the Act. First, it created a civil sanction of \$20,000 per violation for noncompliant institutions. Second, it provided a path forward for federally unrecognized tribes in California to engage in repatriation. Native representative John Gomez Jr. (2002), who was involved in the effort to pass Cal NAGPRA, declared that Cal NAGPRA would resolve the problem of unrecognized tribes almost entirely, stating, "Those loopholes are closed. AB 978 (Cal NAGPRA) greatly expands both the list of tribes that can participate and the institutions and entities that are subject to repatriation claims." Third, the Act constituted a Repatriation Oversight Commission ("ROC") to oversee dispute

resolution and to determine whether federally unrecognized tribes could engage in repatriation. On paper, these improvements appeared promising, but two of them fall short of their intended purposes and the five shortcomings described in the prior section were replicated in Cal NAGPRA.

### 1. Definitional Ambiguities and A Key Term Not Defined

A small modification to the Act's definition of "Native American" in California's statutes would have created good will with tribal communities. The federal NAGPRA Review Committee recommended that Congress add the words "or was" to the definition of "Native American" so that it read, "'Native American' means of, or relating to, a tribe, people or culture that is, *or was*, [emphasis added] indigenous to the United States" (McKeown, 2010). These two words would create an opportunity for ancient skeletal remains found on California tribal lands to receive consideration for repatriation.

Also, by eliminating the subcategories of "cultural items" described in NAGPRA and simplifying this definition to broadly encompass cultural and sacred artifacts, California could have reduced the number of definitional obstacles that resistant institutions use to retain certain sacred objects. Native tribes see these distinctions as meaningless and take particular umbrage when institutions invoke them as a way to retain objects associated with reburial of ancestors (Wiley, 2012).

Finally, defining the term 'consultation' would have facilitated better interactions between institutions and tribes and established clear expectations for these meetings. At a 2015 NAGPRA forum sponsored by University of San Francisco, Santa Rosa Rancheria tribal leader Lalo Franco stated, "Museums use consultations to their own advantage and

sometimes do the bare minimum just to say they are in compliance. Consultations need to be defined.”

In an interview with Cal NAGPRA expert Rob Wood (2015), he stated that the term “consultation” has been defined for matters involving Native Americans and land use.

Government Code section 65352.4 reads:

“...’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, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty...”

This definition, if incorporated by reference into Cal NAGPRA, would create a simple and elegant solution to this definitional problem and would compel greater accountability for consultations.

## 2. Overly Bureaucratic Procedures

Kathleen Fine-Dare (2002) observed, “NAGPRA implementation is such an enormous and expensive undertaking that the inevitable result has been that of delays and backlogs.” For Native Americans, the administrative tasks are overwhelming, from the review of inventories, to the preparation of repatriation requests, to the actual consultations with entities (Hemenway, 2010; Gonzales-Moreno, 2007). Cal NAGPRA directed entities to use the same exhaustive process as the Act to publish itemized inventories. Cal NAGPRA could require a more streamlined administrative process to benefit all stakeholders.

Cal NAGPRA’s creation of the ROC added bureaucratic complexity to oversight, as the Native American Heritage Commission (NAHC) already existed. Native American commentator Cristina Gonzales-Moreno (2007) observed, “I believe that during the



passage of Cal NAGPRA the likely choice for defining California Tribes would have been through the NAHC, but instead the government chose to create another level of bureaucracy.” As it turns out, this comment was prescient. In 2015, the ROC was dissolved and responsibilities for Cal NAGPRA were transferred to the NAHC.

### 3. Weak Enforcement Provisions

The improved sanction language in Cal NAGPRA should have resulted in better compliance from resistant institutions. However, while California mandated a dispute resolution process for compliance disagreements, the process has never been used. Rob Wood (2015) stated that it is too cumbersome. The federal NAGPRA Review Committee must first review any dispute and proposed sanction. Then, a tribe would have to file a civil lawsuit. Such lawsuits require involvement of the State Attorney General, which would likely never file suit against another state agency. Therefore, this legal remedy is not a practical solution.

A better approach might be to mandate the involvement of State Mediation and Conciliation Services (SMCS), a state-funded agency that employs mediators to handle such disputes. Or, an advisory arbitration step could be added, thereby signaling to parties how a court might view their arguments and positions. Legal scholar Adrian POP (2014) supported alternative dispute processes, stating, “Western culture is not the only one using alternative dispute resolution mechanisms. Other indigenous cultures have developed a large array of conflict resolution tools, as a means of maintaining harmonious relationships.”

### 4. Inadequate Funding

Cal NAGPRA appropriated no funding whatsoever. Many institutions have cited lack of funding as an impediment to compliance. Even if Cal NAGPRA was appropriately funded, the NAHC believes that it would experience the same administrative problems as federal NAGPRA. (Gonzalez-Moreno, 2007). To date, NAHC has not had the time or resources to promulgate regulations for Cal NAGPRA. Rob Wood (2015) observed, “ NAHC got the duties and responsibilities for making Cal NAGPRA work, but no funding to support it. This is an absolute recipe for failure.”

#### 5. Absence of Legal Standard to Balance Interests/Acknowledge Oral Evidence

Rob Wood (2015) states, “Ethnocentricity has always been an issue in Native American dealings. The requirement in Cal NAGPRA for written evidence from Native Americans flies in the face of the law.” The lack of legal recognition of Native oral traditions impedes equity and fairness. In providing evidence during consultations, Fine-Dare (2002) has observed that tribes may be pressured to use the language of archeology to state their positions. This is uncomfortable terrain for Native representatives as it is akin to a denial of their fundamental oral histories.

California has statutes already in effect with a more expansive view of Native American evidence, but only in disputes pertaining to tribal lands. The California Public Resources Code section 21080(e) defines the “substantial evidence” standard for land disputes. The courts have interpreted this language to open the door for greater recognition of Native oral narratives as “substantial evidence.” If Cal NAGPRA could reference this existing code section, advancing a broader definition of substantial evidence, it would assist Native representatives in advocating for their rights.

## **Conclusion – Opportunity for Legislative Action**

This literature review has documented California lawmakers' missed opportunities in Cal NAGPRA but also focused on a few modest and facile solutions to shortcomings in the law. Of the five deficiency areas highlighted, only one proposed solution requires a funding appropriation; all others are statutory language tweaks, references to other existing California laws that require no new drafting, and procedural changes in the way conflicts are resolved among opposing parties.

Professional California lobbyist Cory Jasperson (2015) offered a summary of the factors that create an opportunity for successful legislative advocacy in California politics. He suggests that it is about being in the right place, at the right time, with a unified coalition, championing a "ripe" issue that can hold the attention of beleaguered legislators. Amendments to Cal NAGPRA may be within reach if opposing parties can come together and work with a bill sponsor who is already conversant in the issues of Native rights.

Coalition building must be the first step. John Gomez, Jr. (2002) recounted some of the difficulties that were present before Cal NAGPRA was adopted, stating, "... most opposition we got was not from museums... The biggest tension was with other tribal groups that had different views regarding the inclusion of unrecognized tribes." Wood (2015) also noted that, "Tribal turf issues will still exist. Museums and universities will oppose any amendments. Archeologists will certainly oppose." Speaking for her profession of physical anthropologists, Ann Kakaliouras (2014) concurred, claiming, "When human remains are lost to science permanently, for any reason, there is no further opportunity for restudy or for the bringing of a fresh perspective...." Nonetheless, Jasperson (2015)

validated the perception that it will be easier to move Cal NAGPRA amendments forward while the Democrats head the Executive branch and control the Legislature.

Promulgation of U.S. law pertaining to Native Americans has often achieved poor results for Native peoples. NAGPRA and Cal NAGPRA are no exception and have yet to live up to their promise of treating Native cultures with dignity and respect. With small changes to California law and a modest amount of funding for Cal NAGPRA, California could lead by example and become the platinum standard for Native American human rights in the United States.

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## **PROPOSED SOLUTION**

### **Summary of the Project and Statement of Need**

California lawmakers' enactment of the California Native American Graves Protection and Repatriation Act ("Cal NAGPRA") in 2001 was an important step in recognizing the rights of California's Native tribes. It created legal mechanisms for both federally recognized and non-recognized tribes to exercise authority and control over objects pertaining to their cultural heritage and remains of their ancestors that were confiscated from tribal lands during the westward expansion into California over hundreds of years. Many are housed in custodial institutions, such as museums and scientific and educational institutions. The passage of Cal NAGPRA came eleven years after similar federal legislation, called NAGPRA, was enacted into federal law in 1990. The ratification of Cal NAGPRA was the result of months of negotiations between tribes, the science community and custodial institutions, culminating in the addition of Chapter 5 to the California Health and Safety Code (sec. 8010 et. seq.) However, the new law overlooked a number of key issues that would have facilitated the fulfillment of Cal NAGPRA's intended goal of repatriating objects to their rightful owners in the California Native American community.

I propose a legislative advocacy plan to make relatively modest amendments to the laws that comprise Cal NAGPRA. These amendments have the potential to make significant inroads in increasing successful repatriation outcomes and overall compliance with the law. Because there is a paucity of scholarly writings and other reporting about achievements resulting from adoption of Cal NAGPRA, the research and findings that underpin the following proposal rely on scholarly writings and government-mandated

progress reports published on the impact of federal NAGPRA. To ensure that the findings about federal NAGPRA had resonance in Cal NAGPRA, these findings were validated through discussions with several Cal NAGPRA experts who offered valuable insights on the California experience. These experts included representatives from the Native community, as well as individuals who have worked on Cal NAGPRA implementation, both in repatriation activities and in providing staff assistance to the agencies responsible for oversight of the law. California experts interviewed for this proposal confirmed that, like federal NAGPRA, Cal NAGPRA fell short of its goals in five key areas. This proposal advocates for improvements in California law in the following areas:

1. Streamline procedures and make administrative requirements less burdensome, particularly in the areas of documentation for repatriation claims, the level of detail required in inventories, and the procedural steps required to file a legal challenge pertaining to any aspect of Cal NAGPRA compliance;
2. Add or revise definitions of key terms including: a) 'consultation' to include the minimum requirements and activities that comprise this activity, b) 'Native American' to include ancestral human remains found on tribal lands that may not be related to any presently existing tribe, and c) subcategories of Native objects to provide greater flexibility in determining how to classify them;
3. Revise and improve dispute resolution processes to require the use of alternative dispute resolution methods prior to the filing of legal challenges, thereby potentially avoiding costly and protracted litigation and creating better opportunities for early resolution and consensus-building;



4. Codify a new evidentiary standard that recognizes and gives equal weight to the oral traditions and testimony of California Native Americans in legal proceedings or, in the alternative, incorporate into Cal NAGPRA, by reference, existing California law that already recognizes this kind of evidentiary standard; and
5. Adequate and appropriate funding sufficient to assist custodial institutions, the Native community and the Native American Heritage Commission in fulfilling the mandates of the law.

Despite the relatively minor nature of these proposed amendments, I anticipate that legislative advocacy to create or amend California law will be challenging. Between 1,500 and 2,500 new bills are introduced by California lawmakers in each legislative term. However, the upcoming legislative term offers opportunities. As background, the November 8, 2016 election has now determined the elected members of both houses of the California Legislature. Some of these members have previously sponsored or coauthored bills that recognize Native American rights or seek to address issues of importance to Native populations. These legislators will be high on the list of potential bill sponsors. All members of the Legislature, new and returning, will be sworn in on December 5, 2016 and begin a new two-year legislative term. The legislative term adheres to a strict calendar of dates specified in law and mandated by the California Constitution. Draft bill language or “spot bills”, concepts that have not yet been turned into draft language, must be introduced by a deadline, yet to be determined but near the end of February 2017. These bills could proceed through the policy committee and floor vote processes and be acted upon in the first year of the term or could be extended to the final year of the term, allowing bill sponsors more time to build consensus and address concerns expressed by stakeholders

voicing opposition. For this reason, it is advantageous to capitalize on the full two-year term by introducing a spot bill to amend Cal NAGPRA by the February 2017 deadline. This would maximize the amount of time available to work through consensus building and compromise with all stakeholders. Once introduced, the bill sponsor will be able to request hearings in policy committees and will also seek co-signers and other supportive members of the Legislature, with a goal of getting the bill to a floor vote in both houses. If the bill passes in each chamber of the Legislature, it will be 'enrolled' and sent to the Governor for signature and, if signed, will be 'chaptered' into law. This summary of the milestones and lifespan of a new legislation illustrates the importance of developing a well-organized and committed coalition of support. It also highlights that attention must be paid to careful planning and logistical oversight once the bill development process has begun.

## **Strong Alignment with the Goals of the Museum Field**

This project is aligned with the guiding principles and directives of leading professional organizations in the museum field. Both the International Council of Museums (ICOM) and American Alliance of Museums (AAM) have addressed the recognition of civil and human rights of cultures that have had their cultural heritage confiscated.

Membership in these organizations is incumbent on museums honoring the moral imperatives surrounding repatriation of cultural property held in their custody. These professional organizations, over the last twenty or more years, have promulgated ethical directives to member museums that strive to change historical thinking and practices pertaining to the custody of collections of cultural patrimony, human remains and funerary objects. For example, in the 2004 preamble to ICOM's Code of Ethics, the ethics tenet regarding collections containing objects of cultural heritage states:

Museum collections reflect the cultural and natural heritage of the communities from which they have been derived. As such they have a character beyond that of ordinary property, which may include strong affinities with national, regional, local, ethnic, religious or political identity.<sup>2</sup>

This tenet envisions a process whereby museums engage in dialog with people of origin “based on scientific, professional and humanitarian principles”<sup>3</sup>, with a stated goal of taking “prompt and reasonable steps to cooperate”<sup>4</sup> in the return of cultural heritage objects.

This legislative advocacy project, if successfully executed, will advance the ethical goals of museums and provide a roadmap for other like-minded museum professionals to

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<sup>2</sup> ICOM Code of Ethics for Museums, Tenet 6. Adopted 1986 and revised 2004. Retrieved from <http://icom.museum/the-vision/code-of-ethics/6-museums-work-in-close-collaboration-with-the-communities-from-which-their-collections-originate-a/#sommairecontent>

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

advance a legislative solution in other states and, potentially, in the federal government at some future time. The proposed amendments in law, while important in California, could be adapted as amendments to federal law, correcting documented deficiencies in federal NAGPRA that have existed for more than twenty-five years.

## Goals and Objectives

Below are four proposed goals for the project and associated objectives with preliminary completion dates. Many of the completion dates will be revised if the bill is acted upon in the second year of the legislative term.

GOALS AND OBJECTIVES	PROPOSED COMPLETION DATE
<p><b>1. Conceptualize and articulate the benefits of an improved Cal NAGPRA and make contact with various stakeholder groups to determine their level of interest in making changes to the law</b></p>	
<p>a) Create a brief, high-level “talking points” document that summarizes Cal NAGPRA’s history, identified shortcomings, key constituencies, and proposed legislative solution</p>	December 23, 2016
<p>b) Contact interested parties, including tribal representatives, scientists and representatives of custodial institutions that were on the record in support of or opposition to the original Cal NAGPRA legislation in 2001 to determine their current positions on Cal NAGPRA and the feasibility of creating a coalition to work with a bill sponsor to amend the law</p>	December 23, 2016
<p>c) Identify and reach out to other stakeholders from state agencies that have been charged with responsibilities under Cal NAGPRA, such as current and former members of the Native American Heritage Commission, the State Attorney General’s Division of Tribal Affairs, and State Parks to gauge the their interest and the political ramifications of legislative amendments in support of their work to fully implement Cal NAGPRA</p>	January 13, 2017

<b>2. Identify and contact legislators who have demonstrated a past interest in issues pertaining to California Native Americans to determine their willingness to sign on as a bill sponsor</b>	
a) Research recent legislative history to ascertain the authors and sponsors of bills that have included provisions that support Native American issues, causes or rights	December 23, 2016
b) Contact these legislators by letter, following up by phone, to request an opportunity to discuss drafting of an improved Cal NAGPRA bill;	January 13, 2017
c) Along with a small representative group of stakeholders, meet with legislators to discuss concept, timeline, political challenges and other related factors	February 3, 2017
d) If a legislator agrees to sponsor the bill, determine a 'point person' in the legislator's office, usually a legislative aide, to assist in developing a strategy for successful advocacy	February 18, 2017

<b>3. Commence bill development and fiscal analysis</b>	
a) Obtain the legislative calendar for 2017/2018 to ascertain important deadlines and committee processes required for bill development	December 23, 2016
b) Draft preliminary bill language or prepare minimum requirements for a 'spot bill'	February 24, 2017
c) Ensure that the bill is introduced by the deadline at the end of February 2017 (date to be determined)	February 28, 2017
d) Identify fiscal and budget resources to assist in performing fiscal analysis and developing the amount of funding appropriation required for the bill	March 7, 2017
e) Determine which policy committees will be involved in conducting hearings on the bill	March 10, 2017

<b>4. Develop a campaign to advocate in support of the bill, ensuring that the advocacy plan contains elements that have proven effective in other advocacy efforts</b>	
a) Create materials that can be distributed to legislators, listing the key reasons why they should be in support of the bill	March 10, 2017
b) Prepare testimony for spokespersons to present at policy committee public hearings on the benefits to California of improving Cal NAGPRA (honoring the heritage of California's first inhabitants, improving collaboration between tribes and institutions, celebrating the shared history of Californians, redressing a civil rights injustice, real life anecdotes that illustrate the practical impediments created by the current language, as well as other narratives)	March 10, 2017
c) With the concurrence of tribal representatives, contact lobbying firms that already represent tribes in California, primarily for gaming activities, to elicit their assistance in contacting legislators	March 24, 2017
d) With agreement from other stakeholders, contact lobbyists that may represent them in legislative efforts	March 24, 2017
e) Conduct trainings with stakeholders that are willing to meet with legislators	March 24, 2017
f) Develop teams of representatives that have historically been natural adversaries (e.g. a Native representative and an archeologist or museum representative) to meet together with individual legislators to showcase broad-based support and consensus on the need for reform, focusing on civil and human rights as central themes that would be addressed by having a more fair, effective implementation of Cal NAGPRA, as these are bedrock principles of the Democratic Party and should be well received by the legislature	March 24, 2017



g) Organize a Native American cultural event, perhaps including dance and other tribal customs, outdoors at the State Capitol in Sacramento to highlight the rich heritage of Native tribes and draw public attention to Cal NAGPRA	May 3, 2017
h) Implement a “Day in the Capitol” event, in which bill supporters make appointments to visit legislators in their offices, timed to occur on the same day as the Native American cultural event	May 3, 2017
i) Plan and execute a media campaign for print and social media, including a series of press releases, interviews with high profile stakeholders, letters to editors, and postings on Instagram, Facebook and Twitter accounts	August 31, 2017
j) Mobilize a letter writing, phone and email effort to contact legislators when critical votes are scheduled	August 31, 2017
k) Be available for consultation on any outstanding issues in the final bill development processes leading to the floor vote	August 31, 2017

## Cal NAGPRA Amendments - Legislative Advocacy Plan

<b>Tasks by Timeline</b>	<b>Start</b>	<b>End</b>
draft white paper of Cal NAGPRA (history, challenges, solutions)	12/19/16	12/23/16
draft cover letters to groups in support and opposition	12/19/16	12/23/16
mail cover letters and white papers to all known stakeholders	12/19/16	12/23/16
review legislative roster and obtain legislative calendar	12/19/16	12/23/16
identify legislators that have history of support for Native Americans	12/19/16	12/23/16
follow-up with supporters/opposition from 2001 Cal NAGPRA legislation	1/2/17	1/13/17
follow-up with other stakeholders (NAHC, Parks, Attorney General, etc.)	1/2/17	1/13/17
contact legislators to request meeting on proposed bill	1/2/17	1/13/17
confer with each group to assess readiness to begin advocacy effort in 2017	1/16/17	1/20/17
identify stakeholder representatives to meet with legislators	1/16/17	1/20/17
meet with stakeholders to script the legislative presentation	1/23/17	1/27/17
determine high level budget estimates from each stakeholder group	1/23/17	1/27/17
schedule legislative meetings	1/30/17	2/3/17
conduct legislative meetings incl. strategy, timeline, politics, legislative analyst	2/6/17	2/18/17
work with legislative analyst to draft spot bill	2/20/17	2/24/17
deliver spot bill to to Legislative Secretary's Office	2/28/17	2/28/17
<b>Bill Introduction Deadline</b>	<b>2/28/17</b>	<b>2/28/17</b>
meet with legislative analyst to develop appropriations request	3/1/17	3/7/17
draft actual bill language	3/1/17	3/7/17
identify which policy committees will hear bill	3/6/17	3/10/17
submit draft bill language to legislator for final review	3/8/17	3/10/17
be available to respond to legislator and provide support for bill	3/6/17	8/31/17
prepare public testimony for committee hearings	3/6/17	3/10/17
create fact sheets that can be distributed to legislators	3/6/17	3/10/17
design training plan for stakeholders involved in legislator visits	3/13/17	3/17/17
submit draft bill language to Legislative Counsel's Office	3/13/17	3/17/17
conduct training with stakeholders	3/20/17	3/24/17
appear for public testimony as requested	3/20/17	4/28/17
contact lobbying firms for assistance in legislative outreach	3/20/17	3/24/17
create legislative teams, consisting stakeholders (former adversaries)	3/20/17	3/24/17
schedule legislative visits	3/27/17	3/31/17
plan a cultural event on Capitol grounds (Native dance, music, craft-making)	3/27/17	3/31/17
obtain permit to hold cultural event	4/3/17	4/7/17
plan a multi pronged media campaign	4/3/17	8/31/17
develop a social media campaign	4/3/17	8/31/17
mobilize legislative outreach campaign prior to votes	4/3/17	8/31/17
<b>Last Day for Policy Committee Hearings</b>	<b>4/28/17</b>	<b>4/28/17</b>
meet with legislators in "Day at the Capitol" event	5/3/17	5/3/17
perform a cultural event to coincide with "Day at the Capitol"	5/3/17	5/3/17
<b>Last Day for Each House to Pass Bills out of House of Origin</b>	<b>6/2/17</b>	<b>6/2/17</b>
<b>End of Legislative Session</b>	<b>8/31/17</b>	<b>8/31/17</b>
<b>Last Day for Governor to Sign or Veto Bills</b>	<b>9/30/17</b>	<b>9/30/17</b>

Resources	December-16				January-17					February-17			
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**Phases**

Determining Stakeholders' Levels of Interest
Contact Legislators for Bill Sponsorship
Bill Drafting and Fiscal Analysis
Advocacy Campaign
Other Plan-Related Milestone Dates

## **SUMMARY AND CONCLUSIONS**

The outcome of legislative advocacy cannot always be evaluated in an obvious way, as a successful or failed attempt to enact new law. Legislative experts typically take a long view on the success of advocacy efforts. Success is often accomplished through an iterative process, where an idea is introduced in one year of a legislative session but must build lawmakers' support and gain traction following multiple attempts to move it forward. The reasons that a worthy bill might fail when it is first introduced include such factors as perceived low stature of the bill sponsor (e.g. freshman legislator), lack of public interest in the proposed change, vocal opposition to the bill in public hearings, funding prohibitions, inability to attract co-sponsors, a politically unpopular issue, or other political trade-offs which may be imperceptible to the bill sponsor at the time a bill is introduced.

Occasionally bills move quickly through the legislative process, but this usually occurs after a high-profile event creates a sense of urgency. For example, after the mass shooting near UC Santa Barbara in 2014, it only took three months for several complex gun control measures to be drafted, passed out of policy committees, voted on by both houses and signed into law by Governor Jerry Brown. It is important to recognize that this is unusual and typically occurs when legislators believe that there are worthwhile political and social benefits to be gained from such expedited processes. It is highly unlikely that the proposed Cal NAGPRA bill would follow an expedited track, as there is little public clamor for it

and no sense of urgency to enact it. While an affirmative ‘win’, where a proposed bill is chaptered into state law in the first year of the session, is the most desirable outcome, other legislative paths can be characterized as successful even if a proposed bill does not make it to the Governor’s desk for signature during its first outing.

Because this project plan contemplates introducing a Cal NAGPRA bill in the first year of a two-year legislative session, if it fails to gain enough support to pass in the first year, it is possible that it can be recast as a two-year bill, giving the legislative sponsor and the interested constituencies more time to build legislative and public support. As long as it is passed by the end of the second year of the legislative session, it can become law. However, if it expires without legislative action at the end of the second year, or fails to pass a floor vote in one or both houses, or the Governor vetoes it, any of these outcomes may be considered a significant, and possibly fatal, setback. If any of these occur, the bill sponsor will have to decide whether to reintroduce the bill in a subsequent legislative session or abandon the effort. This may occur with or without input from the stakeholders, as the bill sponsor must determine whether to expend more of his or her political capital on this effort.

A high volume of the bills introduced in each legislative term address important and ubiquitous issues that affect millions of Californians, such as education or environmental reforms, or involve constituencies that have powerful lobbying operations in Sacramento, such as labor unions. The nature of these



issues and related lobbying efforts can eclipse the importance of bills that address single issues or affect a small percentage of Californians. Given these realities, successful Cal NAGPRA legislative advocacy will be most possible if a vocal and organized coalition of stakeholders is energized and vocal enough to draw public attention to the longstanding human rights inequities that spurred the original impetus to seek a legislative solution in 2001.

While researching this project, I assumed that many tribes likely retain the services of lobbyists to assist them in advocating for their interests in Sacramento. Lobbyists are expert political operatives with established relationships with legislators. By collaborating with them to advocate for improvements in Cal NAGPRA, the likelihood of success for this project increased. However, following a comprehensive review of the California Secretary of State's Lobbying Directory, it appears that few tribes retain lobbyists; those that have lobbyists use them primarily for Indian gaming issues that generate revenue for tribes. While working with lobbyists can still be pursued, this discovery helped to clarify initial steps in the planning process.

This project plan, whether or not it succeeds in amending state laws pertaining to Cal NAGPRA, is a template that can be modified for legislative advocacy on any number of future legislative initiatives in the museum field. California Association of Museums (CAM's) government relations and advocacy program has been in existence since 2004 and contracts with an Advocacy Coordinator to manage these efforts. While CAM primarily advocates for increased

funding for such entities as the California Arts Council, it also champions ethical and environmental causes such as restrictions on the import of ivory and horns, monarch butterfly conservation, bans on micro-beads that adversely impact aquarium environments, ADA accommodations and other issues that impact museums. In some cases, CAM has taken the lead in advocacy efforts; in other instances, CAM has joined forces with another lobbying group to advocate for these causes. CAM might benefit from this project plan on future legislative advocacy efforts.

Whether or not this Cal NAGPRA legislative advocacy plan will achieve success is unknown at this time. The challenge is to properly frame the shortcomings in Cal NAGPRA in a manner that legislation can address and to propose sensible and politically viable solutions that are easy to support and that will face minimal opposition. Even if these factors are present, success is far from assured, as this bill will compete for the Legislature's attention with many other worthy proposals. Notwithstanding any unforeseen obstacles, legislative advocacy may still stand a reasonable chance of success during the Brown Administration, since Governor Brown is a Democrat, the Legislature is Democratically controlled and both branches have been receptive to recognizing the rights of Native Americans in recently enacted legislation. Moreover, the California Supreme Court has never been more ethnically diverse, with only two Caucasian justices on the seven-member bench and nearly half of the justices appointed by Governor Brown. This ethnic diversity and the moderate, Democrat-leaning court may benefit Native communities in the event there are legal challenges to any provisions enacted in the Cal NAGPRA amendments.

The project plan in this capstone is comprehensive, complete and adaptable to any California legislative advocacy efforts in the museum field. Understanding the inner workings and required procedures of the California lawmaking process is important for any museum professional embarking on advocacy or lobbying on behalf of an institution, an initiative that affects museums, or a peripheral issue in which museums have interest. The four basic phases of the action plan -- determining stakeholders' levels of interest, finding bill sponsors, drafting bill language and performing fiscal analysis, and devising an effective advocacy campaign -- are the fundamental requirements of any effective strategy that involves the Legislature. If this project plan accomplishes its goal of amending state laws pertaining to Cal NAGPRA, victory will constitute another step forward in ameliorating the devastating effects of European colonialism on California's Native peoples, their traditions and heritage. With minor legislative reform and a relatively small amount of funding, California can live up to its promise of restoring respect and dignity to Native cultures and people who have been marginalized for centuries. Moreover, California's enactment of this legislation would create a replicable model for other states to adapt to address their own Native American human rights challenges.

I believe that the narrative of injustice toward Native Americans is still a largely underappreciated part of our US history. Many, if not most, Native American objects in museums today were acquisitioned from artifact collectors, grave robbers, hobbyists, explorers and scientists who confiscated cultural heritage objects from tribal lands and vanquished peoples, desecrating gravesites and even participating in US government sanctioned artifact and human remains gathering for scientific study. In recent decades,

the moral implications of these actions have received greater attention, as museums have evolved from institutions that merely collect and display objects to institutions that strive to act as ethical stewards of the public's common wealth and heritage. The American Alliance of Museums (AAM) asserts in its Code of Ethics, "This stewardship of collections entails the highest public trust and carries with it the presumption of *rightful ownership* [emphasis added], permanence, care, documentation, accessibility and responsible disposal."<sup>5</sup> Anecdotal reports suggest that some AAM member museums continue to be resistant or unresponsive to Native American claimants who seek repatriation of objects that fall under requirements of federal and state law. There is room for improvement in ethical leadership in the museum field. Initiatives like Cal NAGPRA have the possibility to elevate these moral imperatives and to spur action on the part of museums to promote positive humanitarian outcomes and advance social justice goals of equity and fairness. By playing a prominent role in promoting human rights, the museum field can claim the moral high ground and become even more worthy of the public's trust and confidence.

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<sup>5</sup> AAM Code of Ethics. Adopted 1991 and amended 2000. Retrieved from: <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics>

## **APPENDICIES**

## Appendix A

### Annotated Bibliography

Bernstein B., Ph.D. (2010). "Repatriation and Collaboration: 20 Years Later." *Museum Anthropology* 33, (2), 196-198.

Bruce Bernstein, former Executive Director of the Southwest Association for Indian Arts, summarized what he saw as positive permanent changes that have resulted from twenty years of collaboration between Native peoples and museum and scientific communities. He noted that a relatively small percentage of objects have been returned to Native tribes as a result of NAGPRA. Therefore, he claimed that the larger contribution of NAGPRA has been an evolution in communication from consultations to true partnerships and an improved understanding of opposing views. He believed that this partnership would change the paradigm in museums to include Native participation in transforming objects into richer interpretative exhibitions of Native culture. I believe this byproduct of NAGPRA can be better realized if the law compels resistant parties to collaborate more fully and clarifies the scope of such consultations.

Cryne, J. A. (2009). "NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts." *American Indian Law Review*, 34, 99-122.

Julia Cryne was a third year law student at Oklahoma College of Law when she wrote this article, discussing deficiencies in NAGPRA specifically identified by the National Association of Tribal Historic Preservation Officers (NATHPO) in its 2008 status report. Cryne also highlighted judicial rulings that failed to support the Congressional intent of NAGPRA and created precedent that now makes it difficult

for tribes to find equitable resolution of disputes in court. Many of the shortcomings Cryne listed are Congressional compromises in the drafting of NAGPRA that codified definitional ambiguities, created lax sanctions for compliance failures, and narrowly defined the scope of land and tribes covered by NAGPRA. This article is on point with the direction of my research into how California's adoption of federal NAGPRA, with few modifications, has left tribes in California with insufficient redress under the law and an inadequate capacity to fully realize the stated legislative goals encompassed by Cal NAGPRA.

De Meo, A. M. (1994). "More Effective Protection for Native American Cultural Property Through Regulation of Export." *American Indian Law Review* 19, 1-72.

Attorney De Meo's focus in this article was the protection of cultural property covered under NAGPRA from illegal trafficking and interstate trade or transport. She highlighted that NAGPRA vests ownership rights of cultural property on tribal and federal lands in Native Americans, which gives them standing in legal disputes about illegal removal of such property but she criticized lax enforcement of NAGPRA laws, due to law enforcement's lack of funding and her perception that prosecutors and the criminal courts are apathetic about enforcing legal compliance. The issues she raised draw attention to areas where the law can be strengthened to ensure greater compliance, particularly by law enforcement entities.

Edgar, H. J. H. & Rautman, A. L. M. (2014). "Contemporary Museum Policies and the Ethics of Accepting Human Remains." *The Museum Journal* 57, (2), 237-247.

Heather Edgar and Anna Rautman are anthropology scholars at the University of New Mexico. Edgar is also a curator at the Maxwell Museum of Anthropology. The

focus of this article was to raise awareness of ethical issues that museums have faced regarding the acceptance of human remains in a post-NAGPRA environment. The authors highlighted an example of this ethical dilemma, that of the White's City Museum, which was a roadside attraction that displayed Native American remains and artifacts. When federal agents seized it, the collection came to the Maxwell Museum to curate and repatriate these remains and artifacts. The Maxwell took custody of these objects, although it had no legal obligation to do so, because it was equipped to properly and ethically care for these kinds of objects while most other agencies are not. This article demonstrated that there are unintended consequences regarding the obligations placed on museums that have stemmed from NAGPRA and have been inadequately addressed in the law, primarily in the area of funding for care and treatment of objects that come to museums from collectors. While it offered no solutions, it presented a challenge that could potentially be addressed through a legislative solution.

Fine-Dare, K. (2002). *Grave Injustice: The American Indian Repatriation Movement and NAGPRA*. Lincoln, NE: University of Nebraska Press.

Anthropology professor Kathleen Fine-Dare has authored one of the key scholarly works that seeks to illuminate the impact of NAGPRA on Native Americans' struggle to repatriate cultural property and human remains. Fine-Dare described eleven elemental problems with NAGPRA, ranging from procedural compliance challenges, to definitions contained in NAGPRA, to dispute resolution and other legal interpretations of statutory language. The interpretation of NAGPRA by judges schooled in European-based law has created special challenges, as misunderstood



spiritual beliefs, reliance on oral histories and a paucity of written documentation and evidence disadvantage Native American tribes seeking justice. The ongoing controversy and competing interests of science and tribal spirituality have been often reviewed in courts that give more weight to scientific inquiry than to Native beliefs. This chapter summarized shortcomings of NAGPRA in a succinct and compelling manner. It is among the richest sources of my research into the deficiencies of the existing law.

Gomez, J. (2002). Interview by Professor Joel Martin, *News from Native California* 16, (1), 34-40.

Joel Martin, the Rupert Costo Endowed Chair of American Indian Affairs at University of California, Riverside, interviewed John Gomez, Cultural Analyst for the Pechanga Band of Luiseno Mission Indians, approximately one year after Cal NAGPRA was chaptered in to law. Gomez was a legislative advocate while the Cal NAGPRA bill language was being drafted. Gomez was optimistic that Cal NAGPRA would correct weaknesses in NAGPRA and make the repatriation process more accessible to California Native tribes. While some of those predictions have come true, I wonder how Gomez would respond today, when after fifteen years there is still no funding and no perceptible interest from the Legislature in reviewing the progress of implementation. Gomez also underscored significant opposition from some tribes to the drafting of Cal NAGPRA. He perceived this opposition to be related to 'turf' and trust issues among many tribes in California. If a new legislative effort is to succeed, the drafters will need to consider these unexpected tribal perspectives.

Gonzales-Moreno, M. C. (2007). *“Restless Spirits: Museums and the California Native American Graves Protection and Repatriation Act Dilemma.”* (Unpublished master’s thesis). John F. Kennedy University, Berkeley, CA.

Cristina Gonzales-Moreno’s master’s thesis on Cal NAGPRA, although not peer-reviewed, was illuminating for several reasons. Gonzales-Moreno is a Native American and was able to examine Cal NAGPRA’s success through the lens of a key stakeholder group. Moreover, she is working on Cal NAGPRA issues in her profession, so she has practical experience and concerns that she sought to highlight for the museum community. She reiterated many times that the lack of funding has stalled many efforts to move forward with Cal NAGPRA implementation. I appreciated reading about the history of treatment of Native peoples from the perspective of a Native writer. Often, the well known, but sanitized, history fails to convey the despair experienced by Native tribes, so reading this thesis was humbling. I also appreciated her many observations about where the law falls short in California and her views on how it can be improved.

Graham, M. Ph.D. and Murphy, N. (2010). “NAGPRA at 20: Museum Collections and Reconnections.” *Museum Anthropology* 33, (2), 105-124.

Martha Graham and Nell Murphy, both directors at the American Museum of Natural History (AMNH), concentrated in this article on NAGPRA interactions between three tribes and AMNH around repatriation of objects. These three interactions demonstrated how much more is possible than just an exchange of objects when museums and tribal leaders created respectful dialog and sought repatriation solutions that supported the relevance and continuity of Native cultures. This article showcased optimal outcomes that are possible through NAGPRA

consultations and that such interactions can serve as the beginning of long and mutually beneficial associations between Native cultures and museums. There are many lessons in this article about how to engage in respectful compromise and how to build bridges to Native peoples who have been marginalized and excluded from decision making about their cultural objects for centuries. These case studies show how positive, quintessentially human, outcomes can be achieved even in an overly bureaucratized program like NAGPRA. How this information will factor into my research is not yet known, but I think the approaches to consultation described in this article are worthy of further study.

Hemenway, E. (2010). "Trials and Tribulations in a Tribal NAGPRA Program." *Museum Anthropology*, 33, (2), 172-180.

Eric Hemenway is an Indian, Tribal Repatriation Specialist for the Odawa Indians and a faculty member of the National Preservation Institute. He is also a former member of the NAGPRA Review Committee, so his perspective reaches beyond his own tribal work. Hemenway's article is a personal reflection on some of the practical, administrative and spiritual issues that have arisen for him in the return of ancestral remains to the Odawa Indians. While he denounces past injustices pertaining to Native tribes, he acknowledges that museums and tribes share similar implementation problems related to NAGPRA. Each have resource constraints, a claims process that is burdensome, large collections of culturally unidentifiable individuals, objects treated with harmful preservation chemicals, and insufficient funds to actually meet the mandates of the law. These recurring themes from many authors could easily form the basis for improved legislation in California.

Kakaliouras, A. M. (2012). "An Anthropology of Repatriation, Contemporary Physical Anthropological and Native American Ontologies of Practice." *Current Anthropology* 53, (S5), 210-221.

Anthropology Professor Anna Kakaliouras discussed the divergent views pertaining to repatriation of Native American cultural heritage expressed by indigenous cultures and anthropological scientists that persist two decades after the passage of NAGPRA. She saw an epistemological gap between scientists and indigenous communities that has yet to be bridged. By using objects subject to repatriation as a focal point to open communication and cooperation among all stakeholders, archaeologists can learn new information about Native chronologies and cultures, thereby fostering greater agreement about and less resistance to repatriation. While I agree that the dialogue is important, I think the author overlooked the deeply held positions of the scientific community about these objects. I am not convinced that scientists will consider new insights into Native cultures a fair and even trade-off for relinquishment of cultural objects. However, legislative proposals could recognize how communication has evolved and potentially craft a consultation process that promotes more directed communication about the importance to the tribal community of Native traditions.

Kakaliouras, A. M. (2014). "When Remains are 'Lost': Thoughts on Collections, Repatriation and Research in American Physical Anthropology." *Curator* 57, (2), 213-223.

Anthropology Professor Anna Kakaliouras explored the concept of loss to the field of physical anthropology due to repatriation of study collections that have been held in universities for decades. She explained the basis for scientific despair over the loss

of skeletal remains, as anthropology research is predicated on repeatability of each scientist's analysis on a study group of artifacts. Once remains are repatriated, that opportunity is lost. The author challenged the fields of science that study these collections to broaden their study methodologies to encompass a more holistic approach to the artifacts, incorporating what can be learned from consultation with Native tribes to provide better context about the lives, health and behavior of the people associated with these remains. Kakaliouras suggested that science rethink its traditional research methods and embrace a new brand of scientific scholarship that I would characterize as a blend of cultural and physical anthropology. It may, in fact, create a nexus between these disciplines that could be illuminating to the profession and bring new understanding about prehistory and Native ancestors. I think her idea is interesting and bold and could be a way to begin to bridge the controversy between science and Native peoples. How this insight will factor into my capstone project is unknown to me at this time.

McKeown, C. T., Ph.D. (2010). "A Willingness to Listen to Each Side': the Native American Graves Protection and Repatriation Review Committee, 1991-2000." *Museum Anthropology* 33, (2), 218-233.

Timothy McKeown is a legal anthropologist with the Department of the Interior, working primarily on NAGPRA implementation. His article, summarizing the work of the NAGPRA Review Committee, noted that Congress has mostly disregarded the Review Committee's six proposed amendments to NAGPRA over a twenty-year period. The Committee has also urged Congress, to no avail, to provide additional funding for museums or Native tribes to fulfill the tasks required under NAGPRA. Despite these setbacks, McKeown views the Committee as having had a positive

impact on NAGPRA. From reading his article, I must disagree, as it seems that this Committee has little clout in impacting necessary federal change in the law and regulations pertaining to NAGPRA. This is useful information, as it validates a basis of my argument regarding the experience in California with the Repatriation Oversight Committee formed pursuant to Cal NAGPRA's passage.

McLaughlin, R. (2004). "NAGPRA, Dialogue and the Politics of Historical Authority." In J. R. Richman & M. P. Forsyth (Eds.), *Legal Perspectives on Cultural Resources*, (185-201). Walnut Creek, CA: Altamira Press.

This book, edited by Richman and Forsyth, covers a variety of legal issues and perspectives about the history of debates around cultural heritage, repatriation, enforcement and other areas, covering many international conflicts and some commentary on NAGPRA. Robert McLaughlin's chapter described the historical backdrop to NAGPRA and chronicled issues with implementation, particularly as they relate to federal agencies' compliance with the law. He noted that the exemption from sanctions made it difficult to compel these agencies to make their best efforts to meet the spirit and intent of NAGPRA. This reading added more evidence to other readings about NAGPRA's ineffective treatment of compliance in the federal government, much of which has been replicated in California.

O'Loughlin, S. K. (2013). "Moving Forward from the Last Twenty Years: Finding a New Balance." In C. Sangita & J. M. N. Lavalley (Eds.), *Accomplishing NAGPRA: Perspectives on the Intent, Impact and Future of the Native American Graves Protection and Repatriation Act*, (223-238). Corvallis, OR: Oregon State University Press.

Attorney and Choctaw Indian Shannon O'Loughlin reported on the NAGPRA at 20 Symposium, a national conference to celebrate the NAGPRA's twenty-year

anniversary. The main thrust of this chapter was how the “balance of interests” concept is used in legal arguments to frustrate the intent of NAGPRA by weighing the interests of the scientific and museum communities against those of Native peoples. Institutions in possession of cultural objects have the sole authority to determine cultural affiliation. If the Native community wants to challenge an institution’s determination, the tribal litigant has the burden of proof to convince a court that the institution has failed to comply with the law. Courts often decide these cases by weighing interests and usually decide in favor of museums and scientists, partially because little weight is given to traditional knowledge and oral histories. This summary is consistent with the court cases I have reviewed to determine where NAGPRA is failing the Native community. It may be a persuasive argument in moving forward with amendments to Cal NAGPRA.

POP, A., Ph. D. (2014). “Traditional Approaches in Alternative Dispute Resolution: A Brief Overview.” *Conflict Studies Quarterly*, 7, 34-48.

Adrian POP is interested in identifying and promoting different forms of alternative dispute resolution (ADR) to address cultural conflicts. Her informative article described how and in what cultural contexts mediation, conciliation, restorative justice practices and use of neutral arbitrators have been successful. POP noted that indigenous societies have used ADR for centuries to resolve intra- and inter-tribal conflicts with impressive results. She discussed the many benefits of using ADR over traditional adversarial approaches to conflict resolution. From my many years in court administration, I am familiar with such approaches and am a firm believer in the impact they can have on building relationships and dialog among opposing

parties. I believe that tribal leaders might welcome an expansion of ADR in Cal NAGPRA. It also seems likely that law and science professionals would be receptive to ADR, as acceptance of these legal approaches is now commonplace. In fact, in California courts, parties in civil disputes are routinely ordered by the court to first try to resolve legal issues using ADR before the court will consider convening an evidentiary hearing. Including an ADR process in statutory amendments to Cal NAGPRA is likely to be a relatively uncontroversial feature of a future legislative proposal.

Seidemann, R. M. (2010). "NAGPRA at 20: What Have the States Done to Expand Human Remains Protection." *Museum Anthropology*, 33, (2), 199-209.

Ryan Seidemann, Assistant Attorney General for the State of Louisiana, looked back at the first twenty years of NAGPRA from the perspective of NAGPRA's impact on protection of human remains in archaeological sites. He focused primarily on legislation enacted in Louisiana that went further in protecting burial sites than NAGPRA required, but he also looked at a few other states' laws pertaining to burial site protection. He discussed the shortcomings of California's response to NAGPRA, noting that California appropriated, nearly verbatim, the federal law and did not expand the scope of site protection. Seidemann also researched the laws in Maine and Montana, states that greatly expanded the definitions of burial sites and promulgated criminal penalties for violations. I appreciate this summary, as I am interested in whether California can improve its law by following the lead of other states that have successfully addressed some NAGPRA's shortcomings.



Self, K. (2010-2011). "Self-Interested: Protecting the Cultural and Religious Privacy of Native Americans Through the Promulgation of Property Rights in Biological Materials." *American Indian Law Review* 35, 729-765.

Second year law student Kimberly Self introduced an area of law that receives little attention in NAGPRA or any other area of law where scientific research and personal property rights intersect. The premise of the article is that genetic material should be afforded the same rights as other property. By doing so, under NAGPRA, Native peoples would be able to assert rights to possession of the remains of ancestors and potentially get court orders to enjoin scientists from conducting genetic testing on any skeletal remains in their scientific collections. The author claimed that genetic research that denies a tribe's account of its history is harmful to that Native culture, but there are no protections in property or tort law that make it unlawful to conduct genetic testing without consent. The author believes NAGPRA should include such protections. This is an interesting premise but I can see both sides of the argument. People who donate their bodies to science give consent for testing in the interest of advancing scientific inquiry, where Native peoples had no such opportunity consent to testing. However, if NAGPRA included wholesale prohibitions on genetic testing of existing skeletal remains, the loss to scientific research would be profound. I am not sure how, or if, this article will factor into a possible legislative proposal.

Talbert, L. R. (2012-2013). "Native American Graves Protection Repatriation Act: Requiring Federal Recognition Digs Its Own Grave." *American Indian Law Review* 37, 171-202.

Third year law student Laura Talbert's legal commentary argued that NAGPRA's threshold requirement, that only federally recognized tribes are eligible for

repatriation of cultural property, defeats the legislative intent of NAGPRA. She made a compelling argument for why federal tribal recognition is a flawed requirement and suggested that a remedy would be to remove this requirement from the law and empower the NAGPRA Review Committee to review and rule on all claims for repatriation, regardless of the status of the requestor. While California did broaden the eligibility criteria for tribes to participate in repatriation under Cal NAGPRA, even this more inclusive standard has left a number of tribes unable to use this remedy. This area should be reviewed and debated when drafting statutory amendments.

United States Government Accountability Office. (2010). *NAGPRA: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act: Report to Congressional Requestors*. Washington DC: U.S. Government Printing Office.

At the request of Congress in 2009, the Governmental Accountability Office (GAO) conducted a compliance review of federal agencies subject to the provisions of NAGPRA and oversight entities charged with compliance monitoring, regulation promulgation and recommending modifications to NAGPRA implementation. The GAO found significant compliance problems among federal agencies, but noted that the weak enforcement provisions in NAGPRA were among the root causes of low compliance. The GAO also found that National NAGPRA, which provides administrative support, and the NAGPRA Review Committee were also underperforming, partially due to insufficient resources and lack of clear authority in the law. This report confirmed the opinions of many other scholars and commentators who are writing about NAGPRA. While this report is focused on federal NAGPRA, many of the issues cited are also problematic in Cal NAGPRA. I

believe this report serves to inform the debate about what needs to be done to make this legislative mandate effective and successful in achieving its public policy goals, both at the federal and state level.

Wiley, M. (2012). "Unidentifiable Remains, Unalienable Rights: Addressing the Problematic Nature of Cultural Affiliation under NAGPRA using a Human Rights Framework." University of Missouri, Kansas School of Law, 1-60. Retrieved from [https://www.academia.edu/4769575/Unidentifiable\\_Remains\\_Unalienable\\_Rights\\_Addressing\\_the\\_Problematic\\_Nature\\_of\\_Cultural\\_Affiliation\\_under\\_NAGPRA\\_using\\_a\\_Human\\_Rights\\_Framework](https://www.academia.edu/4769575/Unidentifiable_Remains_Unalienable_Rights_Addressing_the_Problematic_Nature_of_Cultural_Affiliation_under_NAGPRA_using_a_Human_Rights_Framework)

Morgan Wiley wrote this paper while attending Kansas City School of Law.

Although it is not peer-reviewed, the author made an argument for viewing all NAGPRA issues through a civil rights/human rights prism. The article was informative, as it summarized the legislative history leading up to NAGPRA and then chronicled the handful of court cases that have been adjudicated since the passage of NAGPRA in the area of unidentifiable remains, illustrating the evolving legal theories around Native American sovereignty and independent nation status. The judiciary appears to be moving toward interpreting ambiguities in NAGPRA in favor of Native American interests and through an analytical lens that acknowledges the moral duty to affirm human rights. This evolution is well aligned with Article 1 of Cal NAGPRA, which requires that "human remains and cultural items be treated with dignity and respect." If the judiciary is slowly moving toward recognition of the civil rights subtext of NAGPRA claims, amended California law can directly and affirmatively promote this notion to help the courts adjudicate claims more equitably.

## **Appendix B**

### **Project Stakeholders**

The project stakeholders are divided into three categories: potentially interested constituencies, representatives of the Legislative and Executive branches of California and a project manager. These stakeholders are outlined below, along with the roles they would undertake in supporting this project.

## Potentially Interested Constituencies

When Cal NAGPRA was enacted in 2001, the bill was heard in two policy committees, Government Organization and Business and Professions. Many California tribes testified at these hearings and wrote letters in support of the bill. Several custodial institutions and professional organizations also wrote letters of opposition and testified regarding their concerns. These stakeholders are part of the 2001 legislative record and are identified now as potentially interested constituencies. They will be approached to ascertain their interest and willingness to participate in a coalition to amend Cal NAGPRA. They will be instrumental in assisting legislative analysts in drafting bill language that reflects stakeholder consensus, meeting with legislators, testifying on behalf of the bill, staging media and other events, and mobilizing advocacy efforts aimed at legislators in support of these amendments.

<i>California Tribes in Support of Cal NAGPRA in 2001</i>	
Agua Caliente Band of Cahuilla Indians	
Augustine Band of Cahuilla Mission Indians	
Barona Band of Mission Indians	
Blue Lake Rancheria	
Buena Vista Rancheria	
Cabazon Band of Mission Indians	
Cachil Dehe Band of Wintun Indians of the Colusa Indian Community	
Cahto Tribe of Laytonville Rancheria	
Campo Band of Mission Indians	
Cedarville Rancheria	
Chemehuevi Indian Tribe	
Elk Valley Rancheria	
Ewiiapaayp Tribal Office	
Fort Mojave Indian Tribe	
Greenville Rancheria	
Inaja Cosmit Band of Mission Indians	
Jamul Indian Village, A Kumeyaay Nation	
Karuk Tribe of California	

Kumeyaay Cultural Repatriation Committee	
La Jolla Indian Reservation	
La Posta Band of Mission Indians	
Lone Pine Paiute-Shoshone Reservation	
Lytton Band of Pomo Indians	
Manzanita Band of Mission Indians	
Mesa Grande Band of Mission Indians	
Mooretown Rancheria	
Pala Band of Mission Indians	
Paskenta Band of Nomlaki Indians	
Pinoleville Indian Reservation	
Pitt River Tribe	
Ramona Band of Cahuilla Mission Indians	
Redding Rancheria	
Resighini Rancheria	
Robinson Rancheria Citizens Council	
San Pasqual Band of Mission Indians	
Santa Rosa Band of Mission Indians	
Santa Rosa Rancheria Tachi Tribe	
Santa Ysabel Band of Diegueno Indians	
Sheep Ranch Rancheria of Me-Wuk Indians of California	
Soboba Band of Luiseño Indians	
Susanville Indian Rancheria	
Sycuan Band of Kumeyaay Nation	
Torres-Martinez Desert Cahuilla Indians	
Twenty-Nine Palms Band of Mission Indians	
Tyme Maidu Tribe Berry Creek Rancheria	
United Auburn Indian Community	
Viejas Band of Kumeyaay Indians	

<i>Institutions/Organizations in Opposition to Cal NAGPRA in 2001</i>
American Association of Physical Anthropologists
California State University
Oakland Museum of California
Society for California Archaeology
Society for American Archaeology
University of California

## Representatives of the Legislative and Executive Branches of California

<i>Stakeholder</i>	<i>Role</i>
State Assembly Member or Senator	Bill sponsor/author
Other members of the Legislature	Co-sponsors/co-authors
Legislative analyst in legislator's office	Draft spot bill language
Policy committee members and staff	Draft proposed actual bill language and perform fiscal analysis
Legislative Counsel's Office	Review bill language/number and format in proper statutory form
Policy committees	Conduct committee and public hearings on bill proposal
California Highway Patrol	Issue permit to hold cultural event on Capitol grounds
Individual legislators	Meet with stakeholders
Assembly Speaker and Senate Pro Tempore	Schedule floor vote on bill, enroll bill for Governor's review
Governor	Sign or veto bill
Secretary of State	Chapter for inclusion in state law

## **Project Manager**

The project manager assumes a critical role in achieving the goals of the project and is singularly focused on ensuring that necessary procedural and tactical steps are taken in the legislative advocacy effort. In this capacity, the project manager will undertake the following roles:

- Neutral convener of stakeholders that have historically been in adversarial positions to attempt to work through issues that impede consensus on draft bill language;
- Liaison among constituencies and with legislative contacts;
- Lead advocate with legislative members and fiscal analysts;
- Trainer for constituents that will have direct involvement with legislators;
- Communications lead to draft talking points and testimony;
- Publicity and marketing lead for press releases, social media and cultural event planning;
- Administrative oversight to ensure that the timeline and required procedural steps are achieved.



## Appendix C

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