

SECTION I

Chapter 3. BUILDING A TRIBAL REPATRIATION PROGRAM: OPTIONS FOR EXERCISING SOVEREIGNTY

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Iroquois delegation. Photo by Janine Jones, courtesy of NMAI, Smithsonian Institution.

THE FOLLOWING is a discussion of how Indian tribes can use their sovereign powers to secure their rights under NAGPRA. There is a spectrum of approaches to the exercise of repatriation rights, ranging from case-by-case pursuit to the creation of comprehensive, pro-active programs. Due to constraints such as limited financial and human resources, the comprehensive, pro-active approach may have to be a long-term objective. This section of *Mending the Circle* is intended to help tribes envision and develop comprehensive repatriation programs while building their capabilities for dealing with repatriation in the here and now in spite of limited funding and staff.

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There are many ways in which tribes can use their sovereign powers to deal with repatriation. We will focus here on two general kinds of tribal governmental action—law-making and institution building. Of course, no Native tribe is forced to establish a repatriation program, and whether to do so is the most basic initial decision for the tribe to make. The first part of this chapter discusses the tribal goals and priorities that might influence this decision. The second part sets out some of the main functions that a program ought to be capable of performing.

Part three focuses on using a tribe's law-making powers to build a repatriation program, beginning with a discussion of some of the different approaches tribal legislation might take, and some of the substantive legal issues that legislation might address. Then follows an overview of the kinds of tribal institutions that a tribal government might use to fashion a repatriation program; there are suggestions regarding the roles and relationships of the various kinds of tribal institutions in carrying out these functions. Part IV concludes the chapter with some comments on practical considerations in carrying out a tribal repatriation program.

Throughout this chapter, the term "Indian tribe" is intended to include portions of tribes, separate tribes combined under a single government, and "Alaska Native villages," in accordance with the definition in NAGPRA. When dealing with cultural property, federal courts have upheld the sovereign authority of Indian tribes and Alaska Native villages.¹ The discussion of options for exercising sovereignty assumes that federal agencies, museums and courts, accept this basic legal principle. Since the focus of this section is on the exercise of tribal sovereignty, it does not expressly address the situation of Native Hawaiian organizations. Compelling arguments can be made that the federal government should recognize Native Hawaiians as possessing sovereignty and having the right of self-determination,² but those arguments are beyond the scope of this chapter.

I. FOCUSING ON TRIBAL GOALS AND PRIORITIES

Before tribal leaders commit their tribal government to building a repatriation program, they should give some consideration to just what it is that the tribe hopes to achieve. Tribes have significant rights under NAGPRA, but the existence of these rights is not in itself a compelling reason for each and every tribe to build a comprehensive repatriation program. While many tribes regard the repatriation and reburial of the remains of disinterred ancestors to be a compelling duty, other tribes do not consider reburial appropriate. Some tribes may consider the repatriation of certain items of cultural patrimony to be the highest priority, while others may think it more important to protect the graves of ancestors on tribal lands or on federal lands. There may be differences of opinion within tribes regarding what the priorities should be.

Thus, the first step in building a repatriation program is to decide whether to build a program at all, and the first step in making this decision is to focus on the tribe's own objectives and priorities. Setting priorities should help a tribe to determine whether it can accomplish its objectives with its existing institutions of government or whether it really should create something new. Some tribes may even find that they can accomplish their priority objectives by letting the leaders of their traditional religious societies do most of the work. In such cases tribal governments may be able to provide significant help to traditional religious leaders through relatively simple measures, such as proclaiming official tribal endorsement of such efforts and providing staff support (See Appendix E for some options already chosen by various tribes).

Tribes that choose to limit their involvement in carrying out the NAGPRA policy should

be aware that, for some aspects of NAGPRA, involvement by the tribal government really is important. For example, if a tribe wants to repatriate items of cultural patrimony, it should be prepared to demonstrate that the items satisfy the statutory definition of cultural patrimony.³ A tribe needs to be prepared to make a similar case if it wants to repatriate sacred objects that were owned or controlled by individual tribal members.⁴

In seeking repatriation, whether on a case-by-case basis or through establishment of a comprehensive tribal program, tribal officials should see NAGPRA as a tool rather than as an end in itself. NAGPRA can be used to support tribal repatriation efforts, but a tribe should design its program to meet its own needs rather than shape its program to fit the statute. Tribal officials also should keep in mind that NAGPRA embodies a number of compromises struck during the federal legislative process. By building their relationships with museums and federal agencies, and by thoughtfully exercising tribal sovereignty, tribes may be able to go beyond the language of the statute, perhaps obtaining repatriation of items that are outside the coverage of NAGPRA.

II. FUNCTIONS OF A TRIBAL REPATRIATION PROGRAM

If a tribe decides that it wants to build a repatriation program, its first step might be to analyze the different kinds of functions that a tribal repatriation program should be able to perform. To secure the repatriation of human remains and “cultural items” covered by NAGPRA from federal agencies and museums a tribal program should be capable of performing several important functions: 1) providing an authoritative source of tribal law and custom relating to repatriation; 2) facilitating involvement by traditional cultural authorities; 3) analyzing information (including summaries and inventories) provided to the tribe by federal agencies and museums; 4) consulting with federal agencies and museums; 5) conducting independent investigations to locate human remains and cultural items that the tribe may want to have repatriated; 6) presenting repatriation requests to federal agencies and museums; 7) advocating the tribe’s claims to certain materials, especially in cases in which other tribes, individuals or institutions make competing claims; 8) determining the proper disposition of items that have been repatriated; 9) resolving intratribal (and intertribal) disputes; and 10) safeguarding human remains and other cultural items that are imbedded in the ground. Each of these functions is discussed below.

Sources of Tribal Law and Custom

NAGPRA defers to tribal law and custom on several key issues. For example, some of the statutory definitions of terms that are used in NAGPRA incorporate Native legal concepts, either directly or implicitly. Two such defined terms are “cultural patrimony” and “right of possession.” As defined in NAGPRA, the term “cultural patrimony” means an object which has “ongoing historical, traditional, or cultural importance to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual.”⁵ If a particular cultural item was considered inalienable common property under written or customary tribal law at the time that the item passed out of tribal possession, such an item is considered “cultural patrimony” under NAGPRA (assuming that it satisfies the other provisions of the definition).

In a similar way, NAGPRA establishes the standard to be applied by a federal agency or museum in response to requests by lineal descendants, tribes or Native Hawaiian organizations for the repatriation of unassociated funerary objects, sacred objects or objects of cultural

patrimony. First the person, tribe or organization making the request must demonstrate that the agency or museum “did not have the right of possession” for the objects requested.⁶ As defined in NAGPRA, “right of possession” means that the present owner must have obtained the object with the voluntary consent of an individual or group that had the authority to sell or give it away.⁷ Whether or not the person or group that made the original transfer had the authority to do so is a question that depends on tribal law at the time the transfer was made.⁸

Despite NAGPRA’s deference to Native legal concepts, a tribe may encounter resistance in particular cases, in part because federal agency or museum officials may not understand Native legal concepts, which may be significantly different from Anglo-American legal concepts. Tribes can use their legislative powers to deal with this situation.

Involvement by Traditional Religious Leaders

Since repatriation involves traditional cultural and religious beliefs and practices, a key function of a tribal program might be to facilitate the involvement of traditional religious leaders and others who are regarded as authorities in matters of traditional religion and culture. NAGPRA uses the term “traditional religious leaders,” and, although the Act does not define this term, it does provide that such persons are entitled to be involved in consultations with museums and federal agencies relating to the repatriation of human remains and cultural items.⁹

This chapter sometimes uses the term “traditional cultural authority” rather than “traditional religious leader.” As defined in regulations issued by the Advisory Council on Historic Preservation this indicates “an individual or group of individuals in an Indian tribe [or] Native Hawaiian organization . . . who is recognized by members of the group as knowledgeable in the group’s traditional history and cultural practices.”¹⁰ Since some persons who are recognized by members of their tribes as authoritative sources of traditional cultural and religious knowledge do not hold themselves out as, and may resist being called “leaders,” the broader term may be more appropriate.

Whether or not they are normally involved in the formal workings of tribal government, traditional cultural authorities generally should have some involvement in their tribe’s repatriation program; tribal officials and staff should consider this in fashioning their programs. In some cases the tribal governments themselves may be prohibited by tribal law from dealing in traditional religious matters; in such cases the traditional societies may be the sole cognizant authority for the tribe. The success of a tribal repatriation program may depend on their inclusion and appropriate role in the program. For example, a tribe may need the testimony of its traditional cultural authorities to make a claim for the repatriation of cultural patrimony.

In some tribes traditional cultural authorities will naturally be involved in the repatriation program, but in other tribes it may require a special effort on the part of the tribal secular leadership to include them. Whether or not tribal political leadership must actively foster involvement by traditional cultural authorities in the inner workings of a tribal repatriation program, the establishment of formal roles for traditional people can enhance their stature for situations in which they are called upon to deal with other institutions of the larger society.

Analyzing Summaries and Inventories

NAGPRA imposes certain responsibilities on museums and federal agencies, including: (1) preparing inventories of human remains and associated funerary objects in their possession; and (2) preparing summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

The summaries were to have been completed no later than November 1993, and many museums and federal agencies have sent summaries to tribes as required. Museums and federal agencies must complete their item-by-item inventories of human remains and associated funerary objects by November 1995. These documents may provide the information tribal peoples need to secure the repatriation of human remains and cultural items. On the other hand, analyzing these documents may be a challenging, possibly overwhelming, task, especially if a tribe's cultural items are now held by numerous museums and federal agencies.

Thus, a tribal repatriation program ought to be able to analyze the summaries and inventories, and manage the information they contain. To some extent these functions might be performed by volunteers or existing tribal employees who are willing to commit some of their "free" time, but for any tribe that wants to take full advantage of NAGPRA, some paid staff devoted to this function may well be a necessity. Such staff could work as part one or more of the tribal governmental institutions discussed in part III of this chapter. The best way to set this up will vary from tribe to tribe, but it is a function that a tribal program must be able to perform.

Consultation with Federal Agencies and Museums

NAGPRA provides that after completion of the summaries, museums and federal agencies are required to engage in "consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders."¹¹ The tribal staff should be able to do this, for such consultation is a vital part of dealing with summaries and inventories. On request, tribes and Native Hawaiian organizations are entitled to have access to "records, catalogues, relevant studies or other pertinent data for the limited purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession" of objects that must be listed on the summaries.¹² Inventories of human remains and associated funerary objects, must be completed "in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders."¹³

Thus, Native tribal and organizational officials, and traditional religious leaders have rights to engage in consultation with museums and federal agencies after the completion of the summaries and before the completion of the inventories. If a tribe wants to take full advantage of NAGPRA, its repatriation program should be equipped to carry these consultations beyond merely reviewing and analyzing documents provided by museums and federal agencies. The consultation process should include reading between the lines and asking probing questions. It might also shade into negotiating agreements with museums and federal agencies that go beyond the requirements of NAGPRA.

Conducting Independent Investigations

A tribe may conduct its own investigations to locate human remains and cultural items. It may question the accuracy of summaries and inventories provided to it, and it may investigate institutions other than those covered by NAGPRA which may possess items that the tribe wants back.

Presenting Repatriation Requests

An inventory prepared by a museum or federal agency may establish that certain human remains and associated funerary objects are culturally affiliated with a particular tribe. A summary may establish cultural affiliation for unassociated funerary objects, sacred objects or



Elizabeth Blackowl, President of the *Pawnee* Tribe witnessing the presentation of a blanket to Arizona Senator John McCain by fellow *Pawnee* Vance Horsechief at a repatriation ceremony, Fort McNair, Washington, DC, June 6, 1995. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

objects of cultural patrimony. Once cultural affiliation has been established, the tribe has the right to have human remains and cultural items returned, but to take advantage of this right, the tribe must ask.¹⁴ Thus, preparing documents to formally request the repatriation of human remains and cultural items is a function that a tribal repatriation program must be able to perform.

Even when cultural affiliation has been established, a tribe generally will be required to do more than simply request that the items be returned. A tribe can establish a right to the return of cultural patrimony, sacred objects or unassociated funerary objects if it can show that the museum or federal agency does not have a right to possess the items.¹⁵ A tribe is entitled to repatriation of an item of cultural patrimony if it can show that the item is indeed cultural patrimony; it is entitled to repatriation of a sacred item if it can show that the item was owned or controlled by the tribe itself or, if it was owned or controlled by a member of the tribe, that there are no identifiable lineal descendants or that the lineal descendants have been notified and have not made a claim to the item.¹⁶ Thus, the function of presenting repatriation requests to museums and federal agencies should be understood to include demonstrating support for such requests.

Where cultural affiliation has not been established by an inventory or summary, a tribe still has the right to the return of human remains and cultural items if it can show cultural affiliation “by a preponderance of the evidence based on geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historic, or other relevant information or expert opinion.”¹⁷ Thus, where cultural affiliation has not been established by an inventory or summary, the function of presenting a repatriation request will include demonstrating cultural affiliation.

Advocating the Tribe's Claims

Simply presenting repatriation requests to museums and federal agencies may not be enough, even where cultural affiliation has been established. Some museums and federal agencies may be reluctant to comply with NAGPRA policy; most have some practical limits on their ability to respond to repatriation requests. The ability to advocate a tribe's claims may help to expedite responses to repatriation requests.

When a museum or federal agency has arguable grounds for resisting a repatriation request, the tribe must be able to advocate its position. For example, if a tribe asserts that a museum or federal agency does not have a right of possession of certain cultural items, the tribe should be ready to make its case. Similarly, a tribe must be capable of advocating its claim if a competing claim has been filed by another tribe or by one or more lineal descendants. In some cases, advocating a tribe's position may require filing an action in federal court to seek judicial enforcement of the Act.¹⁸

Determining Proper Treatment of Repatriated Items

Even when a tribal program has succeeded in establishing the tribe's right to have certain items repatriated, work remains to be done. The proper treatment of repatriated items may be prescribed by a tribe's religious teachings, or it may be a subject that religious teachings do not address. Through involvement of the traditional cultural authorities, a tribe must decide on the proper treatment of these items. A tribal repatriation program should be capable of facilitating these decisions. In carrying out these decisions, a tribal program should be prepared to consult with the museum or agency that has possession of the items to make arrangements regarding the time, place and manner in which the items should be delivered to tribal representatives. A tribal program may also have to attend to such details as acquiring the use of land for carrying out reburial ceremonies.

Resolving Intratribal (and Intertribal) Disputes

Resolving disputes is a function of tribal repatriation programs that should not be overlooked, and there are many ways in which this function could be approached. There may, for example, be competing claims by different tribes or by lineal descendants within a tribe to certain human remains or cultural items. NAGPRA provides that, in such cases, if the federal agency or museum "cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or a court of competent jurisdiction."¹⁹

In such cases, the competing claimants may share the belief that letting the agency or museum retain possession is inappropriate. If tribal law provides a mechanism for resolving such competing claims, the claimants could agree to have the agency or museum return the item(s) for dispute resolution under tribal law. A tribal court or independent tribal agency could be empowered to resolve such disputes, possibly with roles for traditional cultural authorities. Alternatively, a tribal governing body could designate an existing traditional forum to resolve such disputes.

Protecting Graves and Imbedded Cultural Items

There is more to NAGPRA than repatriation. NAGPRA is also about protecting Native

American graves, so a tribe might decide to set up its program to deal with both repatriation and graves protection. To discuss these functions adequately would require a separate chapter,²⁰ but some discussion is warranted.

The graves protection provisions in NAGPRA address two kinds of situation: (1) intentional excavation and removal of Native American cultural items and human remains from federal lands or tribal lands;²¹ and (2) the inadvertent discovery of Native American cultural items or human remains on federal lands or tribal lands.²² NAGPRA provides that intentional excavation is a violation of the law unless a permit has been issued by the relevant federal agency pursuant to the Archaeological Resources Protection Act (ARPA).²³ For the most part, the statutory language in NAGPRA simply cross-references the existing federal law, which prohibits the excavation, removal, damage or destruction of “archaeological resources” on federal lands or Indian lands without a permit issued by the relevant federal agency. The term “archaeological resources” includes human remains and other items that fit within NAGPRA’s definition of “cultural items” except that, to be covered by the ARPA definition, an item must be at least 100 years old.²⁴ Thus, the category “cultural items” under NAGPRA includes some items that are not “archaeological resources” under ARPA.

NAGPRA also covers more ground than ARPA within Indian country. By its terms, ARPA applies to “Indian lands” and federal “public lands.” “Indian lands” is defined in ARPA as excluding fee lands,²⁵ while “tribal lands” includes fee lands in NAGPRA.²⁶ One function of a tribal graves protection program might be to prod the Department of the Interior into carrying out ARPA in Indian country in a way that is consistent with NAGPRA.

Except for these differences in the coverage of the two Acts, NAGPRA does not add much to the tribal rights already recognized under ARPA. Under both statutes, the intentional excavation of graves or other covered items violates the law unless an ARPA permit has been issued; a tribe can block the excavation by declining to give its consent to the issuance of a permit.²⁷ A tribal graves protection program under NAGPRA should be able to assert this tribal right, ensuring that no ARPA permits are issued without tribal consent. This could be accomplished by monitoring the permitting actions of the Bureau of Indian Affairs²⁸ or by establishing a parallel tribal permit requirement.

NAGPRA does expand the rights of tribes in protecting graves and other places where “cultural items” are imbedded in federal public lands. Under ARPA, a tribe has the right to receive notice before an ARPA permit is issued,²⁹ while under NAGPRA a tribe has the right to be involved in consultation prior to the issuance of a NAGPRA permit as well as the right to determine the ultimate disposition of any culturally-affiliated items that may ultimately be excavated.³⁰ A tribal graves protection program should be capable of asserting these rights.

NAGPRA also includes provisions relating to the inadvertent discovery of human remains or cultural items on federal lands or tribal lands. If such a discovery is made in the context of a previously permitted activity such as mining, logging or agriculture, the person conducting the activity is required to cease activity in the area and to give notice to the appropriate federal agency or Indian tribe or Native Hawaiian organization.³¹ The person conducting the activity may resume 30 days after the notice has been certified. Thus, a tribal graves protection program should be capable of asserting the tribe’s interests within this 30 day time frame, or the chance to prevent further damage to the discovered site may be lost.

A tribal graves protection program should be designed to take advantage of the tribe's rights under the National Historic Preservation Act (NHPA), particularly the 1992 Amendments.³² Section 106 of the NHPA establishes a consultation process which provides a degree of protection to sites listed on, or eligible for listing on, the National Register of Historic Places. This consultation process is administered by the Advisory Council on Historic Preservation.³³ Places that have religious or cultural importance for Native Peoples, including places where Native American graves are located, may be eligible for the National Register. The 1992 Amendments to the NHPA provide that tribes and Native Hawaiian organizations have a right to be involved in the Section 106 consultation process when a federal action might affect a National Register property (listed or eligible) that they consider to have religious and cultural importance.³⁴

In addition to the Section 106 consultation process, which is triggered by a specific proposed federal action, Section 110 of the NHPA requires each federal agency to establish a preservation program to identify places under the agency's jurisdiction or control that are eligible for the National Register and to ensure that such historic properties are considered in agency planning processes.³⁵ Section 110 requires Federal agencies to consult with Indian tribes and Native Hawaiian organizations in carrying out their preservation programs. Thus, tribes have rights to be consulted both in the context of the project-specific consultation under Section 106 and in the more long-term planning process required by Section 110. A tribal graves protection program under NAGPRA should be capable of asserting these tribal rights under the NHPA. By doing so a tribe may be able to establish long-term working relationships with federal agencies that manage lands on which there are sites that the tribe regards as having religious or cultural importance. A long-term working relationship, built on a foundation of statutory rights, may be the most effective way to protect such places.

III. USING TRIBAL LEGISLATION TO BUILD A PROGRAM

This part of the chapter focuses on ways that tribes can use their law-making powers to build repatriation programs. For example, a tribe may proclaim what the law is. It can also create subdivisions of tribal government and give each subdivision a mandate to carry on certain governmental functions. These functions of tribal legislation, which are discussed below, are of course inter-related.

Options for Proclaiming Tribal Law

NAGPRA defers to tribal law on certain key points, for example, tribal law must be taken into account in the application of key terms such as "cultural patrimony"³⁶ and "right of possession"³⁷ to specific cultural items. The tribal law considered most binding, however, is whatever law was in effect when the item in question left the tribe, individual or group with authority to possess, or have custody over, that item. If such an event occurred before there was any written tribal law on the subject (for many tribes there still may be no applicable written tribal law), the application of these statutory terms will be based on the customary tribal law of the time. A tribe may be able to secure repatriation from museums or federal agencies bound by NAGPRA by simply informing the museum or agency as to what the tribal customary law was at the relevant period of time.

Some museums or federal agencies that may want to keep disputed items in their collections might not give up the items until a tribe has proved its case in federal court. To deal with

such situations, a tribe might enact legislation that codifies the relevant tribal customary law. This may be a rather simple thing to do for those tribes concerned with obtaining the repatriation of a relatively small number of cultural items.

On the other hand, writing all of the relevant tribal customary law into a tribal code might yield legislation with more detail than is really necessary. Furthermore, the traditional cultural authorities who know this body of tribal law may be uncomfortable with the idea of putting it in writing. Then too, codification might be excessively difficult for tribes with complex clan structures and complex customary law regarding clan property. In some cases, tribal customary law may not resolve all the kinds of conflicts that arise, but may provide rules that can be applied in specific cases.

An alternative approach would be to enact tribal legislation which codifies the broad outlines of tribal customary law and gives a mandate to an appropriate tribal entity (an existing or new department or independent agency or traditional forum or commission) to fill in the details. This could be done through administrative rule-making or through the development of a revised tribal code that would be presented to the tribal legislative body for enactment.

A third variation would be to codify the broad principles and mandate the tribal court to fill in the details in deciding specific cases drawing on tribal customary law as well as the codified tribal law. Under this approach, the tribal court could decide the legal issues that arise in repatriation cases on a case-by-case basis. The tribal court could follow the Anglo-American legal tradition of looking to previously decided cases for legal principles to apply to cases that arise and, in so doing, fashion a tribal “common law”.³⁸ Tribal legislation might establish a special division of the tribal court to decide such cases, or it might authorize the tribal court to appoint a special master to hear such cases and recommend decisions to the court. Under either of these approaches, traditional cultural authorities could be directly involved, as judges of the special division, as special masters, or as expert witnesses.

In light of the fact that for some tribes there are now two or more federally recognized tribal entities for what was once a single tribe or nation, it may be advantageous to create intertribal mechanisms for ascertaining the relevant customary tribal law. Such tribes might jointly create a special intertribal court, or they might agree on a process for resolving intertribal disputes through mediation or arbitration.

Conversely, some federally recognized tribes are now comprised of two or more tribes, or portions of tribes, that historically were distinct. Many such “confederated” tribes maintain certain distinctions in the ways they conduct their governmental business and cultural traditions. For such confederated tribes, one function of modern tribal legislation would be to establish a way of determining what the applicable tribal customary law was at the time certain items were alienated from tribal possession, for relevant tribal customary law may predate confederation.

In addition to codifying the relevant customary tribal law, or establishing a process for the law to be proclaimed in the context of specific cases, a tribe might want to address a number of other substantive legal issues through tribal legislation. In light of the fact that lineal descendants have certain rights under NAGPRA, a tribe might want to specify its customary legal principles for determining descent, including clan relationships and familial relationships. A tribe also might consider codifying customary legal principles for determining cultural affiliation with human remains and cultural items. Other subjects which might be addressed in tribal legislation include principles regarding the appropriate care of the dead and the treat-

ment of items of cultural patrimony and sacred objects, although a tribe may prefer to leave these subjects to unwritten customary law.

Given the interplay between graves protection and repatriation in NAGPRA, tribal legislation should include provisions dealing with graves protection. See pp. 29–31 for details.

Overview of Institutional Options

To take full advantage of NAGPRA, tribal officials should analyze the functions to be performed by tribal repatriation programs, and organize their governmental institutions so they can perform these functions most effectively. The kinds of decisions that need to be made include: which functions to assign to existing governmental institutions; how to change the mandate and organization of existing institutions to better perform the assigned functions; and whether any new institutions should be created.

Indian tribes typically use a variety of governmental subdivisions and institutions to carry out the various functions of government. Some of these institutional structures, particularly those that perform a wide range of governmental functions, are necessarily more complex than others. There are some common patterns, but there are also significant differences, some of which are based on cultural differences. There are also innovations to deal with such current issues in Indian country as regulating the environment and high-stakes gaming. The following section discusses some of the institutional issues and options that should be considered in fashioning a tribal repatriation program.

The Tribal Governing Body

This chapter discusses only some of the many varied ways in which tribal governments are structured. For example, some tribes have tribal councils, often called business committees, which are directly involved in all aspects of tribal government, including the three basic kinds of governmental function: the legislative (making laws); the executive (carrying out laws and administering the day-to-day business of government); and the judicial (interpreting laws and resolving disputes). In the larger American society, the federal government and the states typically carry out these different governmental functions with three distinct branches of government, and many tribes have adopted a similar system. Other tribes have established court systems as more-or-less independent branches of government; in these instances tribal councils perform the legislative and executive functions.

Whether they are performed by a single entity (the council) or by two or three separate branches, all three basic kinds of governmental function must be carried out somehow. In building a tribal repatriation program, tribal leaders should consider these three kinds of governmental functions. There is a need to know what the tribal law is with respect to repatriation, there must be a way to carry out tribal law, and there also should be a way to resolve disputes.

Executive Branch Departments or Subdivisions

Council members, Tribal Chairpersons, judges, and other governmental officers are elected or appointed to these leadership positions. In addition, tribes usually employ paid staff workers. Some tribes may also use volunteers to do some kinds of work. As a general practice, paid staff positions are organized into governmental subdivisions, which are often known as “departments.” Depending on the range of governmental programs and functions that any given tribe carries out, there may be such subdivisions or departments as education, health services, social

services, natural resources, water resources, fish and wildlife, utilities, and planning. In many tribes, departments are subdivided into hierarchical organizational structures. Departments are usually subject to direct supervisory control by the executive branch of government, e.g., the chairperson's office, or the tribal council if there is no separate executive branch of government. A department of tribal government may be supervised by a committee of the tribal council; alternatively it may be supervised by the tribal chairperson, subject to review and approval of the department's budget by a committee of the tribal council.

Some kinds of governmental subdivisions may have more independence from the tribal governing body than others. For example, tribal housing authorities are typically set up as distinct entities with their own governing boards. Tribal museums, schools, colleges, and law enforcement agencies also may be cast in this more independent mold. Such entities may be charged with carrying out important governmental functions, while their structure provides them with a degree of independence from tribal politics.

In building a tribal repatriation program, the tribal governing body should look at its existing governmental subdivisions and determine whether one or more of them ought to be assigned responsibilities for carrying out the repatriation program. If no existing subdivision seems well-suited for the task, the governing body should consider creating a new entity or a new subdivision of an existing department. Creating something new, however, may require a greater commitment of funds and other resources than building on to an existing subdivision.

It may make sense for more than one governmental subdivision to play a role in repatriation. For example, a tribal museum may have staff capabilities that make it the best qualified tribal entity for interacting with museums and federal agencies for the return of human remains and cultural items, while a natural resources or planning department may be best qualified to deal with the protection of burial grounds. A tribal college may have the capability to document



Elizabeth Blackowl, President of the *Pawnee* Tribe, signing deaccession papers. Remains of *Pawnee* Scouts are in the background. *Pawnee* repatriation, June 6, 1995. Photo courtesy of Jane Beck, Repatriation Office, NMNH, Smithsonian Institution.

traditional cultural practices and customary law in ways that will be persuasive in administrative hearings and federal courts. While it may make sense for more than one governmental subdivision or other entity created by tribal government to perform a role in a tribal repatriation program, if this approach is taken the tribal governing body should clearly specify the roles of each.

Independent Agencies

While governmental subdivisions are usually subject to direct control by the tribal governing body, some kinds of entities created by tribal governments are subject only to indirect control. Entities at this end of the spectrum are often referred to as independent agencies. The federal government and the states have created independent agencies for a variety of purposes, and, in recent years, the practice of creating such agencies is coming into more widespread use by tribal governments as well. Like other governmental subdivisions, independent agencies typically have some paid staff, but rather than reporting directly to the tribal governing body, the staff report to a board or commission. The people who comprise the board or commission may be appointed by the tribal council or by the tribal chairperson, subject to confirmation by the tribal council. Typically each commissioner serves a term of several years, and the terms may be staggered so that the entire membership is not subject to change with each general election.

Independent agencies carry out a variety of functions, most of which can be sorted into two main categories: (a) regulating activities that affect the public health and welfare or the environment; and (b) providing a forum to resolve disputes without going to court (or as a prerequisite to going to court). Regulatory functions include such things as issuing permits to construct buildings or use land in certain other ways, issuing licenses to control hunting and fishing, and setting standards to protect the environment. Dispute-resolution functions include serving as a forum for administrative hearings when an applicant appeals from the denial of a permit or when an applicant seeks a variance or other special treatment under a land use code. Many independent agencies perform both kinds of function.

Mandates for independent agencies are usually given through legislation enacted by the tribal government. Sometimes the legislative mandate is set out in rather broad language, and an agency is authorized to fill in the details by issuing rules or regulations. The federal and state governments usually draft environmental laws in this way, and it is a practice that is likely to become widespread among the tribes as well. By establishing an “independent” agency, a government, in effect, can regulate itself.³⁹

An independent agency may be a good approach to repatriation for many tribes. One model tribal repatriation law has been developed which features an independent agency comprised both of elected leaders and traditional cultural authorities. This model tribal law is discussed later.

Tribal Courts

Since NAGPRA defers to tribal law and custom on several points of law, tribal courts are likely to play important roles in carrying out the provisions in NAGPRA. In resolving particular disputes, and to the extent that tribal law is not clearly defined, tribal courts will be called on to determine what the relevant tribal law is.

Tribal legislative bodies can enact certain key principles of tribal customary law as part of their tribal code; this, along with the inclusion of traditional cultural authorities in a special division of tribal court, would help make tribal court rulings on tribal customary law more authoritative in the eyes of the non-tribal governmental entities with which tribes must interact in pursuing repatriation. Similarly, the tribal court’s decisions regarding repatriation cases might

have greater stature for non-tribal entities if tribal legislation were to require that pertinent questions of customary law first be decided by an independent agency such as a cultural heritage commission.

Traditional Cultural Authorities

In addition to the formal institutions of government, there are also informal, or less formal, cultural institutions. These less formal institutions may include traditional religious societies and clan-based organizations; some may be the present-day manifestations of traditional ways of carrying out self-government before tribes adopted written constitutions. In some cases, these more-or-less traditional institutions may be personified in a few respected individuals; in other cases, a larger number of people may be involved, but it still may be difficult to separate the cultural institutions from key individuals. The term “traditional cultural authorities” as defined earlier is a useful generic term for these kinds of individuals and institutions.

For many tribes, repatriation is a subject in which the interests of political leaders and traditional cultural authorities converge. In some cases, when dealing with subjects such as repatriation where traditional cultural values and practices have continued importance, traditional cultural authorities may be as or even more important for self-government than the elected leadership. Even when the formal governmental institutions are committed to the repatriation of all the human remains and cultural items to which their tribes have rights of possession, in many tribes these institutions still will need the help of traditional cultural authorities in turning such commitments into reality. Political and religious leaders need to find ways to work together. The following discussion adds model tribal law to the potential means for fostering cooperation we have already suggested.

A Model Tribal Code

The Center for the Study of American Indian Law and Policy at the University of Oklahoma has developed a model tribal repatriation law, the “Cultural Heritage Ordinance,” which has been published together with a brief explanatory article by Rennard Strickland and Kathy Supernaw.⁴⁰ This model tribal law, which was developed to help tribal governments secure their rights and carry out their responsibilities under NAGPRA, features a type of independent agency of tribal government called a “Cultural Heritage Committee.” A tribe planning to enact such a law might consider using the word “commission” rather than “committee,” simply because the former term may give the agency more stature in the eyes of the larger society.

In the model law, the Commission is comprised of five members: two who are elected members of the tribal governing body, two who are traditional religious leaders, and a fifth selected by consensus of the other four members.⁴¹ This format is intended to serve the needs of a tribe in which the elected leadership and the traditional religious leadership are not one and the same. The composition of such a commission and the means of selecting its members should be tailored to the needs of any given tribe that chooses to adopt such an approach. The basic idea, however, should remain fairly constant: the tribal governing body delegates authority to the Commission to carry out a repatriation program and, in setting up the Commission, the tribal governing body includes both political leaders and cultural leaders.

The Commission would be vested by the tribal governing body with a broad range of powers to act on behalf of the tribe, including conducting negotiations and mediations, entering into agreements, determining the proper treatment of repatriated items, hiring and firing of

employees, and recommending that the tribal Attorney General or lawyer pursue legal actions.⁴² The model law would charge the Commission with certain mandatory duties and delegate to it the necessary authority to carry out a range of discretionary powers,⁴³ which roughly correspond to the functions of the tribal repatriation program discussed earlier. The Commission's mandatory duties include making findings, on behalf of the tribe regarding such matters as cultural affiliation and rights of possession for specific cultural items. The Commission's discretionary powers include the authority to issue regulations to carry out the tribal law.

This discussion of the model tribal law should not be taken as an endorsement by this author or by the editors. Indeed, there are some rather obvious shortcomings in the model law. For example, its provisions relating to graves protection do refer to ARPA, but the reference suggests some misunderstanding of the application of that Act.⁴⁴ In addition, the model law totally overlooks the interface between the NHPA and NAGPRA. Nevertheless, the basic concept of the model law—establishing a committee or commission as an independent agency—might work well for many tribes. While this model was developed to serve the needs of tribes in which the governmental leadership and the traditional cultural authorities are different groups of people who do not always get along with each other, as a basic approach it might work just as well for a tribe in which the elected leadership and the traditional cultural authorities get along with each other very well.

III. MAKING A REPATRIATION PROGRAM WORK

The most important part of a successful program may well be the dedication and commitment of the people who work in it. Some tribes have achieved considerable success in obtaining the repatriation of human remains and cultural items—largely because they believe that they must succeed—even without much of a formal program. Their experiences, some of which are chronicled in other chapters of this book, hold many pragmatic lessons for making tribal repatriation programs work. Against the background of those lessons drawn from experience, a few observations are here offered.

Persons involved in carrying out tribal repatriation programs at times may feel somewhat overwhelmed by the law and the regulations. They may feel as though they need training before they can even get started. Training, particularly workshops and the like, can be useful for tribal officials and staff, but it should not be thought of as necessarily accomplished before building a program. Many of the people working for tribes who are now experts in the field are experts because they charged ahead.

A tribal program may need to work with outside experts to make the case for cultural affiliation or to track the chain of possession of certain cultural items in order to challenge a museum's claim of a right of possession. Remember, however, that in many ways carrying out NAGPRA turns on tribal customary law, and this is a body of law that comes from within each tribe. Outside experts can be useful in some situations and they may be necessary in others, but their role should not overshadow the role of the tribe's own experts.

Finally, there are many roles that lawyers can play in helping a tribe with its repatriation program: filing lawsuits in federal court to seek enforcement of rights under the Act; asking the Secretary of the Interior, on behalf of a tribe, to assess civil penalties against violators, and so forth. Lawyers also may perform roles in tribal courts and commissions, advocating for the different sides in disputed cases. Lawyers can help tribes craft their legislation and design their institutions of government. These laws and institutions should serve tribal interests, which may mean limiting the roles of lawyers, for example, when the resolution of certain kinds of disputes is assigned to traditional cultural authorities rather than tribal courts. If tribal lawyers do this part of their job well, they may find that they can fade into the background and let tribal customary law take over.

END NOTES

1. *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir., 1989).
2. See S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309 (1994).
3. 25 U.S.C. §§ 3001(3)(D) (definition) and § 3005(a)(5)(B) (showing required of tribe).
4. 25 U.S.C. § 3001(3)(C) (definition) and § 3005(a)(5)(C) (showing required).
5. 25 U.S.C. § 3001(3)(D).
6. 25 U.S.C. § 3004(c).
7. 25 U.S.C. § 3001(13).
8. This subject is explored in more detail in Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 Ariz. St. L. J. 175 (1992).
9. Traditional religious leaders are entitled to be involved in consultation that must take place prior to the completion of inventories of human remains and associated funerary objects. 25 U.S.C. § 3003(b)(1)(A). Traditional religious leaders are also entitled to be involved in the consultation that is to be conducted after the completion of summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3004(b)(1)(B).
10. 36 C.F.R. § 800.2(bb) (as proposed, 59 Fed. Reg. 50403 (Oct. 3, 1994)).
11. 25 U.S.C. § 3004(b)(1)(A).
12. 25 U.S.C. § 3004(b)(2).
13. 25 U.S.C. § 3003(b).
14. 25 U.S.C. § 3005(a)(1), (2).
15. 25 U.S.C. § 3005(c).
16. 25 U.S.C. § 3005(a)(5).
17. 25 U.S.C. § 3005(a)(4).
18. 25 U.S.C. § 3013.
19. 25 U.S.C. § 3005(e).
20. See generally Dean B. Suagee & Karen J. Funk, *Cultural Resources Conservation in Indian Country*, 7 *Natural Resources & Environment*, No. 4, 30 (Spring 1993).
21. 25 U.S.C. § 3002(c).
22. 25 U.S.C. § 3002(d).
23. 16 U.S.C. § 470cc.
24. 167 U.S.C. § 470bb(1). The uniform regulations expand on this definition. See 43 C.F.R. § 7.3(a).
25. 16 U.S.C. § 470bb(4).
26. 25 U.S.C. § 3001(15).
27. 25 U.S.C. § 3002(c)(2); 16 U.S.C. § 470cc(g).
28. See 25 C.F.R. part 262.
29. 16 U.S.C. § 470cc(c); see also the uniform regulations, 43 C.F.R. § 7.7.
30. 25 U.S.C. § 3002(c)(2), (3).
31. 25 U.S.C. § 3002(d).
32. 16 U.S.C. § 470 - 470w-6.
33. 36 C.F.R. part 800.
34. 16 U.S.C. § 470a(d)(6).
35. 16 U.S.C. § 470h-2.
36. 25 U.S.C. § 3001(3)(D).
37. 25 U.S.C. § 3001(13).
38. For one account of the development of tribal common law, see Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 *Amer. Indian L. Rev.* 379 (1993).
39. For a discussion of a model tribal environmental review code featuring an independent Environmental Regulatory Commission, see Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 *Colo. J. Int'l Env'l L. & Pol'y* 59, 89-100 (1994).
40. Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 *Ark. L. Rev.* 161 (1993).
41. *Id.* at 165, 177.
42. *Id.* at 178-79, section 105 of the model law.
43. *Id.* at 179-81, section 106 of the model law.
44. *Id.* at 193, section 306 of the model law. The model law does not seem to recognize that ARPA permits may be required prior to authorization by the Bureau of Indian Affairs for activities such as construction, logging and mining. In addition, the section of the model tribal law that refers to ARPA includes no language regarding tribal rights under ARPA on federal public lands. Another apparent flaw in the model law is that it relies on criminal sanctions for enforcement and on civil actions for damages. Since tribes lack criminal jurisdiction over non-Indians, civil penalties may be a more appropriate sanction. (Although the model law uses the term "civil penalties," in fact it only provides for civil actions to recover damages. *Id.* at 199, section 409 of the model law.)