

NAGPRA IN COLORADO: A SUCCESS STORY

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A primary goal of the Native American Graves Protection and Repatriation Act (NAGPRA) is to correct the human rights violations committed against Native Americans from centuries of grave looting, stealing, and improper sales of cultural items. In the twenty-two years since NAGPRA's passage, the human rights foundation of the Act has been overshadowed by struggles regarding interpretation and implementation. The museums and Native American tribes of Colorado have not lost sight of NAGPRA's human rights foundation, however. Their commitment to the spirit of NAGPRA is evident in the museums' and tribes' approach to basic implementation and taking the initiative to develop state law to fill gaps in NAGPRA several years before federal regulations addressed the same issue. The collaboration between Colorado museums and tribes is, therefore, a model for NAGPRA implementation today and for the future.

INTRODUCTION	594
I. BACKGROUND: FROM CENTURIES OF LOOTING TO NAGPRA	596
A. <i>Native Graves Prior to NAGPRA</i>	596
B. <i>Human Rights Foundations, NMAIA, and the Passage of NAGPRA</i>	598
C. <i>The Content of NAGPRA</i>	601
1. Protection of Undisturbed Native Graves	601
2. Criminal Penalties for Trafficking.....	601
3. Consultation and Repatriation from Museums and Federal Agencies	602
D. <i>Issues of Interpretation and Application</i>	602
II. COLORADO COMPLIES WITH NAGPRA BASICS	609
A. <i>Laws and Native Graves in Colorado</i>	609
B. <i>A Potential Disaster</i>	612
C. <i>Signs of NAGPRA Success</i>	614

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	<i>D. NAGPRA in Colorado Versus Elsewhere</i>	615
III.	NAGPRA SUCCESS IN COLORADO: GOING BEYOND	
	BASIC COMPLIANCE	618
	A. <i>The Role of Colorado Tribes</i>	620
	B. <i>The Role of Colorado Museums: Cultural Sensitivity Lays the Groundwork for Success</i>	621
	C. <i>Partnerships Form to Build a Better NAGPRA</i>	624
	D. <i>New Regulations for Culturally Unidentifiable Remains</i>	627
	E. <i>The Future of NAGPRA in Colorado</i>	630
	CONCLUSION	630

INTRODUCTION

The Native American Graves Protection and Repatriation Act¹ (NAGPRA) is, first and foremost, a human rights law.² Passed in 1990, NAGPRA is a federal statute enacted to correct the human rights violations caused by centuries of looting Native American graves, stealing from tribes, and displaying stolen human remains³ and objects in museums. NAGPRA addresses these past wrongs by protecting undisturbed Native American graves;⁴ imposing criminal penalties for trafficking in Native American remains and objects;⁵ and requiring museums and federal government agencies to inventory all of their Native American human remains, sacred and funerary objects, and objects of cultural patrimony in consultation with tribes and to repatriate items and remains whose tribe or owner can be identified.⁶ NAGPRA also gives museums and

1. 25 U.S.C. §§ 3001–3013 (2006). Hereinafter, “NAGPRA” or “the Act.”

2. 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye) (“[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.”).

3. The use of “individual” rather than “human remains” is a widespread practice of respect. *See, e.g.*, NAT’L PARK SERV., DEPT. OF INTERIOR, NATIONAL NAGPRA PROGRAM FY2011 MIDYEAR REPORT (2011), <http://www.nps.gov/nagpra/DOCUMENTS/Reports/NationalNAGPRAMidYear2011final.pdf>. While wishing to respect this preference and honoring it where possible, “human remains” is the language used in NAGPRA itself, *e.g.*, 25 U.S.C. §§ 3002–3003, so, for the sake of clarity, “human remains” must sometimes be used in this Note.

4. 25 U.S.C. §§ 3001–3003.

5. 18 U.S.C. § 1170 (2006).

6. 25 U.S.C. §§ 3003–3005.

federal agencies restrictive time limits within which to complete these tasks.⁷ Not only does NAGPRA mandate immediate and oftentimes expensive action on a sensitive issue, but NAGPRA is also full of ambiguous terminology, requiring differentiation between “associated” and “unassociated” funerary objects⁸ and challenging how to define “Native American.”⁹ Because the passage of NAGPRA required such innovative and extensive action so quickly, museums and federal agencies under NAGPRA’s mandates understandably focused on the Act’s implementation requirements. In this rush to understand and comply with NAGPRA’s requirements, a disconnect occurred. Although human rights were the driving force in the Act’s passage, they have become lost in NAGPRA’s implementation. Great strides have been made in the past twenty-two years to correct the human rights violations. However, GAO (Government Accountability Office) reports, regulative additions to NAGPRA, and legal battles over NAGPRA’s requirements all demonstrate that the Act has yet to be fully implemented as it was envisioned. Tribes and museums striving to use and comply with NAGPRA still struggle to do so years later because the human rights foundation of the Act has been overshadowed by disputes over definitions.

This Note posits that despite the general disconnect between the goals and the implementation of NAGPRA, Colorado has managed to implement NAGPRA in a way that has not lost sight of the Act’s human rights foundation. By taking a proactive approach, Colorado recognized and implemented the heart of NAGPRA’s intention—correcting centuries-old human rights violations—while other states and government agencies have only grudgingly complied with NAGPRA’s basic requirements. Specifically, Colorado developed a process that filled in the gaps of NAGPRA with

7. Summaries of sacred objects, objects of cultural patrimony, and unassociated funerary objects were given a three-year time limit, *id.* § 3004(b)(1)(C), and inventories of human remains and associated funerary objects were given a five-year time limit, *id.* § 3003(b)(1)(B). See *infra* Part I.C.3, for a discussion on the difference between these two requirements.

8. 25 U.S.C. § 3001(3)(A)–(B) (differentiating that “associated objects” must still be with the remains they were buried with while “unassociated objects” are not held at the same museums as the remains).

9. *Id.* § 3001(9); see also *infra* Part I.D (discussing *Bonnichsen v. United States*, 367 F.3d 864, 875–82 (9th Cir. 2004)), for a discussion of NAGPRA’s definition of “Native American.”

supplemental state law in order to return and rebury individuals' remains that may otherwise not be eligible for repatriation. Colorado's process anticipated federal NAGPRA regulations requiring other states and federal agencies to follow essentially the same process.¹⁰ As NAGPRA at a national level still struggles to achieve its goals two decades after implementation, Colorado is a model for how NAGPRA should be implemented.

This Note details Colorado's model implementation of NAGPRA in three parts. Part I provides background on the bleak legal and social context leading to the enactment of NAGPRA, the passage of NAGPRA, and the content of NAGPRA. Part II lays out the potential challenges Colorado faced with NAGPRA, the early indicators of meritable implementation, and compares Colorado's implementation to that of other states and federal agencies. Finally, Part III explores the collaborative approach that has made NAGPRA so effective in Colorado and the extra work, beyond rudimentary compliance, that made possible the development of Colorado's process to return culturally unidentifiable remains.

I. BACKGROUND: FROM CENTURIES OF LOOTING TO NAGPRA

Understanding the laws and practices surrounding the looting of Native American graves prior to the passage of NAGPRA is vital to fully appreciate the impact and complications of the Act. Part A addresses the national lack of respect shown to Native graves for centuries. Part B discusses the human rights foundations of NAGPRA, NAGPRA's predecessor—the National Museum of the American Indian Act (NMAIA)—and the passage of NAGPRA. Part C lays out the actual content of NAGPRA, and Part D addresses the difficulties with the Act—from its ambiguous language to the financial and emotional strain it has put on museums and tribes.

A. *Native Graves Prior to NAGPRA*

White Americans, even figureheads such as Thomas Jefferson, have been desecrating Native American graves since

10. See *infra* Part III.C–D.

the colonial era.¹¹ By the twentieth century, there was even federal legislation enacted to define the right to dig up Native American graves. With the stated goal of protecting artifacts on federal land from looters, the Antiquities Act of 1906 “defined dead Indians interred on federal land as ‘archeological resources’ and . . . converted these dead persons into ‘federal property.’ ”¹² Such an act was contrary to long-standing common-law principles that human remains are not property.¹³ Not only was this policy an ethnocentric break from the common law’s respect for human remains, but putting Native ancestors’ remains in museums also disregarded the Native cultural belief that ancestors’ spirits cannot be at rest while their remains are above ground.¹⁴ Disinterment “stops the spiritual journey of the dead,” leaving the Native ancestors’ spirits to “wander aimlessly in limbo.”¹⁵

Respect for the dead and their graves (even unmarked ones) is deeply ingrained in American culture,¹⁶ and rules on disinterment are usually lengthy and require extensive judicial supervision and involvement.¹⁷ However, these “legal

11. James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archeology and American Indians*, 24 ARIZ. ST. L.J. 11, 14–17 (1992) (Jefferson excavated a Native burial mound in Virginia without asking permission from the local Native Americans. He did so “in the name of science.”).

12. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, in THE FUTURE OF THE PAST 9, 12 (Tamara L. Bray ed., 2001); Antiquities Act of 1906, 34 Stat. 225 (1906) (current version at 16 U.S.C. §§ 431–433 (2006)) (the original Antiquities Act is no longer in effect, but has been integrated into 16 U.S.C. §§ 431–433). Mesa Verde, in southwestern Colorado, was one of the first two sites “protected” under the Antiquities Act. Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 ST. THOMAS L. REV. 65, 72 (2000). The other site was “George Washington’s home at Mount Vernon.” *Id.*

13. Trope & Echo-Hawk, *supra* note 12, at 12; *see also* Williams v. Williams, (1882) XX Ch.D. 659 at 665.

14. *See* ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES 31–32 (2000).

15. Riding In, *supra* note 11, at 13.

16. *See, e.g.*, Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938) (A jury awarded a man \$5,000 in emotional distress damages when the unmarked grave of his child was plowed over. The case was remanded on other grounds.).

17. *See, e.g.*, WOODLAND PARK, CO., CODE tit. 2, ch. 2.28, § 2.28.230 (2002), available at http://library.municode.com/HTML/13858/level2/TIT2ADPE_CH2.28CERE.html#TIT2ADPE_CH2.28CERE_2.28.230DI (stipulating that (1) disinterment requires a court order or a signed affidavit from the deceased’s next of kin on a form provided by the city; (2) it is not allowed without permission of the deceased’s family members; and (3) it cannot be done on a weekend or a holiday).

protections, which most citizens take for granted, have failed to protect the graves and the dead of Native people” despite the importance of burial grounds in Native cultures.¹⁸ State case law, such as the 1982 California case of *Wana the Bear v. Community Construction Inc.*¹⁹ and the 1965 Florida case of *Newman v. State*,²⁰ has established that Indian burial sites are often not protected as cemeteries. In *Wana the Bear*, the California Court of Appeals ruled that a Miwok burial ground did not qualify for the protections afforded to cemeteries under California law (and therefore refused to enjoin the construction of a residential subdivision on the burial grounds) because the burial grounds had been “abandoned” in the late nineteenth century when the Miwok were driven out of the area.²¹ In *Newman*, the removal of a Seminole man’s skull from a burial ground was held not to be a wanton and malicious disturbance of the contents of a tomb, in large part because the burial ground was unmarked.²² Because of the long-time practice of grave looting by white Americans and case law reinforcing the lack of legal protection of Native American grave sites, it is estimated that “between 100,000 and two million deceased Native people have been dug up from their graves for storage or display by government agencies, museums, universities and tourist attractions.”²³

B. Human Rights Foundations, NMAIA, and the Passage of NAGPRA

In the 1970s, the United States’ Native American community began addressing this human rights violation through an Indian burial rights movement.²⁴ This movement opposed the use of Native ancestors’ remains for scientific research and the storage of Native ancestors’ remains in museums.²⁵ The foundations of the burial rights movement were in the international fight for human rights and self-

18. Trope & Echo-Hawk, *supra* note 12, at 11.

19. 180 Cal. Rptr. 423, 425–26 (Cal. Ct. App. 1982).

20. 174 So. 2d 479, 483–84 (Fla. Dist. Ct. App. 1965).

21. *Wana the Bear*, 180 Cal. Rptr. at 424, 426–27.

22. *See Newman*, 174 So. 2d at 480, 483.

23. Trope & Echo-Hawk, *supra* note 12, at 11.

24. James A. R. Nafziger & Rebecca J. Dobkins, *The Native American Graves Protection and Repatriation Act in Its First Decade*, 8 INT’L J. CULTURAL PROP. 77, 80 (1999).

25. *Id.*

determination,²⁶ with the backdrop of “the dramatic social movements of the 1960s and early 1970s associated with civil rights demonstrations, anti-Vietnam War protests, counter-cultural nonconformity, and demands for environmental protection” in the United States.²⁷ The burial rights movement had a straightforward purpose: addressing the “legacy of grave robbing, postmortem head hunting, and unethical research” done to deceased Native ancestors in the United States.²⁸ Native American activists argued that the lack of legal protection for Native American graves was a human rights violation and a failure to provide Equal Protection. Stealing human remains of any ethnicity from their graves and displaying these remains in museums is a violation of human rights, and, because “the law and policy that protects the sanctity of the dead and the sensibilities of the living has failed to protect Native Americans,” there has also been an Equal Protection violation.²⁹ As Senator Inouye told the Senate,

[w]hen human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.³⁰

The need for stronger burial rights became clear to the broader public when it discovered just how many Native ancestors’ remains were at issue. In a 1987 Select Committee on Indian Affairs hearing, the Smithsonian admitted that of the 34,000 individuals in its collection, 14,523 were North American Native ancestors and 4,061 were “Eskimo, Aleut, and Koniag” Native ancestors, which caused an “intense and immediate Native American reaction.”³¹ Awareness of the issue among the non-Native American population became more

26. *Id.*

27. James A. R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 175, 184–85 (2006).

28. Riding In, *supra* note 11, at 25; *cf.* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 848–49 (2d ed. 2008).

29. *See* Trope & Echo-Hawk, *supra* note 12, at 10–11, 15–16.

30. 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990).

31. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 266 (2005).

widespread after a 1988 *National Geographic* article about the government's "inadequate response" to the destruction of over 800 Native American burial sites in Kentucky.³² The burial rights movement and the public exposure helped put pressure on the federal government to correct this human rights violation.

Members of Congress attempted, unsuccessfully, to pass legislation protecting Native graves several times in the late 1980s.³³ Then, in 1989, Congress passed the National Museum of the American Indian Act (NMAIA).³⁴ This Act required the Smithsonian, of which the National Museum of the American Indian was to be a part, to do inventories and summaries of their Native American human remains and funerary objects with the help of Native American tribes.³⁵ If remains or objects could be identified as belonging to a particular culture, they were to be returned to the tribe or lineal descendants.³⁶ This Act was an important precursor to NAGPRA not only because it established a federal repatriation procedure, but also because it required the United States' national museum to comply.³⁷ The Smithsonian had a substantial Native American collection and had vigorously opposed the Congressional bills of the 1980s trying to address Native American repatriation issues.³⁸ With the precedent of inventories and repatriation procedures imposed on the Smithsonian, Congress was poised to pass legislation requiring repatriation from the nation's other federally funded museums.

32. Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 369 (1999); Harvey Arden, *Who Owns Our Past?*, NAT'L GEOGRAPHIC, Mar. 1989, at 376.

33. Trope & Echo-Hawk, *supra* note 12, at 20.

34. 20 U.S.C. §§ 80Q-80Q-15 (2006).

35. *Id.*; Trope & Echo-Hawk, *supra* note 12, at 20-21.

36. 20 U.S.C. § 80Q-9 to -11.

37. Another interesting point concerning the National Museum of the American Indian Act as a precursor to NAGPRA is that the two acts were passed under different titles of the U.S. Code. The National Museum of the American Indian Act is in title 20, the "Education" title, while NAGPRA is in title 25, the "Indians" title. 20 U.S.C. § 80Q; 25 U.S.C. §§ 3001-3013 (2006). This difference could be used to make an argument that while the NMAIA did strive to strike a balance between the interests of museums wanting to retain collections for further research and Native Americans wanting to rebury their ancestors, NAGPRA's placement in title 25 shows a preference for Native American human rights.

38. Trope & Echo-Hawk, *supra* note 12, at 20.

C. *The Content of NAGPRA*

NAGPRA was signed into law by President George H. W. Bush on November 23, 1990.³⁹ It is a comprehensive piece of legislation with three main goals: the protection of undisturbed Native graves; criminal penalties for trafficking in Native American remains and objects; and the return of human remains and stolen objects by museums and federal agencies.⁴⁰

1. Protection of Undisturbed Native Graves

NAGPRA addresses how to handle the contents of a newly discovered Native grave and protection of unexcavated graves on federal land.⁴¹ It grants ownership of found objects and remains to the lineal descendant of the buried Native American or the tribe on whose land the grave was discovered.⁴² It also strives to protect Native American graves that have not yet been disturbed.⁴³ In addition, NAGPRA establishes procedures to follow in the case of an inadvertent discovery to protect the grave and requires notification of the appropriate tribe before construction, mining, and agriculture can continue in the area.⁴⁴

2. Criminal Penalties for Trafficking

NAGPRA makes it illegal to traffic Native American remains and cultural objects and establishes criminal punishments for violations.⁴⁵

39. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

40. 25 U.S.C. §§ 3001–3013; GERSTENBLITH, *supra* note 28, at 848–93.

41. 25 U.S.C. § 3002(d).

42. *Id.* § 3002(a). NAGPRA defines “tribal land” as “all lands within the exterior boundaries of any Indian reservation; . . . all dependant Indian communities; . . . [and] any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of the Public Law 86–3.” *Id.* § 3001(15)(A)–(C) (internal quotation marks omitted).

43. 25 U.S.C. § 3002(d)(1) (stating that unmarked graves of Native peoples on federal land are protected from intentional excavation).

44. *Id.*

45. 18 U.S.C. § 1170 (2006) (including fines and/or imprisonment of up to five years).

3. Consultation and Repatriation from Museums and Federal Agencies

Finally, once implemented, NAGPRA required all federally funded collections to conduct an inventory of their “human remains and associated funerary objects” within five years of the passage of NAGPRA⁴⁶ and create a summary of unassociated funerary objects, objects of cultural patrimony, and sacred objects within three years.⁴⁷ These inventories and summaries had to be done in consultation with tribal government and religious leaders.⁴⁸ Summaries were intended to provide more general information about entire collections “in lieu of an object by object inventory.”⁴⁹ The summary process also did not require consultation with tribes as early as the inventory process did.⁵⁰ The less stringent nature of the summary process was presumably why it had a shorter deadline than the inventories, although the two processes are otherwise alike.⁵¹ The museum or federal agency then had to attempt to establish a “cultural affiliation” for the human remains and objects to a particular tribe.⁵² If remains or objects could be culturally identified, the museum had to repatriate them.⁵³

D. Issues of Interpretation and Application

Because of the ground-breaking nature of NAGPRA in both American Indian and museum law, NAGPRA’s scope and

46. 25 U.S.C. § 3003.

47. *Id.* § 3004; see also *infra* Part D, for a discussion on the meaning of these terms.

48. 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B).

49. Nat’l Park Serv., U.S. Dep’t of Interior, *Summary and Inventory Overview*, NAT’L NAGPRA, http://www.nps.gov/nagpra/TRAINING/Summaries_and_Inventories.pdf (last visited Sept. 2, 2011).

50. *Id.*

51. Most importantly, both require museum-initiated consultations with the goal of making cultural affiliation determinations. *Id.*

52. 25 U.S.C. §§ 3003(a), 3004(a). “[C]ultural affiliation means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” *Id.* § 3001(2) (internal quotation marks omitted).

53. See Nat’l Park Serv., *supra* note 49. For unassociated funerary objects, sacred objects, and objects of cultural patrimony, the museum or agency holding the object must be unable to prove that it has a right of possession to the object before it can be repatriated. 43 C.F.R. § 10.10(a)(B) (2010).

definitions are not completely clear, even after twenty-two years. As one museum scholar put it, “NAGPRA does not give wholesale answers to disputes. Instead, it sets forth rules, definitions, and procedures”⁵⁴ Definitions of the terms used in NAGPRA have caused many problems. For example, the definition of “Native American” became a famous and hotly contested issue.⁵⁵ In *Bonnichsen v. United States*,⁵⁶ a federal judge decided that a nearly ten thousand-year-old skeleton known as “Kennewick Man” or “the Ancient One” was essentially too old to qualify as a Native American under the NAGPRA definition. Finding a significant difference between a tribe that *is* indigenous rather than a tribe that *has been* indigenous, the judge concluded that “because Kennewick Man’s remains are *so* old and the information about his era is *so* limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures.”⁵⁷

The subcategories of “cultural items” have also caused interpretation issues. The definition of “human remains” is obvious enough, but the four subcategories of objects—“associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “cultural patrimony”—have not been as easy to define.⁵⁸ The terms can easily overlap and often impose definitions and categorization in a way that does not easily align with Native cultural beliefs concerning the objects. For example, “associated” and “unassociated” funerary objects both refer to objects originally buried with an individual,⁵⁹ but a statutory difference has been imposed that hinges on whether the institution that currently holds the burial object also holds the individual with which the object was placed.⁶⁰ Thus, an associated funerary object is an object that is now in the possession of the entity who is also in possession of the human

54. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 114 (2d ed. 1998).

55. NAGPRA defines “Native American” as “of, or relating to, a tribe, people, or culture that *is* indigenous to the United States.” 25 U.S.C. § 3001(9) (emphasis added) (internal quotation marks omitted).

56. 367 F.3d 864, 882 (9th Cir. 2004).

57. *Id.*

58. 25 U.S.C. § 3001(3) (internal quotation marks omitted).

59. *Id.* § 3001(3)(A)–(B).

60. *See id.*

remains that the object was originally buried with.⁶¹ An unassociated funerary object is an object that is in the possession of an entity who does not also have possession of the human remains that the object was originally buried with.⁶² This difference between associated and unassociated funerary objects, while seemingly straightforward, has encountered complications. Even if a funerary object enters a museum's collection with the individual it was placed with, a funerary object can change from being associated to unassociated if the individual's remains are separated from the funerary object.⁶³ Furthermore, because funerary objects must be "with" an individual to be defined as associated, objects that have been "abandoned at locations distant from the grave as part of funerary practices" may not be considered associated funerary objects despite the intentional nature of their placement.⁶⁴ It is questionable whether NAGPRA would even apply to such an object; even though the object is deliberately placed as part of a funerary ceremony it has never been "associated" with the remains. But it has also never been separated from the remains and therefore "unassociated."⁶⁵

Museums and tribes have also struggled with the distinction between "sacred" and "religious" objects.⁶⁶ NAGPRA only applies to "sacred" objects because while "all NAGPRA sacred objects have a religious character," not all religious objects are sacred.⁶⁷ It may seem logical that any object of a religious nature should be protected by NAGPRA under such a broad term as "sacred," but, in fact, NAGPRA only protects items as "sacred objects" if they are "needed for present-day use in religious ceremonies."⁶⁸ The category "cultural patrimony" is also notably difficult to apply because it does not cover items

61. *Id.* § 3001(3)(A).

62. *Id.* § 3001(3)(B).

63. *See id.*

64. *See id.* § 3001(3)(A); C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL'Y 153, 165 (2002) ("Certain Indian tribes, particularly those from the northern plains, have ceremonies in which objects are placed near, but not with, the human remains at the time of death or later."); Daniel N. Matthews, *NAGPRA in Southern Idaho: An Ethnographic Approach* 102 (Apr. 21, 1997) (unpublished Ph.D. dissertation, University of Colorado) (on file with Norlin Library, University of Colorado).

65. Matthews, *supra* note 64.

66. ROGER ECHO-HAWK, *KEEPERS OF CULTURE* 104 (2002).

67. *Id.*

68. *Id.*

that are valued by a whole tribe but are individually owned such as “personal property of famous chiefs or privately owned cultural artifacts of great significance.”⁶⁹

Beyond the difficulty of understanding the terminology of NAGPRA, tribes and museums alike have found frustrations with implementing NAGPRA. For museums, it has been an ongoing challenge to comply with NAGPRA’s three-year limit for creating a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony,⁷⁰ as well as the five-year limit for completing an inventory of associated funerary objects and human remains.⁷¹ Museums’ Native American collections are often so large that five years was not enough time to inventory and summarize the entire collection, especially if the museum needed to consult with many different tribes.⁷² Also, under the original NAGPRA, human remains could not be repatriated if the cultural affiliation of the remains was indeterminable, or if several tribes had claimed ownership and the museum was unable to determine who the “most appropriate claimant” was.⁷³

Beyond the difficulty implementing the specific provisions of NAGPRA, the goals of the legislation can also be unsettling for museums. “[Museums] faced the prospect of returning their priceless collections to tribes that often lacked resources to preserve them.”⁷⁴ Moreover, one of the goals of NAGPRA—to put sacred objects back in use—meant that previous museum pieces would be used “until worn out and discarded, a disheartening prospect for curators who dedicate their working lives to such objects’ conservation.”⁷⁵

Native tribes have also found many things lacking in NAGPRA. First, a common problem in American Indian law arose: NAGPRA was written in the terms and concepts of Anglo-American law, but the Native American cultures that NAGPRA impacts do not share these same legal conceptions.

69. *Id.* at 110.

70. 25 U.S.C. § 3004(b)(1)(C) (2006).

71. *Id.* § 3003(b)(1)(B).

72. In 1996 alone, fifty-eight museums were granted extensions for completing their inventories of human remains and associated funerary objects. Extension of Time for Inventory, 61 Fed. Reg. 36,756, 36,757 (July 12, 1996).

73. 25 U.S.C. § 3005(e). New regulations have since been passed regarding the disposition of culturally unidentifiable human remains. See 43 C.F.R. § 10.11(c) (2010).

74. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 17 (2003).

75. *Id.*

This created “a conflict in cultural and legal traditions.”⁷⁶ Tribal methods of dispute resolution and systems of property ownership emphasize conciliation and community rather than individual rights, and they often depart markedly from the Anglo-American tradition in which NAGPRA was written.⁷⁷ For instance, Navajo jurisprudence stresses problem solving rather than the win-lose fault finding of Anglo law.⁷⁸ While Anglo law “uses coercion and power” to find the “‘truth,’ and limits standing to parties who claim direct injury” in its focus on guilt, the Navajo system focuses on “moral suasion” and “on healing rather than on guilt.”⁷⁹ NAGPRA expresses “rights of possession” in terms of Fifth Amendment Takings and retribution for trafficking human remains and objects in terms of fines and imprisonment.⁸⁰ NAGPRA is clearly an Anglo-American law.

Clashing cultural and legal systems have created other obstacles to implementing NAGPRA. Putting individuals’ remains that have been sitting in a museum’s collection back in the ground is an important goal of NAGPRA, but the Act’s requirements stop at repatriation.⁸¹ NAGPRA has no language mandating the reburial of remains, let alone reburial at the original gravesite, despite the importance this original site holds for Native cultures. This means NAGPRA does not call for Native human remains that were found on public lands to be reinterred on public land. Also, remains found on private land cannot be reinterred on the private land if there is not a special arrangement with the landowner. Therefore, under NAGPRA, the original resting sites for the exhumed Native Americans are usually not an option for reinterment.⁸²

NAGPRA has also caused internal issues for Native American tribes. “Deep divisions have developed within tribes over who has the authority to speak [for the tribe] on repatriation issues” and “who should answer the inquiries.”⁸³ Also, the handling of human remains in consultation and

76. MALARO, *supra* note 54, at 114.

77. *Id.*

78. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 33 (1999).

79. *Id.*

80. 25 U.S.C. § 3001(13) (2006); 18 U.S.C. § 1170 (2006).

81. *See* 25 U.S.C. § 3005.

82. KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 129 (2002).

83. GULLIFORD, *supra* note 14, at 29.

repatriation can be an isolating experience for the Native Americans who must touch them;⁸⁴ many Native tribes believe there are negative repercussions when a deceased ancestor is exhumed and separated from the objects he or she was buried with. Consequently, forcing a tribal member to handle ancestors' remains puts the handler in close proximity to these negative repercussions, which can lead other tribal members to avoid or ignore the handler.⁸⁵

Moreover, tribal infrastructures can be ill-equipped to deal with the level of Native participation that NAGPRA demands.⁸⁶ Turnover rates in the Historical Preservation Officer positions, which some tribes created in response to NAGPRA, are still high, making handling issues, such as the categorization of objects under the four highly technical NAGPRA definitions and the effective participation in and use of NAGPRA, very challenging for these tribes.⁸⁷ Beyond structural and procedural difficulties, NAGPRA addresses sacred items and the remains of Native ancestors and the disrespect they have suffered, which is a very sensitive issue for Native Americans. As former Executive Secretary of the Colorado Commission on Indian Affairs, Ernest House, Jr. said, "[i]f we were talking about public safety and health care, tribal leaders are used to that . . . but [NAGPRA] is talking about sacred items."⁸⁸

Finally, tribes have raised complaints about implementation. Tribes have objected to the cursory approach that some museums and federal agencies have taken in completing their inventories.⁸⁹ Although providing tribes with collection-level summaries rather than object-by-object inventories is acceptable under NAGPRA for sacred objects, objects of cultural patrimony, and unassociated funerary

84. *Id.*

85. *See id.* ("Those medicine men are being separated by tribal members and being treated as if they are spirits . . . They are shunned by their own people.") (quoting Robert Frost, Native American consultant).

86. Since the passage of NAGPRA, many tribes have established cultural heritage officers and NAGPRA Coordinators to specifically handle NAGPRA issues, and there is now a database on the National Park Service webpage of tribal contacts for NAGPRA issues. *See* Nat'l Park Serv., U.S. Dep't of Interior, *Native American Consultation Database*, NAT'L NAGPRA, <http://grants.cr.nps.gov/nacd/index.cfm> (last updated May 2011).

87. Telephone Interview with Ernest House, Jr., former Exec. Sec'y, Colo. Comm'n on Indian Affairs (Nov. 18, 2010).

88. *Id.*

89. *See, e.g.,* FINE-DARE, *supra* note 82, at 153.

objects, this approach makes it very challenging for tribal NAGPRA officers to identify specific items on which to make repatriation claims.⁹⁰ Also, the museum practice of consulting with tribes in groups instead of individually can hinder the intent of the required consultations: to form respectful, working relationships with tribal representatives at an individual level in order to learn as much as possible about the objects in the museum's collection.⁹¹ Neither museum action is specifically disallowed by NAGPRA, but neither helps NAGPRA's goal of constructive consultation leading to cultural affiliation determinations.⁹² These problems have led to the common complaint that "[b]ecause of the money it is costing, the resources it is draining, and the frustration it is engendering, NAGPRA has driven itself into the position of arousing the suspicions of Native Americans."⁹³ In 2008 the National Association of Tribal Historic Preservation Officers issued a report criticizing NAGPRA's implementation at the federal level.⁹⁴ The report rebuked Congress for not providing adequate funding to properly implement NAGPRA and pointed out the lack of proper training provided to federal agencies and museums on their obligations under NAGPRA.⁹⁵ The report also highlighted tribes' lack of access to information identifying which museums and agencies may have possession of objects and human remains subject to NAGPRA but have not completed inventories and summaries.⁹⁶

Lawsuits under NAGPRA are also problematic. A plaintiff must show damage to her own property to have standing in such a case, which means she must first establish ownership of the item.⁹⁷ Unfortunately, as previously discussed, Native beliefs of property ownership do not easily align with the Anglo-American legal system,⁹⁸ so a Native American's rightful "ownership" of an item in a museum is difficult to prove. As a result, most claims under NAGPRA are dismissed on

90. *See id.*

91. *See id.*

92. *See* 25 U.S.C. §§ 3003–3004 (2006).

93. FINE-DARE, *supra* note 82, at 165.

94. MAKAH INDIAN TRIBE & NAT'L ASS'N OF TRIBAL HISTORIC PRES. OFFICERS, FEDERAL AGENCY IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (2008), *available at* www.nathpo.org/PDF/NAGPRA%20Report/NAGPRA-Report.zip.

95. *Id.* at 42–46.

96. *Id.* at 42–43, 46.

97. Yasaitis, *supra* note 31, at 284.

98. *See supra* Part I.D (discussing Native American property law).

procedural issues before they can even begin.⁹⁹ This means that if an item or human remains are not repatriated through the initial NAGPRA consultation and claims procedure, there is little hope of restitution in court. Clearly, there are many issues with NAGPRA from both the museum and tribal perspective. However, Colorado has shown—through its successful implementation of NAGPRA—that these challenges are not insurmountable. The state's museums and tribes have managed to maintain perspective and focus in regards to NAGPRA's human rights goals and have not been substantially impaired by interpretational and procedural difficulties.

II. COLORADO COMPLIES WITH NAGPRA BASICS

Despite the many difficulties inherent in NAGPRA, Colorado has taken on the challenge of proper implementation. Part A addresses the special challenges Colorado has faced in implementing NAGPRA due to its state laws preceding the Act. Part B addresses how initial implementation in Colorado was challenging, due to the immediate and extensive amount of work it required of both museums and tribes. Part C discusses Colorado's robust NAGPRA activity and the amount of National Parks Service grant funding that has flowed into the state. Finally, Part D highlights Colorado's successes in implementing NAGPRA by comparing Colorado to states that have struggled with implementing NAGPRA.

A. *Laws and Native Graves in Colorado*

Colorado began passing laws to protect Native American graves decades before NAGPRA was passed.¹⁰⁰ A state Antiquities Act was passed in 1967 aimed at preventing the looting of Native graves on state land by reserving title to

99. See, e.g., *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912 (D.C. Cir. 2003) (finding that tribal fears of NAGPRA violations when the Army Corp of Engineers transferred land to the state of South Dakota were merely speculative and therefore lacked standing); *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995) (denying the claim that the remains themselves had rights not to have scientific research performed on them).

100. This fact in itself shows that Colorado was poised to be a model example of NAGPRA implementation. Some states did not have laws to protect Native graves more than eight years after the passage of NAGPRA. See, e.g., Alston V. Thoms, *Beyond Texas' Legacy: Searching for Cooperation Without Submission*, 4 TEX. F. ON C.L. & C.R. 41, 48 (1998).

“historical, prehistorical, and archaeological resources found on state-owned lands to the state.”¹⁰¹ In 1973, the Office of the State Archeologist was created, and, as one of its main duties, took charge of receiving and storing remains inadvertently found or criminally exhumed from state land.¹⁰² The new office strove “to coordinate, encourage, and preserve by the use of appropriate means the full understanding of this state’s archaeological resources as the same pertain to man’s cultural heritage.”¹⁰³ However, the legislation did not dictate special procedures for Native graves. Furthermore, repatriation of remains was beyond the scope of the State Archeologist’s original duties. As a result, found remains often ended up in storage at the Office of Archaeology and Historic Preservation.¹⁰⁴ The state Historic Preservation Act was revised in 1990 and began protecting unmarked graves on state land and stipulated procedures “in the case of inadvertent discovery” with time limits that prevent remains from going into permanent housing in the custody of the State Archeologist.¹⁰⁵

By NAGPRA’s passage in 1990, Colorado state law already protected the contents of inadvertently discovered graves by providing a thorough set of rules for how to proceed when Native remains were found. The Colorado Revised Statutes called for an on-site examination by the State Archeologist within forty-eight hours of the discovery of any human remains on public (state) or private land, disinterment of Native remains (unless the landowner, State Archeologist, and the Commission of Indian Affairs agreed to leave the remains), and allowed the State Archeologist “to make determinations regarding the disposition of Native American human

101. FINE-DARE, *supra* note 82, at 99; *see also* COLO. REV. STAT. § 24-80-401 (2010).

102. Bridget Ambler & Sheila Goff, NAGPRA at 20: NAGPRA as a Change Agent in Colorado 7 (Nov. 11, 2010) (unpublished manuscript) (on file with the Department of Material Culture, Colorado Historical Society); *see also* COLO. REV. STAT. § 24-80-404.

103. COLO. REV. STAT. § 24-80-403.

104. *See* Ambler & Goff, *supra* note 102, at 7–8.

105. FINE-DARE, *supra* note 82, at 99; COLO. REV. STAT. § 24-80-1302 (requiring an on-site inquiry by a county medical examiner or coroner, contact with the Colorado Commission on Indian Affairs, and time limits for how long remains may be held by the state archeologist). Without these time restrictions and the duty to contact the Colorado Commission on Indian Affairs, disinterred Native American human remains could be held by the state indefinitely. *See* COLO. REV. STAT. § 24-80-1302.

remains.”¹⁰⁶ This right to repatriate relied heavily on the State Archeologist’s judgment because the statute did not halt repatriations, as NAGPRA does, when the remains’ cultural heritage was unclear or several tribes claimed the remains.¹⁰⁷ The statute minimized the procedural requirements and amount of time the Native remains could be disinterred and investigated before the Commission of Indian Affairs was contacted and plans were made to reinter the remains.¹⁰⁸ Unfortunately, Colorado’s efficient law for repatriating Native remains conflicted with NAGPRA. While Colorado law allowed the State Archeologist to make dispositions of Native remains, NAGPRA requires the State Archeologist to follow its standards, which do not permit repatriating remains that are culturally unidentified or claimed by multiple tribes.¹⁰⁹

At the time of NAGPRA’s passage in 1990, Colorado law protected Native graves and allowed for repatriation of the disinterred; but Colorado law lacked and still lacks protection for items buried with the remains, items previously exhumed, or items already in museums.¹¹⁰ This means that items intentionally buried with an individual disinterred from private land in Colorado have never been subject to protection.¹¹¹ In addition, there was a lack of protection for objects taken from Native graves and already placed in Colorado museums. The only way to make a claim on an item in a museum at the time was under a property law passed in 1988 addressing “Loans to Museums.” This law stated that owners who loaned objects to museums had only seven years to make a claim on the object or it became part of the museum’s collection.¹¹² Considering that most of the artifacts in Colorado museums that came from Native graves were dug up before

106. COLO. REV. STAT. §§ 24-80-1301 to -1304; Ambler & Goff, *supra* note 102, at 15.

107. See 25 U.S.C. § 3005(a) (2006). The text of NAGPRA at this time only allowed for repatriation of human remains when cultural affiliation could be established. By inference, when remains’ cultural affiliation cannot be determined, they cannot be repatriated.

108. COLO. REV. STAT. § 24-80-1302(2); Ambler & Goff, *supra* note 102, at 15.

109. See 25 U.S.C. § 3005.

110. See COLO. REV. STAT. § 24-80-1302.

111. The “[h]uman remains” protected under this law are narrowly defined as “any part of the body of a deceased human being in any stage of decomposition.” COLO. REV. STAT. § 24-80-1301(3) (internal quotation marks omitted).

112. COLO. REV. STAT. § 38-14-101 to -103.

1981¹¹³ and were not intentionally given to museums as loans, this statute was of little help.

Although NAGPRA added more protection for Native remains and objects than what Colorado law provided at the time,¹¹⁴ NAGPRA also created new complications because Colorado's laws on the State Archeologist's right to repatriate remains did not wholly align with NAGPRA's procedures. Because of NAGPRA's revolutionary nature and broad scope, NAGPRA brought many new rules and rights to Native remains and cultural objects in Colorado.

B. A Potential Disaster

As it was in the rest of the country, implementing NAGPRA was a monumental undertaking in Colorado. Bridget Ambler, Curator of Material Culture at History Colorado,¹¹⁵ explained that “[w]hen the Native American Graves Protection and Repatriation Act . . . arrived knocking on the doorsteps of American museums on November 16, 1990, most answered in their nightclothes, unsure of the strange visitor and certainly unsure of how to accommodate it (and without the financial means to fund compliance).”¹¹⁶ Complying with NAGPRA took a “Herculean” effort from History Colorado, especially because its collection of Native American human remains and objects had suffered “over a hundred years of neglect.”¹¹⁷ Not only had the collection been neglected, it had been dismantled; in 1981, a research strategy to aid in cataloging the collection called for dis-articulating many of the partial skeletons to store like bones together as opposed to keeping the skeletons as intact as possible.¹¹⁸

Other Colorado institutions also faced immediate obstacles to implementation. Fort Lewis College did not even learn it needed to comply with NAGPRA until September of 1994, one

113. For example, many of the human remains and objects in the Denver Museum of Nature and Science's Native American collection came from donations made by Francis and Mary Crane in 1968. See Notice of Inventory Completion: Denver Museum of Nature & Science, Denver, CO, 76 Fed. Reg. 14,061 (Mar. 15, 2011).

114. See *infra* Part I.C, for a discussion of the protections NAGPRA provides.

115. History Colorado is the new name for what was formerly the Colorado Historical Society.

116. Ambler & Goff, *supra* note 102, at 9.

117. *Id.*

118. *Id.* at 8.

year after the summary due date, and only little more than a year before the inventory of human remains and associated funerary objects was due.¹¹⁹ Because the Fort Lewis Anthropology Department had never received any federal funds for fieldwork, they did not think their collection was subject to NAGPRA.¹²⁰ It was not until 1994 that they received a letter from the National Parks Service and realized that other departments at Fort Lewis College that received National Science Foundation funding made the Anthropology Department subject to NAGPRA.¹²¹

Native Americans also faced challenges with NAGPRA in Colorado. In order to comply with NAGPRA, the tribes with a possible cultural affiliation to the human remains and objects in a museum collection must go to the museum to view the collection during consultations.¹²² This consultation requirement facilitates communication between museums and tribes, allows museums to better understand their collections, and lets tribal representatives see exactly what remains and objects in a museum may belong to their tribes. However, consultations also require tribal representatives to do extensive, and therefore expensive, traveling. Colorado has only two federally recognized tribes, the Southern Ute Tribe and the Ute Mountain Ute Tribe,¹²³ but Colorado museums have Native American remains and objects from all over the country.¹²⁴ NAGPRA does not address how tribes are supposed to fund the travel to complete these consultations.¹²⁵ Therefore, NAGPRA consultation requirements place a large financial obligation on tribes. Implementing NAGPRA in Colorado was not convenient or easy for any of the involved parties. Yet, despite these setbacks, Colorado museums and tribes managed to work towards implementing NAGPRA effectively.

119. FINE-DARE, *supra* note 82, at 123.

120. *Id.*

121. *Id.*

122. See 25 U.S.C. § 3003(b)(1)(A) (2006); 25 U.S.C. § 3004(b)(1)(B).

123. A list of federally recognized tribes is printed annually. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010).

124. See, e.g., *American Indian Art*, DENVER ART MUSEUM, http://www.denverartmuseum.org/explore_art/collections/collectionTypeId--20 (last visited Sept. 4, 2011).

125. See 25 U.S.C. § 3003(b)(1)(A); 25 U.S.C. § 3004(b)(1)(B).

C. *Signs of NAGPRA Success*

One sign of how extensive and successful NAGPRA implementation has been in Colorado is the impressive number of National NAGPRA program grants awarded to Colorado museums and Native American tribes.¹²⁶ Realizing that the actions mandated by NAGPRA were a heavy financial burden, the Department of the Interior began awarding grants through the National Park Service's National NAGPRA Program in 1994 to help accomplish these required tasks.¹²⁷ "In recognition of the repatriation process, Section 10 of [NAGPRA] authorizes the Secretary of the Interior to make grants to museums, Indian tribes, and Native Hawaiian organizations for the purposes of assisting in consultation, documentation, and the repatriation of museum collections."¹²⁸ By 2009, the Department of the Interior had given \$31 million in 592 NAGPRA grants.¹²⁹ Museums and tribes in Colorado have been awarded over \$2 million in grants since 1994.¹³⁰ Only California, Alaska, and Oklahoma have received more grant funds.¹³¹ Such a large amount of grant money is at the very least a sign of extensive NAGPRA activity in Colorado.¹³²

126. National NAGPRA is the program within the National Park Service that administers NAGPRA. From 1994–2010, Colorado museums and tribes received approximately forty-six NAGPRA grants. Nat'l Park Serv., U.S. Dep't of Interior, *National Park Service NAGPRA Grant Awards*, NAT'L NAGPRA, <http://www.nps.gov/nagpra/grants/allawards.htm> (last visited Mar. 11, 2011).

127. Thomas L. Strickland, U.S. Dep't of Interior, *Foreword to NAT'L PARK SERV., U.S. DEPT' OF INTERIOR, JOURNEYS TO REPATRIATION: 15 YEARS OF NAGPRA GRANTS 1994–2008*, at 2 (2008), <http://www.nps.gov/nagpra/NAGPRA-GrantsRetroFinal.pdf>.

128. *Id.*

129. *Id.* at 5.

130. *Id.* at 11. This \$2 million has gone to the following parties: History Colorado, the Colorado Springs Fine Arts Center; the Denver Art Museum; the Denver Museum of Nature and Science; the Fort Collins Museum; Fort Lewis College; the Southern Ute Indian Tribe of the Southern Ute Reservation; the University of Colorado Museum in Boulder; and the University of Denver Department of Anthropology and Museum of Anthropology. *Id.* at 15.

131. *Id.* at 10–11. California and Alaska have each received almost \$5 million in NAGPRA grants, and Oklahoma has received almost \$4.5 million. *Id.* Oklahoma and Alaska both have a significantly higher Native American percentage of their populations than Colorado, and California's population is seven times bigger than Colorado's and has significantly more universities and cultural institutions for NAGPRA grants to go to. *State and County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Sept. 4, 2011).

132. Grants for consultation and documentation range from \$5,000 to \$90,000 and repatriation grants can go up to \$15,000. NAT'L PARK SERV., U.S. DEPT' OF

The number of completed inventories and repatriations in Colorado is also impressive. History Colorado alone has repatriated “over 700 human remains and over 2,000 associated funerary objects.”¹³³ Putting these numbers in perspective, the National Forest Service’s entire collection for the Southwestern Region before repatriation was about 5,000 human remains and 15,000 associated funerary objects.¹³⁴ This level of activity indicates that Colorado museums and tribes are successfully fulfilling their consultation obligations so that they can complete their inventories and summaries.

D. NAGPRA in Colorado Versus Elsewhere

Even in terms of basic NAGPRA compliance, Colorado has been more successful than other states. The National NAGPRA Program grants play an instrumental role in tribes’ and museums’ efforts to implement NAGPRA, and about half of the applications for these grants are successful.¹³⁵ Receipt of these grants is clearly competitive, and several states have not been awarded any grant money.¹³⁶ Colorado museums and tribes have effectively tapped this funding resource by repeatedly submitting successful applications for grants and by proposing projects that the National NAGPRA Program wants to fund.¹³⁷

Another sign of Colorado’s successful implementation of NAGPRA has been the lack of lawsuits and non-legal conflicts on NAGPRA issues.¹³⁸ Lawsuits regarding NAGPRA

INTERIOR, JOURNEYS TO REPATRIATION: 15 YEARS OF NAGPRA GRANTS 1994–2008, at 4 (2008), <http://www.nps.gov/nagpra/NAGPRA-GrantsRetroFinal.pdf>.

133. E-mail from Bridget Ambler, Curator of Material Culture, History Colo., to Kristen Carpenter, Professor of Law, Univ. of Colo. Law Sch. (Oct. 5, 2010, 2:35 PM) (on file with author).

134. Minutes from the Sixteenth NAGPRA Review Comm. Meeting 23 (Dec. 10–12, 1998) (on file with author).

135. See NAT’L PARK SERV., *supra* note 132, at 8, 8 fig. (2008) (showing that there have been approximately 1265 applications for grants; 590 successful applications and 675 unsuccessful applications, for a success rate of 46.6 percent).

136. *Id.* at 10–11 (No tribes or museums from Delaware, New Jersey, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wyoming have been awarded NAGPRA grants.).

137. For instance, the University of Colorado and its natural history museum have been awarded grant money for each of the past eight years. See *National Park Service NAGPRA Grant Awards*, NAT’L NAGPRA, <http://www.nps.gov/nagpra/GRANTS/ALLAWARDS.htm#2010> (last visited Oct. 22, 2011).

138. Arizona, California, Hawaii, Oklahoma, Oregon, Nevada, New Jersey, New Mexico, New York, South Dakota, Texas, Vermont, and Washington D.C. have all experienced NAGPRA litigation. See *San Carlos Apache Tribe v. United*

implementation have been filed in twelve states and the District of Columbia, but NAGPRA-centered suits are almost nonexistent in Colorado case law.¹³⁹

Colorado museums have also managed to avoid non-legal conflict over NAGPRA as well.¹⁴⁰ One of the most public examples of a non-legal conflict over NAGPRA comes from California. In 2009, the Hearst Museum eliminated its autonomous NAGPRA unit.¹⁴¹ In an attempt to persuade the Hearst Museum to repatriate the 11,000 human remains it still possessed, Native American groups drummed and a Buddhist nun went on a hunger strike.¹⁴² Wesleyan University, in Connecticut, also gained attention for its noncompliance.¹⁴³ The University only sent summaries of their collection to eight tribes from Connecticut and Tennessee, but a NAGPRA consultant found that the university had items “from almost every state.”¹⁴⁴ This noncompliance for nearly a decade and a

States, 272 F. Supp. 2d 860 (D. Ariz. 2003); *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010); *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072 (S.D. Cal. 2008); *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008); *Bonnichsen v. United States*, 969 F. Supp. 614 (D. Or. 1997); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207 (D. Nev. 2006); *N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, No. 09-683, 2010 WL 2674565 (D.N.J. June 30, 2010); *United States v. Corrow*, 941 F. Supp. 1553 (D.N.M. 1996); *W. Mohegan Tribe & Nation of N.Y. v. New York*, 100 F. Supp. 2d 122 (N.D.N.Y. 2000); *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047 (D.S.D. 2000); *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992).

139. A single Colorado case mentions NAGPRA, but it is in a footnoted list of a “variety of statutory and regulatory regimes” that a mining company must comply with, and the court specifically says the case did not warrant a “meaningful judicial review” of the list of regimes. *Dine Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1259 (D. Colo. 2010).

140. There have been examples of tribes being frustrated with the long period of time the repatriation process has taken, though. *See, e.g., Katy Human, Bones of Contention Go Home*, DENVER POST, Feb. 9, 2007, at A1, available at ProQuest, File no. 1213554471 (The Miccosukee Tribe of Florida made repatriation claims on hundreds of items in the Denver Museum of Nature and Science collection that did not begin to be repatriated until 2007.).

141. *See* NAGPRA & UCB BLOG, <http://nagpra-ucb.blogspot.com/> (last visited Nov. 19, 2011).

142. Doug Oakley, *December Protest: Drumbeat Sounds Outside UC Museum for Return of Human Remains*, NAGPRA & UCB BLOG (Dec. 6, 2009, 6:11 AM), <http://nagpra-ucb.blogspot.com/search/label/News%20coverage>.

143. Daniel Greenberg, *University Takes Steps to Begin Complying with NAGPRA*, THE WESLEYAN ARGUS (Feb. 1, 2011), <http://wesleyanargus.com/2011/02/01/university-takes-steps-to-begin-complying-with-nagpra/>.

144. *Id.*

half prompted the formation of a new student group: Students for NAGPRA Compliance.¹⁴⁵

In contrast, Colorado institutions have received praise for their NAGPRA implementation. A cultural resource specialist for the Tlingit and Haida Tribes of Alaska has stated that the Denver Museum of Nature and Science (DMNS) has been one of the “most cooperative” museums he has worked with on NAGPRA.¹⁴⁶ Conversely, the University Museum in Philadelphia, the Portland Art Museum, and the Seattle Art Museum were named the worst museums to work with on NAGPRA issues.¹⁴⁷ In Colorado, the lack of conflict on NAGPRA issues despite the large amount of NAGPRA activity seems to indicate that while Colorado is a hotbed of NAGPRA activity, it is cooperative, and therefore successful, activity.

Colorado has also been more successful in implementing NAGPRA than the federal agencies covered by the Act. In 2010, the Government Accountability Office issued a report that eight key federal agencies were not in compliance with NAGPRA.¹⁴⁸ Despite being due fifteen years ago, these agencies’ summaries and inventories were not in compliance with the Act.¹⁴⁹ In addition, the quality of the materials that had been completed varied greatly, and many of the summaries and inventories were not published in the Federal Register, as NAGPRA requires.¹⁵⁰

Basic implementation of NAGPRA is going well in Colorado. But the large number of NAGPRA grants and well-documented activities of Colorado museums and tribes complying with NAGPRA do not tell the complete story. NAGPRA implementation in Colorado seems to be thriving, but how and why? If Colorado museums and tribes are only doing what was required by NAGPRA, why are they getting so much funding two decades after the Act was passed? The story goes deeper than mere compliance.

145. *Id.*

146. Harold Jacobs, Letter to the Editor, *Re: ‘Museums Concede Dark Role in Looting of Indian Relics,’ Sept. 2 News Story; and ‘Indians Have Right to Relics,’ Sept. 7 Editorial*, DENVER POST, Sept. 18, 2003, at B6, available at ProQuest, File No. 406842591.

147. *Id.*

148. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST TWENTY YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010).

149. *See id.* at 16–29.

150. *Id.* at 17, 26.

III. NAGPRA SUCCESS IN COLORADO: GOING BEYOND BASIC COMPLIANCE

The statistics above beg the question, “why is Colorado different?” DMNS’s in-house attorney, Lynda Knowles, believes it is a combination of geography, collection size, and most importantly, institutional philosophy.¹⁵¹ Colorado is a western state with Native American input and issues more prevalent than in some eastern states, and Colorado museums’ collections are also smaller than many eastern museums’.¹⁵² While these factors are certainly at play, Knowles has observed that DMNS’s institutional philosophy of treating NAGPRA first and foremost as human rights legislation has been the most vital aspect of the museum’s NAGPRA success.¹⁵³ Bridget Ambler, of History Colorado, believes Colorado’s approach to NAGPRA is special because of “the commitment of the individuals as well as the institution.”¹⁵⁴ History Colorado put an emphasis on human rights law in its nationally unique decision to share its NAGPRA liaison with the Colorado Commission on Indian Affairs.¹⁵⁵ This shared position created a direct link between History Colorado and the state agency charged with being the liaison between Colorado and its tribes.¹⁵⁶ In Ambler’s opinion, this shared position “infused [History Colorado’s] NAGPRA implementation efforts with a[n] enhanced cultural sensitivity and awareness.”¹⁵⁷ While the position is no longer shared, History Colorado still works closely with the Colorado

151. Interview with Lynda Knowles, Legal Counsel, Denver Museum of Nature and Sci., in Denver, Colo. (Feb. 8, 2011).

152. *Id.* The National Museum of the American Indian estimates that about 25,000 items in its collection are subject to NAGPRA. *Repatriation*, NAT’L MUSEUM OF THE AM. INDIAN, <http://www.nmai.si.edu/subpage.cfm?subpage=collections&second=collections&third=repatriation> (last visited Aug. 16, 2011).

153. Interview with Lynda Knowles, *supra* note 151.

154. E-mail from Bridget Ambler, Curator of Material Culture, History Colo., to author (July 11, 2011, 9:41 AM) (on file with author). At History Colorado, formerly Colorado Historical Society, its previous curator, Carolyn McArthur, worked collaboratively with Roger Echo-Hawk, a history scholar, to lay the foundation for effective NAGPRA implementation, which has carried on into today. *Id.* At the Denver Museum of Nature and Science, the addition of Dr. Chip Colwell-Chanthaphonh to the Anthropology Department is credited with establishing the museum’s current philosophy and success with NAGPRA. *See id.*

155. *Id.*

156. *See id.*; *Colorado Commission of Indian Affairs*, LIEUTENANT GOVERNOR GARCIA, <http://www.colorado.gov/cs/Satellite/LtGovGarcia/CBON/1251598936425> (last visited Nov. 11, 2011).

157. E-mail from Bridget Ambler, *supra* note 154.

Commission on Indian Affairs, and “the partnership by its nature has made [History Colorado’s] NAGPRA implementation efforts more transparent, and has helped [History Colorado] to better understand some of the cultural background that our tribal partners bring to the table during consultations.”¹⁵⁸ This approach to NAGPRA, which stresses communication with tribes, is an element that other museums and federal agencies can emulate regardless of location or collection size.

The DMNS and History Colorado’s institutional philosophies are prime examples of how Colorado tribes and museums have managed to avoid much of the frustration that other institutions and tribes have encountered in implementing NAGPRA. The key to this success is that Colorado museums and tribes have not taken advantage of or gotten bogged down in the unclear wording, unlike those who have taken an antagonistic approach to NAGPRA. Vague definitions are a common problem in implementing NAGPRA, as previously discussed in *Bonnichsen v. United States*.¹⁵⁹ A loophole museums use to avoid repatriations is demonstrating a lack of the requisite connection between the Native remains and the claimant, as in *Bonnichsen*.¹⁶⁰ In contrast, Colorado tribes became active with NAGPRA in large part because Colorado museums were implementing the spirit and, more specifically, the human rights aspects of NAGPRA. Focusing on the purpose of the Act led Colorado to go beyond the plain language of NAGPRA to create a new state rule, Colorado’s “process” for repatriating culturally unidentifiable remains, that specifically addresses Native grave and repatriation issues that NAGPRA does not address.¹⁶¹ Parts A and B discuss the role of Colorado’s Native tribes and museums in NAGPRA implementation. Part C discusses the formation and

158. *Id.*

159. See 357 F.3d 962 (9th Cir. 2004); *supra* Part I.D.

160. See 357 F.3d at 976–79; Julia A. Cryne, Comment, *NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts*, 34 AM. INDIAN L. REV. 99, 111–12 (2010); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1211–12, 1219 (D. Nev. 2006) (disputing both affiliation and the requirements of consultation under NAGPRA when the Bureau of Land Management decided that an individual was unaffiliated with any current Native American group despite the evidence presented by experts hired by the Fallon Paiute-Shoshone Tribe that the individual should be deemed affiliated). The court also added its own commentary that 2000-year-old remains of an individual “are not likely to be classified as Native American” due to their age. *Id.* at 1216.

161. See *infra* Part III.C.

accomplishments of the tribal-museum alliance, and Part D addresses the future of NAGPRA in Colorado.

A. *The Role of Colorado Tribes*

In many ways, NAGPRA did not reach the Native American tribes of Colorado until a decade after it was implemented. A decade of observation and cooperative implementation was necessary to prove NAGPRA's worth to the Native community.¹⁶² As with most federal American Indian law legislation, Colorado tribes were concerned about how this new Act would be implemented.¹⁶³ Tribes usually hold such new legislation at arm's length because, despite the good intentions of these programs, they are usually inadequately funded and poorly implemented.¹⁶⁴ NAGPRA was originally no different. Tribes were aware of the Act and that the mandated consultations with museums meant they had to participate in NAGPRA's requirements. From the tribal perspective, however, the first decade of NAGPRA was dormant as Native Americans waited to see how this new legislation would "play out."¹⁶⁵ Colorado's two Ute tribes became actively involved in NAGPRA implementation in the 2000s only after the tribes saw that Colorado museums were trying to implement NAGPRA not only because they had a legal obligation to do so, but because the museums wanted to build a better relationship with the Native American community.

162. Telephone Interview with Ernest House, Jr., *supra* note 87.

163. *Id.*

164. *Id.* For example, neither the Joint Venture Construction Program nor the Small Ambulatory Grants Program to build and improve tribal health care facilities had received any federal funding as of 2009 despite being federal government initiatives. See Letter from Gary J. Hertz, Dir., Office of Env'tl. Health and Eng'g, to Tribal Leaders (May 28, 2009), <http://www.dfpc.ihs.gov/JVCP/DearTribalLeader5-28-09.pdf>. Even programs that Native Americans generally do support are typically without the resources to become as effective as intended. See, for example, the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4016, (NAHASDA), which was implemented to address the issue of inadequate housing for Native Americans. Despite the ongoing crisis of inadequate housing, the budget for NAHASDA "has remained static, and in some cases has declined." U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 65 (2003), <http://www.usccr.gov/pubs/na0703/na0731.pdf>.

165. Telephone Interview with Ernest House, Jr., *supra* note 87.

B. The Role of Colorado Museums: Cultural Sensitivity Lays the Groundwork for Success

From the very beginning, tribal and museum partnerships have enabled Colorado to implement NAGPRA in a way that honors the Act's human rights foundation. Collaboration and sharing, not just between tribes and museums but also among museums themselves, has helped the human rights spirit of the Act spread through the Colorado museum community. For example, in order to accurately and timely complete their inventories, History Colorado and the Denver Art Museum (DAM) formed "a grant partnership to create a shared NAGPRA Coordinator."¹⁶⁶ Sharing the NAGPRA Coordinator made the position an affordable investment. And, through this partnership, two of the largest museums in Colorado managed to get both of their inventories submitted on time for both the 1993 and the 1995 deadlines.¹⁶⁷

Several Colorado museum curators have also helped implement the spirit of NAGPRA by returning items under the Act when they could have fought the repatriations by using the ambiguous wording of NAGPRA's object definitions. Curator David Bailey of the Museum of Western Colorado repatriated "an elegant beaded vest and a buckskin dress decorated with elk teeth to Northern Ute families," and, in return, gained the respect of the Northern Ute.¹⁶⁸ Bailey honored this repatriation request instead of utilizing the loopholes that the "cultural patrimony" designation has created because "[e]verybody benefits when we return items and receive valuable information back."¹⁶⁹ Rather than fight to retain museum collection pieces, he "would rather have a dialogue and exchange with living Indians to gain their respect and insight into our collections."¹⁷⁰ Not only did the Museum of Western Colorado receive stories and information from the Northern Ute in exchange for the vest and dress, but the Northern Ute also donated some new beaded items.¹⁷¹ Roger Echo-Hawk of DAM had this to say about repatriating a sash:

166. Ambler & Goff, *supra* note 102, at 11.

167. *Id.*

168. GULLIFORD, *supra* note 14, at 53.

169. *Id.*

170. *Id.*

171. *Id.*

DAM lost a valued object from its collections. The meaning to the Blood people, however, was that a living, long-lost sash returned into the care of the community. In dreams of goodwill, the outcome of justice offers a special blessing to us all. In human terms, this is the significance of NAGPRA.¹⁷²

The definitions of NAGPRA may be unclear, but there are many examples like those just mentioned of Colorado museums not letting the ambiguous definitions get in the way of completing the deeper goals of NAGPRA.

The first rounds of the mandated NAGPRA consultations were also crucial in establishing good relationships between Colorado museums and tribes. These first consultations were unsurprisingly tense because the tribes were keeping the museums and NAGPRA at arm's length, but former Executive Secretary of Colorado Commission on Indian Affairs Ernest House, Jr. feels this tension was an important step.¹⁷³ Tribes needed to see that the museums could "take the heat for what they were trying to implement."¹⁷⁴

Ambler agrees that the consultations were, and still can be, tense, but have been "overwhelmingly positive."¹⁷⁵ History Colorado has taken a very conscientious approach to the mandated consultations and has tried to be aware of the fact that "there is a history of appropriation, subjugation, assimilation, theft, and mistrust on behalf of Euro-Americans towards indigenous peoples, and to think that has all gone away would be naive. American Indians live with that legacy every day; it is part of their family's story, and part of their identity."¹⁷⁶ Awareness and understanding of the inherent tension between the parties are fundamental steps towards each party understanding and helping each other. History Colorado took purposeful steps to address this tension. In consultations, History Colorado

treat[s] tribal delegates with the respect they rightfully deserve as emissaries of sovereign nations. We have developed policies and procedures that we share to be

172. ECHO-HAWK, *supra* note 66, at 2.

173. Telephone Interview with Ernest House, Jr., *supra* note 87.

174. *Id.*

175. E-mail from Bridget Ambler, Curator of Material Culture, History Colo., to author (Nov. 12, 2010, 09:53 MST) (on file with author).

176. *Id.*

transparent about how we implement our program. We also begin each consultation by inviting a tribal representative (usually the most senior person) to provide an invocation. We listen carefully.¹⁷⁷

Other Colorado institutions have also made sincere efforts to address the tension inherent in consultation between museums and tribes. For example, Fort Lewis College's initial consultations were marked by tension, but also by a concerted effort of those involved to build a good relationship that emphasized figuring out what was in Fort Lewis's collection, addressing the concerns of the Native representatives over implementation, and overcoming the flaws in NAGPRA.¹⁷⁸

Colorado museums have also laid the foundation for working with tribes, instead of working against them, to determine how claims for repatriation are handled and funded. The National Park Service NAGPRA grants play a large role in furthering this work.¹⁷⁹ Because responding to NAGPRA inventories and making claims for items is such a costly and complicated process for tribes, Colorado museums have gone beyond fulfilling their own statutory obligations by bearing some of the burden that would otherwise fall on the tribes. History Colorado has

agreed to administer the grants and do the "leg work" on the tribes' behalf, and have done so in collaboration with the Ute Mountain Ute Tribe, the Southern Ute Tribe, the Ute Indian Tribe of Utah, the Pawnee Nation of Oklahoma, 21 Pueblos, Plains tribes and others in different reburial events.¹⁸⁰

DAM responds to "a notice of intent to prepare or submit a repatriation claim" by having the staff collect "the available documentation and provide[] copies free of charge to the claimant."¹⁸¹

The museums have also worked out agreements with tribes over items that a tribe is not prepared to have repatriated or items that the tribe is willing to have housed primarily in the museum. For example, History Colorado has

177. *Id.*

178. See FINE-DARE, *supra* note 82, at 125–33.

179. See *supra* Part II.C.

180. Email from Bridget Ambler, *supra* note 175.

181. ECHO-HAWK, *supra* note 66, at 27.

continued to care for repatriated remains at the tribes' request until the tribes are prepared to transfer custody.¹⁸² History Colorado also has artifacts that are housed in the museum's exhibits but that the tribe can take out on loan whenever it needs them for a ceremony.¹⁸³

An understanding and accommodation of the involved parties' interests rather than mere compliance with the minimum requirements of NAGPRA has built a solid foundation for Colorado tribal-museum interactions. Using this foundation, Colorado has transcended NAGPRA's rules of implementation and has filled gaps in the legislation in the decades following NAGPRA's passage. These efforts have created a true partnership between Colorado's tribes and museums.

C. Partnerships Form to Build a Better NAGPRA

Colorado museums and tribes have created a process for reburying the culturally unidentifiable human remains that, under NAGPRA, would otherwise not be eligible for repatriation and reburial.¹⁸⁴ This collaborative process is an example of the proper way to implement NAGPRA. Respect for human rights and for deceased Native ancestors motivated Colorado museums and tribes to write their own laws that honor the spirit of NAGPRA, even though federal legislation had not caught up to the Act's intent.

Prior to NAGPRA, Colorado law had set forth procedures for the State Archeologist in the event that Native remains were found.¹⁸⁵ By requiring the State Archeologist to follow NAGPRA procedure rather than established state rules, the Act actually made it harder to repatriate Native remains in Colorado.¹⁸⁶ Because these unidentified human remains were a point of major concern for Colorado's Native Americans, History Colorado went to the Colorado Commission on Indian Affairs (CCIA) and asked it to be a liaison between the

182. Email from Bridget Ambler, *supra* note 175.

183. Bridget Ambler, Curator of Material Culture, History Colo., Presentation to University of Colorado Law School Cultural Property Seminar (Sept. 28, 2010).

184. See Ambler & Goff, *supra* note 102, at 22–26.

185. See *supra* Part II.A.

186. Culturally unidentifiable remains could be reinterred under Colorado law, but NAGPRA requires a “cultural affiliation” to be established before remains can be repatriated. Compare 25 U.S.C. § 3005(a) (2006), with COLO. REV. STAT. § 24-80-1302 (2006).

museum and Colorado's two Ute tribes in an effort to address this gap in NAGPRA.¹⁸⁷ The Commission formed a "Reinterment Committee" that focused on "NAGPRA consultations with [History Colorado] and tribes, re-writing the state's burial law, and developing a state-wide reburial plan."¹⁸⁸

This Committee led to a 1999 Memorandum of Understanding between History Colorado, the CCIA, and the two Ute tribes. The Memorandum stated that the groups were going to work together to address the issue of respectful treatment, housing, and disposition of Native human remains through NAGPRA.¹⁸⁹ The Memorandum also described the groups' two ambitious goals: (1) taking a closer look at NAGPRA's cultural identity standards in an effort to get more human remains repatriated; and (2) petitioning the NAGPRA Review Committee to approve a yet-to-be-developed process to rebury Native remains that would otherwise remain unrepatriated under NAGPRA.¹⁹⁰ The Memorandum did not have a legislative impact,¹⁹¹ but it marked an important milestone in NAGPRA's implementation history in Colorado. The Southern Ute Tribe and the Ute Mountain Ute Tribe were no longer holding NAGPRA nor History Colorado at arm's length; the tribes were now fully invested participants.

Building on the momentum of the Memorandum of Understanding, History Colorado and the CCIA obtained a NAGPRA grant in 2000 to host a symposium that brought together tribal experts and academics "to discuss the lines of evidence recognized under NAGPRA and the extant legal scholarship regarding determinations of cultural affiliation."¹⁹² Discussion from the symposium revealed that many of the human remains History Colorado had classified as culturally unidentifiable actually fulfilled NAGPRA's evidence requirements for identification, and the remains were thus identified and repatriated.¹⁹³ The symposium resulted in the repatriation of more Native remains, but many remains still

187. Ambler & Goff, *supra* note 102, at 15.

188. *Id.*

189. Telephone Interview with Ernest House, Jr., *supra* note 87.

190. Ambler & Goff, *supra* note 102, at 16.

191. *Id.*

192. *Id.*

193. *Id.* at 17–18.

could not be culturally identified and, therefore, could not be repatriated.¹⁹⁴

The first goal from 1999 had been fulfilled as much as possible, so it was time to move on to the second goal: develop and propose a reburial process. With the support of then Colorado Attorney General Ken Salazar, History Colorado and CCIA again teamed up for a NAGPRA grant.¹⁹⁵ This time they hosted a 2005 regional consultation with tribes who live or have lived in Colorado.¹⁹⁶ The goal of the regional consultation was to develop a process for reinterring contested and unidentifiable remains that would comply with NAGPRA and replace Colorado's current (and conflicting) state law.¹⁹⁷ Forty-seven tribes were involved in the drafting process.¹⁹⁸ Because multiple tribes have claims on remains in Colorado, the two Colorado Ute tribes "offered to act as mediators or facilitators in the case of contested or culturally unidentifiable human remains,"¹⁹⁹ and were largely responsible for taking up the long-term goal of developing a process to repatriate remains that would otherwise be unrepatriatable under NAGPRA.

Several of the out-of-state tribes invited to the regional consultation—who had poor relationships with the museums in their states—took notice that Colorado was "trying to do a good thing" with its implementation of NAGPRA.²⁰⁰ Consequently, most of the affected non-Colorado tribes decided to lend their support for the process, and by the time the process was presented to the NAGPRA Review Committee for the second time, thirty-nine of the forty-seven involved tribes sent along letters of support, with only one tribe objecting to the process.²⁰¹ The Review Committee and the Department of the Interior approved the process in 2008.²⁰²

The process stipulates that any Native remains found on state or private land, and remains and objects classified as culturally unidentifiable by the State Archeologist, be placed in

194. *See id.*

195. *Id.* at 19.

196. *Id.*

197. *Id.*; *see also supra* Part III.C.

198. Telephone Interview with Ernest House, Jr., *supra* note 87.

199. FINE-DARE, *supra* note 82, at 160.

200. *Id.*

201. Ambler & Goff, *supra* note 102, at 22.

202. *Id.*

the care of the two Colorado Ute Tribes.²⁰³ The tribes will take responsibility for the culturally unidentifiable remains and associated funerary objects and “rebury them in as little as 100 days.”²⁰⁴ The process establishes a preference for how to deal with inadvertently discovered remains (leave them there where possible).²⁰⁵ The process also establishes a strict timeline and provides rules governing the removal of remains that ensure that the remains are not destroyed, are treated with respect, and do not languish in storage indefinitely because of procedural uncertainties.²⁰⁶

D. New Regulations for Culturally Unidentifiable Remains

On May 14, 2010, a new national NAGPRA regulation addressing the “[d]isposition of culturally unidentifiable human remains” went into effect.²⁰⁷ NAGPRA was finally catching up to the way Colorado was already implementing the Act. The NAGPRA Review Committee had been working on regulations regarding the disposition of culturally unidentifiable human remains since 1994.²⁰⁸ It took NAGPRA sixteen years to develop and implement rules similar to the ones Colorado tribes and museums implemented in a mere three years.²⁰⁹

203. *Id.* at 22–24; HISTORY COLO., PROCESS FOR CONSULTATION, TRANSFER, AND REBURIAL OF CULTURALLY UNIDENTIFIABLE NATIVE AMERICAN HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS ORIGINATING FROM INADVERTENT DISCOVERIES ON COLORADO STATE AND PRIVATE LANDS, http://www.historycolorado.org/sites/default/files/files/OAHP/Programs/OSA_NAGPRA_Grant_Protocol_FINAL.pdf [hereinafter PROCESS].

204. Press Release, Barbara O’Brien, Colo. Lt. Gov., Colorado’s Native American Remains Reburial Process Receives Approval (June 2, 2008) (on file with author).

205. PROCESS, *supra* note 203.

206. PROCESS, *supra* note 203; Ambler & Goff, *supra* note 102, at 22–25.

207. 43 C.F.R. § 10.11 (2010). This legislation calls for “disposition” as opposed to “repatriation,” which the original NAGPRA uses in reference to Native ancestors’ remains. The National Park Service defines “disposition” in NAGPRA to mean the “[a]ct of disposing[;] [t]ransferring to the care or possession of another[; or] [t]he parting with, alienation of, or giving up property.” Nat’l Park Serv., U.S. Dep’t of Interior, *NAGPRA Glossary*, NAT’L NAGPRA, <http://www.nps.gov/nagpra/TRAINING/GLOSSARY.HTM> (last visited Mar. 13, 2011). “[R]epatriation means the transfer of physical custody of and legal interest in Native American cultural items . . .” *Id.*

208. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. 58,582 (Oct. 16, 2007) (to be codified at 43 C.F.R. pt. 10).

209. *See supra* notes 195–97, 202 and accompanying text.

Rather than allow culturally unidentified remains to stay in museum collections, there is now a national procedure to ensure that, wherever possible, unidentified remains can be returned to Native Americans.²¹⁰ This new part of NAGPRA addresses one of the biggest gaps in the original legislation. The new regulations require museums to initiate consultations with all tribes that have had culturally unidentified remains removed from their present-day lands and any tribe “from whose aboriginal land” remains were removed.²¹¹ If the consultation does not lead to a cultural identification and consequent repatriation, the museum “must offer to transfer control of the human remains” to tribes in a priority order favoring the tribe(s) from whose land the remains were taken, then the tribe(s) with aboriginal land where the remains were exhumed.²¹² If no tribe from either of the above categories agrees to a transfer of control, then the remains may be transferred to another Native tribe, a non-federally recognized Indian group (with the permission of the Secretary of the Interior), or the remains can be reinterred.²¹³ However, the ambitious repatriation goals regarding culturally unidentifiable human remains do not carry over to any objects that were buried with the remains. While these new regulations require that museums and federal agencies “must offer to transfer control of the human remains,” for the funerary objects associated with the remains, the regulations only stipulate that museums and agencies “may” transfer them.²¹⁴

The new regulations for the disposition of culturally unidentified remains are quite similar to the process for

210. See 43 C.F.R. § 10.11.

211. *Id.* § 10.11(b)(2).

212. *Id.* § 10.11(c)(1).

213. *Id.* § 10.11(c)(2).

214. *Id.* § 10.11(c)(1), (4). The fact that associated funerary objects can be separated from their remains has been heavily contested. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Remains, 75 Fed. Reg. 12,378, 12,397–98 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10). Comments on the new rule said that to separate the remains from their funerary objects is “contrary to American common law and Indian funeral traditions.” *Id.* at 12,398. Also, this rule separates remains from objects that might help to make a cultural affiliation determination on the remains at a later date. *Id.* The Secretary of the Interior’s Office responded to these concerns by stating that making disposition of the associated funerary objects as well as the culturally unidentifiable human remains would raise “possession and takings issues that are not clearly resolved in the statute or the legislative history.” *Id.*

repatriation that Colorado already had in effect. Both emphasize the goal of returning remains to Native Americans even if a specific cultural identification cannot be made, and both favor returns to the federally recognized tribe from whose land the remains were removed.²¹⁵ The Colorado provision that provides that the state's two Ute tribes will take responsibility for the remains and rebury them in a way acceptable to all forty-seven tribes with aboriginal land in Colorado fits seamlessly into the new regulation. This process is exactly the situation that the new regulations give preference to, just with all of the details already worked out. As the two Ute tribes are the state's only federally recognized tribes, no determination of whose tribal lands the remains came from has to be made.²¹⁶ Also, because Colorado has already developed a procedure for reinterring the remains, developing a plan for disposition and reinterment "that is mutually agreeable" (in the words of the new regulation) to all of the involved tribes does not have to be done for each individual case.²¹⁷ Colorado's process is an efficient, streamlined version of the new federal regulation. Integrating these new federal rules into the state's NAGPRA procedures should, therefore, be relatively straightforward. Not only did Colorado's process anticipate the new federal regulations accurately, but it also created a procedure that is even more effective than the new federal rule.

The new NAGPRA regulations take steps towards filling the gaps in the original NAGPRA statute and further correct the human rights violations NAGPRA was intended to fix. However, there are already signs that the same kinds of implementation difficulties surrounding the definitions section will plague this new part of NAGPRA. Tribal groups are upset about how the new regulations define which groups must be consulted and which groups may have remains repatriated to them, and that associated funerary objects are not required to be repatriated with the remains.²¹⁸ At the same time, museums are upset that they have to try to consult with even larger numbers of Native tribes without any additional funding to do

215. See 43 C.F.R. § 10.11; Ambler & Goff, *supra* note 102, at 22–26.

216. See 43 C.F.R. § 10.11(b)(2)(i).

217. See *id.* § 10.11(b)(5); Ambler & Goff, *supra* note 102, at 22–26.

218. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,378–405 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

so.²¹⁹ National NAGPRA is trying to push itself in the same direction taken by Colorado; however, it is moving forward without the same understanding and consideration of the human rights foundation found in Colorado's implementation.

E. The Future of NAGPRA in Colorado

Colorado's process is unique and vastly important to American Indian law and NAGPRA. Iowa has also been proactive in developing a process to reinter Native remains more efficiently, but Iowa's process does not have the strict timeline for examination of the remains, which, in Colorado, has ensured that remains can be reinterred as quickly as possible.²²⁰ Furthermore, the Iowa process lacks the involvement with the Native American tribes that has proved critical in Colorado.²²¹ Colorado's process is "the most extensive of its kind in the country" and is a model for other states dealing with the new part of NAGPRA.²²² Indeed, other states' tribes have asked the Coloradan architects of this process to come talk to their state archeologists, governments, and tribal leaders because they are not getting the same positive outcomes as Colorado.²²³

Colorado's process is a huge accomplishment, but History Colorado, CCIA, Ute Mountain Ute Tribe, and Southern Ute Tribe are not done working on implementing the human rights foundation of NAGPRA. The History Colorado-CCIA-Ute alliance plans to address ways to return to tribes any inadvertently discovered human remains currently housed in museum collections as well as any future discoveries in an even more timely fashion.²²⁴

CONCLUSION

Colorado has implemented NAGPRA with an understanding of the fundamental human rights issues that are the foundation of the Act. This has led to a successful implementation of NAGPRA's basic requirements in Colorado,

219. *Id.*

220. Ambler & Goff, *supra* note 102, at 30-34.

221. *Id.*

222. Press Release, *supra* note 204.

223. Telephone Interview with Ernest House, Jr., *supra* note 87.

224. *Id.*

as well as to the development of state law furthering NAGPRA's goals two years before national legislation accomplished the same goal. Colorado's effectiveness in implementing NAGPRA and its foresight in enacting state law to remedy the gaps in the national regulations should be an example for future NAGPRA legislation. In particular, federal regulations are currently being developed for another section of NAGPRA that was originally reserved (just as the regulations on the disposition of culturally unidentifiable human remains were). 43 C.F.R. § 10.7 addresses the "[d]isposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony" and applies to remains and objects found on federal or tribal land after the November 16, 1990 passage of NAGPRA.²²⁵ Implementation of this reserved section appears to be on the same lengthy schedule as the culturally unidentifiable remains regulations; National NAGPRA has been working on this reserved section for six years, and no regulations have been drafted yet.²²⁶ Colorado's approach to NAGPRA and its development of the culturally unidentifiable remains disposition process should be a model for how National NAGPRA works on developing new regulations. Focusing on the human rights foundations of NAGPRA helps clarify the goals and necessities of future NAGPRA regulations and better enables the involved parties to work towards those goals. Human rights violations are more effectively rectified through good faith and cooperative, efficient legislation, not decades of fighting over definitions.

Despite the many uncertainties and shortcomings of the Native American Graves Protection and Repatriation Act, NAGPRA in Colorado is an example of successful implementation. As Ute Mountain Ute tribal member and former Executive Secretary of the Colorado Commission on Indian Affairs, Ernest House Jr., said, the future of respecting Native graves and burial objects in Colorado is bright because of the "foundation laid in the 1980s, the hard, tense consultations in the 1990s, and the implementation of the Process in 2000."²²⁷ Colorado museums' proactive, respectful approach to the required consultations and lack of loophole

225. Nat'l Park Serv., U.S. Dep't of Interior, *Reserved Sections of the NAGPRA Regulations*, NAT'L NAGPRA, http://www.nps.gov/nagpra/MANDATES/Reserved_Sections.htm (last visited Aug. 17, 2011).

226. *See id.*

227. Telephone Interview with Ernest House, Jr., *supra* note 87.

abuse in repatriations helped gain the trust and respect of Native American tribes. This positive foundation in turn led to Colorado's two Native tribes becoming active partners in a process to reinter culturally unidentifiable remains that NAGPRA did not protect.

Colorado's process is unique not only because it anticipated and seamlessly fit into the 2010 legislation regarding culturally unidentifiable human remains, but also because both museums and Native Americans were—and still are—an integral part of the project. The formation of such a dynamic, effective partnership between traditionally opposed groups around such a sensitive topic is more than just a model for other states and agencies trying to complete their basic NAGPRA obligations—it is an example of how implementing the spirit of NAGPRA is vitally important for achieving the Act's goal of correcting human rights violations. In the process of honoring the spirit of the Act, Colorado tribes and museums built good will, which also helps further the Act's human rights goals. The human rights violations that NAGPRA strives to address have historically pushed the Native and museum/scientific communities apart; however, Colorado tribes and museums have found a way to come together to work for a common purpose of fixing these violations. Colorado is a model state for NAGPRA implementation, and therefore a success story.