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Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act

Ralph W. Johnson* and Sharon I. Haensly**

I. INTRODUCTION

In November 1990, Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA").1 NAGPRA provides for the protection and disposition of Native American cultural items discovered on federal2 or tribal3 lands after NAGPRA's effective date. NAGPRA also addresses disposition of those objects currently held or controlled by federal agencies and museums.4 NAGPRA represents Congress' attempt to resolve years of debate between tribes, archaeologists, and museums.5 Like any legislative pronouncement, however, Congress left key issues to agencies and courts to resolve. This article focuses upon one such area, namely, Fifth

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2. Id. § 3001(5). "Federal lands" include lands other than tribal lands controlled or owned by the United States, including lands selected by, but not yet conveyed to, Alaska Native corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971. Id.
3. See id. § 3002. "Tribal lands" include all land within the exterior boundary of any Indian reservation; all dependent Indian communities; and all lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act. Id. § 3001(15).
4. See id. § 3005(a).

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Amendment\textsuperscript{6} takings questions that may arise when tribes or individual Native Americans demand the return of cultural items from persons discovering them on lands owned in unrestricted fee simple on Indian reservations.\textsuperscript{7}

The first section of the article describes the statutory scheme. The second section delineates the different classes of cultural items and legal principles pertaining to ownership. The third section explores issues related to Fifth Amendment takings. The article concludes with recommendations for both the Department of Interior to consider in forthcoming rulemaking and for Congress to consider in future legislative pronouncements affecting the return of Native American cultural items.

**II. SUMMARY OF STATUTE**

The universe of "cultural items" covered by NAGPRA includes human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony.\textsuperscript{8} NAGPRA establishes two markedly dissimilar schemes governing the return of Native American cultural items to tribes or individual Native Americans. The analysis depends upon whether the item is currently held by a museum or federal agency\textsuperscript{9} or is inadvertently discovered on federal or tribal lands after the effective date of the Act.\textsuperscript{10} Each category of objects has unique legal implications regarding ownership, which are briefly discussed in Section Three of this article.

All museums and federal agencies that possess or control collections of human remains and associated funerary objects must prepare inventories identifying the items' geographical and cultural affiliations.\textsuperscript{11} These agencies and museums must also prepare less detailed summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony.\textsuperscript{12} Native American individuals and tribes will use the inventories and summaries to ascertain whether they are culturally affiliated to the object, decide whether they desire its return, and, depending upon the object's classification, either demand the object outright or first present prima facie evidence that the agency or museum lacks a

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\textsuperscript{6} U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

\textsuperscript{7} See infra notes 17-18 and accompanying text.

\textsuperscript{8} 25 U.S.C.A. § 3001(3).

\textsuperscript{9} See id. §§ 3003-3007.

\textsuperscript{10} See id. § 3002(a).

\textsuperscript{11} Id. § 3004(a).

\textsuperscript{12} Id. § 3005.
“right of possession.” Museums and federal agencies retain a right of possession only by showing that the original Native American individual or group with authority to alienate the object did so voluntarily.

Rarely will Fifth Amendment takings claims arise when Native American individuals or tribes request that museums return objects. Congress anticipated such challenges and provided that parties must turn to “otherwise applicable property law” if applying the concept of “right of possession” implicates a Fifth Amendment takings claim (as determined by the Court of Claims). This escape valve does not apply when a Native American individual or tribe requests the return of human remains or associated funerary objects inadvertently discovered on federal or tribal lands.

The statutory scheme differs dramatically for objects inadvertently discovered on federal or tribal lands. NAGPRA broadly defines tribal lands to encompass all lands within the external boundaries of the reservation. Due in large part to nineteenth century federal allotment acts, Indian reservations often include lands owned by non-Indians in unrestricted fee simple, in addition to lands held in federal trust or restricted status for tribes and members, federal public lands, and state and county lands. On-reservation lands owned in unrestricted fee simple, also referred to in this article as “reservation fee lands,” are often the subject of jurisdictional disputes between landowners, tribes, and state or local governments asserting regulatory jurisdiction.

13. Id. § 3006(a)-(c). Native American individuals and tribes with cultural affiliations to human remains and associated funerary objects need not present prima facie evidence when requesting return of the objects. See id. § 3006(a).
14. Id. § 3001(13).
17. See FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 129-38 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN]. Many of the allotment acts divided reservations into allotments for individual Indians and sold much of the undivided land as “surplus land” to non-Indians. Id. at 131. Indians often sold their lands once alienation restrictions on their allotments lapsed. Although the Federal Government reversed its allotment policy in 1934, the allotment process drastically reduced Indian land holdings. Id. at 136-38. Tribal and individual land holdings fell from 138 million acres in 1887 to 48 million acres in 1934. Id. at 138; see also Craighton Goeppele, Comment, Solutions for Uneasy Neighbors: Regulating the Reservation Environment After Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 65 WASH. L. REV. 417, 418 (1990).
Someone inadvertently discovering a cultural item on federal or tribal land must cease all activity in the area of discovery, notify, in writing, the federal land manager and appropriate Indian tribe, obtain certification that notification was received, and take all reasonable steps to protect the item.\textsuperscript{19} The person may resume activity thirty days after receiving federal or tribal certification.\textsuperscript{20}

NAGPRA establishes a priority system for ownership or control of cultural items excavated or removed from federal or tribal lands. Lineal descendants of those whose remains were found have first priority.\textsuperscript{21} If no lineal descendants come forward, or in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony, priority begins with the tribe on whose land the objects were discovered.\textsuperscript{22} Next in priority is the tribe with the closest cultural affiliation to the objects, and last in priority is the tribe recognized by the Indian Claims Commission or Court of Claims as having aboriginally occupied the area.\textsuperscript{23} The Secretary of the Interior will promulgate regulations governing disposal of cultural items not claimed through the priority system.\textsuperscript{24}

A party desiring to excavate cultural items from tribal lands must obtain a permit pursuant to the Archaeological Resources Protection Act ("ARPA") as well as tribal permission.\textsuperscript{25} ARPA’s jurisdiction, however, extends only to Indian lands held in trust or subject to a restriction on alienation;\textsuperscript{26} whereas NAGPRA’s jurisdiction extends to all lands within exterior reservation boundaries.\textsuperscript{27} Additionally, ARPA’s definition of "archaeological resources"\textsuperscript{28} and NAGPRA’s definition of "cultural items" are far from identical.\textsuperscript{29} NAGPRA permits the intentional removal of cultural items from federal or tribal lands only

\begin{itemize}
\item[20.] Id.
\item[21.] Id. § 3002(a)(1).
\item[22.] Id. § 3002(a)(2). NAGPRA does not address priority if more than one tribe occupies the same reservation. \textit{See id.} § 3002(a)(2)(A).
\item[23.] Id. § 3002(b), (c). A tribe having aboriginally occupied the area could only claim the item if cultural affiliation is not otherwise ascertained and the objects were discovered on federal land recognized as aboriginal by a final judgment of the Indian Claims Commission or Court of Claims. A tribe other than the one aboriginally occupying the area may also have a claim contingent upon its demonstrating a stronger relationship to the item. \textit{Id.} § 3002(a)(2)(C).
\item[24.] Id. § 3002(b).
\item[25.] Id. § 3002(c)(1); \textit{see also} Archaeological Resources Protection Act, 16 U.S.C. § 470aa-mm (1988 & West Supp. 1991).
\item[26.] 16 U.S.C. § 470bb(4).
\item[27.] \textit{See supra} text accompanying note 3.
\item[28.] 16 U.S.C. § 470bb(1).
\item[29.] 25 U.S.C.A § 3001(3).
\end{itemize}
with an ARPA permit "which shall be consistent with this Act,"\textsuperscript{30} but fails to expressly amend ARPA's coverage of items and lands.\textsuperscript{31}

Fifth Amendment takings claims will probably not arise when parties inadvertently discover cultural items on federal lands. ARPA firmly established that archaeological resources found on federal lands belong to the Federal Government.\textsuperscript{32} NAGPRA would not divest a private party of a property right, but merely effects a change in ownership from the Government to an individual Native American or tribe.

NAGPRA delineates an elaborate repatriation process for objects held by museums and federal agencies, and expressly avoids most Fifth Amendment takings challenges.\textsuperscript{33} In contrast are the sparse provisions governing disposition and control of cultural items discovered on federal or tribal lands.\textsuperscript{34} NAGPRA contains no similarly detailed process for the individual Native American or tribe to determine cultural affiliation or assert ownership, establishes no applicable burden of proof, and provides no forum for a landowner or finder to object to the disposition of cultural items. The legislative history evidences that Congress barely considered issues associated with the excavation, control, and disposition of objects inadvertently discovered on reservation fee lands.\textsuperscript{35}

### III. TYPES OF OBJECTS

By common law, ownership of objects located below the land surface vests in the landowner.\textsuperscript{36} However, human remains and, arguably,
associated funerary remains are treated differently. Human remains are considered "quasi-property." Certain survivors are trustees of and have a property interest in the remains, no matter where the remains are found, but only for the limited purpose of conducting a proper funeral. A trustee may find it increasingly difficult to prove even a quasi-property right as the remains decompose.

NAGPRA defines "associated funerary objects" as objects placed with human remains at the time of death or later as part of a ceremony, as well as objects containing human remains. "Unassociated funerary objects" include objects reasonably believed to have been placed with human remains at the time of death or later, but which somehow became separated from the human remains. Parties must demonstrate, by a preponderance of evidence, that unassociated funerary items are related to specific individuals, families, or known human remains, or were removed from a burial site of an individual culturally affiliated to the tribe. NAGPRA's definitions of associated and unassociated funerary objects curiously refer to possession by federal agencies or museums, even though funerary objects may also be discovered or excavated on federal or tribal lands.

Ownership of associated and unassociated funerary remains usually does not vest in the owner of the land under which they were discovered. Funerary objects, like dead bodies, are the rightful property of the person who furnished the graves or the descendants, for the limited purpose of reinterment. Consequently, landowners discovering human

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38. See BERNARD, supra note 37, at 19-20; Bowman, supra note 36, at 167; Boyd, supra note 36, at 888-89.

39. Martin, supra note 37, at 476 (a cadaver ceases to be a dead body under some state laws after undergoing a certain degree of decomposition).


41. See id. § 3001(3)(b).

42. Id.

43. See id. § 3001(3)(a), (b).

44. See Boyd, supra note 36, at 890 n.33.

45. See id. at 890; see also Charrier v. Bell, 496 So. 2d 601, 601 (La. Ct. App. 1986) (disagreeing that ownership of objects buried on non-reservation land with the deceased transferred to the discovering party, but rather finding that the tribe was the lawful owner); Senate Hearing,
remains and associated and unassociated funerary remains on their property probably cannot raise successful takings challenges because they lack an ownership interest.

There is more disagreement concerning ownership of sacred objects, which NAGPRA defines as ceremonial objects used by traditional Native American leaders for the practice of traditional Native American religions by their present-day adherents. Although these objects are extremely important to Native American individuals and tribes, parties disagree over whether they are subject to the same common-law principles that apply to human remains and funerary objects.

Congress was concerned during the debate that the definition of sacred objects not be overly broad. The House Committee recognized the importance of "present day adherents" to traditional Native American religions, but also acknowledged that objects could reach "sacred" levels if needed to renew traditional ceremonies that were "interrupted because of governmental coercion, adverse societal conditions or the loss of certain objects through means beyond the control of the tribe at that time." The Senate Committee intended that the definition of sacred objects exclude items created for purely secular purposes. The legislative history also indicates Congress' willingness to defer to Native American interpretation of those items intrinsically necessary for religious practices.

Although Native Americans and tribes may be unable to assert the same common-law property rights to sacred objects as to human remains...
and funerary objects, they may look to equitable theories to support ownership. Sacred objects implicate First Amendment rights relating to free exercise of religion. The American Indian Religious Freedom Act ("AIRFA"), while probably creating no substantive or judicially-enforceable rights, contains the Federal Government’s express promise to protect and preserve American Indians’ rights to exercise traditional religions through the “use and possession of sacred objects.” Courts weighing property interests in sacred objects should also consider the objects’ importance to Native American culture and religion. And courts may also consider the objects inalienable, like cultural patrimony, because they will often be essential to, and collectively claimed by, the tribe.

The last category of items covered by NAGPRA, cultural patrimony, includes objects with ongoing historical, traditional, or cultural importance central to the Native American group or culture. These objects are by definition inalienable by individual Native Americans. Like sacred objects, the legislative history evidences Congress’ desire to avoid an overly broad definition of cultural patrimony.

Parties asserting ownership interests in buried cultural patrimony must overcome certain legal hurdles. Museums and federal agencies will have difficulty proving the “right of possession,” or the validity of the original transfer. The concept of communal ownership may similarly disadvantage landowners and finders of cultural items on tribal lands,

53. See Boyd, supra note 36, at 890.
55. Federal agencies have not promulgated regulations pursuant to AIRFA, and courts have held that NAGPRA does not grant Native Americans any substantive rights additional to those granted through the First Amendment. See Bowman, supra note 36, at 189-92.
56. AIRFA states in full:

[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights.

57. Sacred objects have a unique relationship to native American culture and religion. See Blair, supra note 47, at 15; Boyd, supra note 36, at 891.
58. See Senate Hearing, supra note 35, at 195-96 (statement of Walter Echo-Hawk); Boyd, supra note 36, at 890.
60. Id.
61. See S. REP. No. 473, supra note 51, at 7-8. The Committee intended that the term refer to only those items with “such great importance” to the tribe as to be inalienable by an individual. Cultural patrimony would include objects such as Zuni War Gods and Iroquois Wampum belts. Id.
but the analysis is less straightforward. Rather than focus on the validity of the original conveyance, Native Americans can stress their collective property interest in cultural patrimony. These items are arguably not ordinary personal property subject to ordinary common law principles. Courts may equitably consider the cultural item’s significance to Native American heritage.

Factors other than the object’s classification may also affect ownership. By common law, a finder who takes possession of lost or abandoned property and exercises dominion and control acquires title, regardless of who owns the land. The landowner, however, usually has rightful possession over items found embedded in the soil. Neither landowner, nor finder, have title to an object that the true owner never abandoned. Property is abandoned if the owner voluntarily and intentionally relinquishes all right, title, claim, and possession without vesting them in another person.

In the case of Charrier v. Bell, the Louisiana Court of Appeals denied an amateur archaeologist’s claim to artifacts found buried on non-reservation private land because the Tunica Indians had never intended to abandon them. The court found that the Tunicas intended the items to remain perpetually buried to serve spiritual or traditional purposes.

IV. TAKINGS ISSUES

Having examined NAGPRA’s statutory framework and covered items, the remainder of the article discusses issues that could be raised in the

63. See generally Joseph L. Sax, Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England, 78 CAL. L. REV. 1543 (1990). Professor Sax explores the origins of English cultural property law and suggests that such objects have two distinct elements: the proprietor’s compensable interest in the item’s use or value, and society’s collective historical interest. Id. at 1554-56.
64. See id. at 1554, 1557.
65. See Boyd, supra note 36, at 891-92. Mr. Boyd refers to the financial worth of cultural items, and suggests that tribes could generate revenue by displaying these objects in tribal museums. Id. at 892 n.41.
67. See Klein, 568 F. Supp. at 1565-66 (allowing the United States to maintain title to an abandoned ship found embedded in submerged lands owned by the Federal Government).
68. See Charrier v. Bell, 496 So. 2d 601 (La. Ct. App. 1986); Brown, supra note 66, at 23.
69. See Boyd, supra note 36, at 919-20.
70. 496 So. 2d 601 (La. Ct. App. 1986).
71. Id. at 604-05.
72. Id. at 605.
context of a takings claim. For example, a non-Native American holding fee title to land within an Indian reservation begins logging a portion of his property. He uncovers several burial mounds with human bones and other objects that appear quite old. The landowner, who recently learned through a reservation-wide mailing of new federal legislation affecting Native American artifacts, informs the tribe's cultural resources director of his find.

The landowner soon receives a letter from the director stating that, pursuant to recent federal law, the tribe certifies its receipt of his notification and directs him to immediately cease all activity in the area of the discovery and take steps to protect the items. He can resume his activity within thirty days of receiving the tribe's letter, and the tribe will inform him during the thirty days of the following: 1) whether the objects are cultural items under NAGPRA; 2) whether the tribe, another tribe, or a Native American individual culturally affiliated with the object will dictate the item's ownership and control; and 3) how the items will ultimately be handled—the landowner may be asked to leave them in place with appropriate protections or excavate them pursuant to a permit and relinquish possession.

The landowner is concerned with the tribe's response. Not only does he wish to retain and ultimately sell some of the objects, he is worried that the tribe will prescribe stringent protection mechanisms for leaving them in place, which in turn may severely curtail his logging and future activities. The landowner contacts an attorney.

A. Applicable Law

1. Federal Law

The primary source of law covering the landowner's activities on the reservation is NAGPRA. The initial issue is whether NAGPRA represents a valid exercise of Congress' plenary power to legislate Native American affairs, including the potential effect on non-Indians and

73. The statute does not describe when or how a tribe or Native American individual would determine whether the object is a cultural item before requesting that the activity cease. See Senate Hearing, supra note 35, at 581-82 (statement of Gary S. Small, The Salt River Project).

74. NAGPRA does not address the permitting process for excavating objects from non-trust lands within reservations and, more specifically, who will obtain the permit. NAGPRA requires landowners to obtain tribal consent before excavating, 25 U.S.C.A. § 3001(3)(c), but does not address whether a tribe or Native American can require the landowner to excavate the object. Nor does NAGPRA address the appropriate permitting mechanism on reservation fee lands in light of ARPA's jurisdictional constraints. See supra note 26 and accompanying text.
reservation fee lands. Courts have long upheld Congress' plenary power to legislate on behalf of Native Americans and tribes. This power is constitutionally-based and extremely broad in scope. Congress may afford Native Americans and tribes special treatment, as long as such treatment is rationally tied to the fulfillment of Congress' unique obligation towards Indians. Congress may also enact legislation that applies to Indian country and, like NAGPRA, significantly departs from state laws.

Congress, by enacting NAGPRA, exercised its plenary power to legislate about the handling, ownership, and disposition of Native American cultural items. Although NAGPRA contains no statements of purpose, its legislative history is replete with Congress' acknowledgment of the need for a repatriation process to redress past wrongs and to adequately protect cultural items found in the future. NAGPRA "reflects the unique relationship" between the Federal Government and tribes.

Congress can enact legislation for Native Americans that reaches non-Indians and reservation fee land. Courts have similarly upheld Congress' delegation to tribes of federal authority over non-Indians and reservation fee land, particularly where the regulated subject matter affects the internal and social relations of tribal life.

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76. See generally Cohen, supra note 17, at 207-12.
77. Fisher v. District Court, 424 U.S. 382, 391 (1976) ("[D]isparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."); Morton, 417 U.S. at 553 n.24 ("The Indian employment preference is not a racial, but a political preference . . . designed to further the cause of Indian self-government.").
81. See Major Crimes Act, 18 U.S.C. §§ 1153, 3242 (1988) (establishing as federal crimes certain named offenses committed by Indians in Indian country); Nance v. EPA, 645 F.2d 701, 714-15 (9th Cir. 1981) (upholding EPA's delegation of regulatory authority to tribes, which affected land use by non-Indians outside the reservation).
82. See United States v. Mazurie, 419 U.S. 544, 555-57 (1975) (upholding congressional authority to regulate alcoholic beverage distribution activities of a non-Indian business located on reservation fee land and the delegation of such authority to the tribe); see also Perrin v. United States, 232 U.S. 478, 486 (1914) (upholding federal prohibition on alcohol sale on reservations that included reservation fee lands, as well as Congress' "wide discretion" to determine what is
regulates cultural items that are essential to tribes' internal and social relations. NAGPRA's jurisdiction appropriately extends over non-Indians and reservation fee lands.

NAGPRA will unquestionably impact perceived or actual property interests on reservation fee lands. Courts have broadly construed property rights in favor of Native Americans when important Native American interests are at stake. For example, the Supreme Court relied on the existence of treaty rights to customary fishing sites to find servitudes and easements on non-Indian fee lands, both on and off the reservation. In another case, the Court broadly interpreted a homestead statute to find that Native Americans rightfully occupied off-reservation lands, even where they had failed to formally acquire title. Moreover, Native Americans have, by federal statute, a lesser evidentiary burden during litigation over property rights against non-Indians.

Congress similarly has authority to regulate non-Indian property rights if cultural items are concerned. Cultural items are arguably analogous to treaty fishing, hunting, and water rights, as they implicate interests that lie at the heart of Native American society. Quoting Chief Oren Lyons of the Onondaga:

Religion, as it has been and is still practiced today on the reservation, permeates all aspects of tribal society. The language makes no distinction between religion, government, or law. Tribal customs and religious ordinances are synonymous. All aspects of life are tied into one totality.

2. State Law

Courts may be asked to apply tribal, federal, or state law by parties disputing property rights related to cultural items discovered or exca-
vated on reservation fee lands. Regarding state law, the general rule is that on-reservation Indians and Indian property are not subject to state law unless Congress expressly indicates otherwise.\textsuperscript{89} If non-Indians and non-Indian reservation fee lands are involved, courts apply preemption analysis to determine the applicability of state law.\textsuperscript{90} Preemption analysis involves a "particularized inquiry" into the state, federal, and tribal interests at stake to determine whether the exercise of state authority would be inconsistent with federal law.\textsuperscript{91} If the answer is affirmative, courts will look to federal or tribal law.\textsuperscript{92}

Neither NAGPRA nor its legislative history indicates that Congress expressly sanctioned the intrusion of state law on reservation fee lands.\textsuperscript{93} Preemption analysis, which weighs tribal, federal, and state interests at stake, often turns on the degree of "Indianness" of the events.\textsuperscript{94} Situations involving compelling Indian interests and comparatively weak state or local government interests usually weigh in favor of federal preemption.\textsuperscript{95}


\textsuperscript{90} See supra note 89.


\textsuperscript{92} See COHEN, supra note 17, at 270-79.

\textsuperscript{93} The House Committee contemplated a limited application of state law in defining "right of possession," which applies only to disputes between museums and Native Americans. See H.R. REP. No. 877, supra note 5, at 15, reprinted in 1990 U.S.C.C.A.N. at 4374. It rejected a definition of "right of possession" that preserved the "application of relevant State law." Id. at 2, reprinted in 1990 U.S.C.C.A.N. at 4378. The House Committee also rejected a bill prohibiting excavations from burial sites without a state permit. Id. at 11, 24, reprinted in 1990 U.S.C.C.A.N. at 4370, 4383.


\textsuperscript{95} See id.; Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) (holding that federal law preempted New Mexico tax on contractor constructing tribal school on tribal lands with BIA and tribal money); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) (holding that federal law did not preempt Washington sales tax on cigarettes purchased by nonmembers and that the state interest is stronger if the subject revenues are not derived from value generated on the reservation by activities involving the tribe); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (holding that federal law preempted Arizona income tax on tribal member residing on Navajo reservation).
Native American individuals and tribes have a keen interest in activities pertaining to cultural items. Tribes and tribal members hold special reverence for religious, cultural, and funerary objects, and usually created the objects themselves. Cultural patrimony and sacred objects are integral in defining Native American religious and cultural societies. Giving persons other than descendants control over their ancestors' remains and associated funerary objects is considered sacrilegious and offensive by most Native Americans. Native Americans assert that not only does lack of control over these items interfere with their ability to maintain traditions and ceremonial obligations, it is a bitter reminder of past discrimination and injustices.

The Federal Government's interest in vesting ownership, control, and authority to protect all items excavated from Indian country with Native Americans is best reflected in its trust responsibility toward Native Americans. The trust responsibility, which arises through federal legislation and the special relationship between the Government and Native Americans, forms a basis for protecting tribal cultures and religions. The Government may also wish to avoid a checkerboard jurisdictional scheme over the control and disposition of cultural items on Indian reservations.

Most, if not all states, have yet to enact laws ensuring Native Americans power over the ultimate disposition of cultural items other than human remains and funerary objects. States may assert interests in cultural items relating to conservation, preservation, protection, and education. Nonetheless, state interests are less forceful if state statutes allow private individuals to own excavated items.

96. See Senate Hearing, supra note 35, at 181-88, 401-05; Ezra, supra note 83, at 732.
97. See Blair, supra note 47, at 16.
98. Id.
102. See Ezra, supra note 83, at 728-29.
103. This policy is not documented in NAGPRA's legislative history.
105. See, e.g., Wash. Rev. Code § 27.53.010 (1989). Many states have enacted statutes pertaining to aboriginal remains, unmarked graves, grave goods, and cultural and religious items. Some state laws apply to private lands or generally to lands within the state.
106. To illustrate, Washington's statute extends to excavation activities on public and private lands. See id. § 27.53.060. Covered items include archaeological resources located on land or water under state or local government control. Id. § 27.53.040. Excavation on private lands
The pattern of federal legislation concerning Native American human remains and cultural items indicates Congress' intent to occupy the field. The Antiquities Act of 1906 prohibits most physical disturbances of archaeological objects on lands owned or controlled by the federal government, which include Indian lands. The National Historic Preservation Act of 1966 encourages Native American participation in decisions and makes federal money available for cultural heritage preservation.

ARPA establishes mechanisms to protect archaeological resources on public or Indian lands and largely supersedes the Antiquities Act. ARPA recognizes Native American control over the ultimate disposition of archaeological resources found on Indian lands. It also requires, as a precondition to permit issuance, consent of the tribe or Native American individual with jurisdiction or ownership over the subject Indian lands.

The American Indian Religious Freedom Act ("AIRFA") supplements First Amendment protection of Indian religious rights. AIRFA protects access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites. AIRFA directs federal agencies to evaluate and modify their policies to protect Native American religious cultural rights and practices.

3. Tribal Law

Accordingly, our non-Native American landowner is told that the controlling law is NAGPRA. The attorney encourages his client to
negotiate with the tribe if he is unhappy with the plan to control and protect the items. He tells his client that another avenue is to challenge the tribe’s interpretation of NAGPRA by filing a lawsuit in inverse condemnation against the Federal Government. The attorney informs his client that the federal court could look to tribal law to define property rights.

The primary sources of tribal law are treaties and retained sovereignty as implemented through tribal constitutions, legal codes, and common law. Most treaties lack express provisions relating to ownership of cultural items or religious and cultural practices. Tribes have retained sovereignty necessary to protect tribal control over internal relations. Tribes also retain inherent sovereign power to regulate conduct by non-Indians and conduct on reservation fee lands that threatens or has some direct effect on the tribe’s political integrity, economic security, or health or welfare.

Tribal laws and customs pertaining to the control and ownership of cultural items found on tribal lands would, in most cases, be valid exercises of tribal authority. Conduct affecting the items would likely impact the tribe’s internal relations, which are closely tied to customs and spiritual beliefs. Tribal authority to regulate the control and disposition of cultural items is arguably analogous to other well-established areas of tribal inherent authority, such as determining tribal membership, regulating domestic relations, and establishing inheritance rules.

Courts have held that tribal law controls the existence and nature of certain property rights. For example, in Colville Confederated Tribes

117. See, e.g., Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (claiming that the Northern Cheyenne Tribe’s redesignation of reservation air quality, accomplished through federally delegated authority, constituted a Fifth Amendment taking).


119. See Quade, supra note 118, at 69. However, implied treaty rights might provide a basis for federal and tribal law. See, e.g., Winters v. United States, 207 U.S. 564 (1908) (implied treaty rights to reserved water). See generally COHEN, supra note 17, at 222. Tribes might have understood at the time they signed the treaties that they retained ownership of cultural items found on the reservation.


121. Montana, 450 U.S. at 565; see also Brendale, 492 U.S. at 426 (recognizing the continued applicability of Montana.)

122. See supra note 98. Many tribes have laws in place pertaining to laying the dead to rest, but few, if any, have statutes addressing handling and disposing of excavated remains. See Quade, supra note 118, at 27.

123. See Montana, 450 U.S. at 564.
v. Walton, 124 the Ninth Circuit found that the tribe, not the state, had regulatory authority over water rights held by a non-Indian allottee on the reservation. Weighing in the tribe's favor was the location of the watershed entirely within the reservation and the fact that tribal control would have no impact on state water rights outside the reservation. 125

By analogy, tribal law should control property rights to cultural items found on the reservation, as well as property rights affected by required protective measures. Tribal regulation in such instances would have little to no effect on off-reservation property rights defined by state law. Moreover, courts would likely find that tribal or individual Native American interests in controlling and protecting the items outweighed state interests in public education and protection.

Many tribes have not yet adopted laws regulating the disposition, control, and protection of cultural items. 126 In the absence of tribal law, courts searching for applicable law may look to federal common law to define parties' property rights. 127 Neither NAGPRA nor its legislative history demonstrates Congress' intent to preempt federal common-law remedies. 128

NAGPRA is a valid exercise of Congress' plenary authority. Tribal law and federal common law provide supplemental authority if NAGPRA is ambiguous or fails to address property rights. State law is probably preempted by federal law on tribal lands, particularly in light of strong federal and tribal interests at stake.

B. Has A Taking Occurred?

The tribe decides that the objects are cultural items and sends the landowner a letter outlining a plan for control and protection. The

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124. 647 F.2d 42 (9th Cir. 1981).
125. Id. at 52-53. The court also noted that deference to state water law would create jurisdictional confusion that Congress sought to avoid. Id. at 53; cf. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). The Ninth Circuit in Anderson held that the state, not the tribe, had regulatory authority over a non-Indian's on-reservation water rights. The court distinguished the Walton holding based on the watershed's extension well beyond reservation boundaries and the more significant state interest. Anderson, 736 F.2d at 1366.
126. See Quade, supra note 118, at 27.
127. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985) (federal common law provided the Tribe with a right to sue to enforce its aboriginal land rights in the absence of direct statutory authority); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985) (federal common law provided the insurance company with a federal cause of action against allegedly unlawful tribal court power); Cardin v. De La Cruz, 671 F.2d 363, 365 (9th Cir. 1982) (action challenging tribe's authority to regulate a non-Indian business arose under federal common law). See generally Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881 (1986). Ms. Field notes that courts addressing Indian law matters frequently omit discussion of federal common-lawmaking authority because it is "so thoroughly accepted and well established." Id. at 948.
128. See Oneida, 470 U.S. at 238.
plan calls for leaving the items in the ground, protected by fenced-in areas with thirty-foot buffer zones. The tribe requests that the landowner cease logging or any other surface or subsurface activities within the fenced-in areas. The landowner’s attempts to negotiate a less onerous plan fail, and he decides to file a suit in inverse condemnation against the United States.

Other scenarios could likewise unfold. For example, the tribe or an individual Native American might seek unrestricted access to the burial mounds or desire the object excavated. Assuming that NAGPRA amends ARPA by implication or that the tribal code requires a permit to excavate cultural items on reservation fee lands, the tribe, Native American individual, or landowner might obtain a permit to excavate the item. The tribe might then wish to display the items on-site and allow non-members (for a fee) and members access to view them. In an extreme case, the tribe might try to exclude the landowner because the burial site covers his entire parcel.

The Fifth Amendment conditions the exercise of governmental power by prohibiting takings of property for public use without just compensation. Landowners and others adversely affected by governmental activity can bring actions in inverse condemnation and demand that the government initiate formal condemnation proceedings. In any of the scenarios described above, the landowner might seek compensation for returning his excavated land to useable condition, for demolition, or for other costs associated with removing a structure built over the excavation site, or for diminished value of his land due to the required protective measures.

Governmental action that fails to substantially advance legitimate state interests or denies an owner economically viable use of his land effectuates a taking. Although courts accept a certain amount of regulation of private property, they find a taking if a regulation “goes too far.” The Supreme Court applies a two-prong alternative test to determine if a taking has resulted. The first prong, also known as the public purpose test, inquires into the relationship between the govern-

129. See supra note 31.
130. U.S. CONST. amend. V.
132. Id. (acknowledging the right to bring an action in inverse condemnation due to the “self executing character” of the Fifth Amendment); see also JACQUES B. GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN 37 (1982).
mental action and its purpose.\textsuperscript{135} Courts find takings if the governmental action is not intended for a public purpose, but usually defer to congressional determinations of public use.\textsuperscript{136}

The second prong of the analysis evaluates the economic impact of the governmental action and the extent to which it interferes with reasonable investment-backed expectations.\textsuperscript{137} Courts engage in factual inquiries related to the difference between the value of the property taken and that remaining, the surviving uses, and the value of property at various points in time.\textsuperscript{138} A court is more likely to find a taking if the government’s interference with the property divests the owner of a “stick in the bundle of property rights,”\textsuperscript{139} denies him all economically viable use of his land, or can be characterized as a physical invasion.\textsuperscript{140}

NAGPRA’s legislative history provides some guidance to courts analyzing takings claims regarding the adverse impacts of required protective measures, as opposed to property interests in the item itself. NAGPRA requires an inadvertent discoverer to make a “reasonable effort” to protect the item before resuming activity.\textsuperscript{141} The Senate Select Committee on Indian Affairs intended that the notification process would allow tribes or Native American individuals to intervene in

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\item \textsuperscript{135} See Agins, 447 U.S. at 260-61.
\item \textsuperscript{136} See Gelin \& Miller, supra note 132, at 6, 14. Although probably not fatal, NAGPRA contains no findings that explain how the transfer of protected objects from private parties to Native Americans advances the public good. S. REP. No. 473, supra note 51, at 22. Courts have found public use in a wide variety of circumstances, including condemned property that was transferred to private beneficiaries. See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243-44 (1984) (upholding the state’s condemnation and sale of large landholdings to decentralize land ownership patterns); Poletown Neighborhood Council v. City of Detroit, 304 N.W. 2d 455 (Mich. 1981) (upholding the city’s condemnation of land in a residential neighborhood to construct a General Motors plant).

Even without findings, courts would undoubtedly find that the purposes of NAGPRA constitute “public use.” The Act does not represent Congress’ authorization of transfer of property for the benefit of private parties. See Nance v. EPA, 645 F.2d 701, 716 (9th Cir. 1981) (citing United States v. Mazurie, 419 U.S. 544 (1975)) (stating that tribes are not private entities).


\item \textsuperscript{139} Hodel, 481 U.S. at 716 (federal legislation altering Indian escheat provisions for trust and restricted lands); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of a federal navigable servitude requiring public access to a pond).

\item \textsuperscript{140} See Nollan v. California Coastal Comm’n, 483 U.S. 825, 831 (1987); Penn Cent., 438 U.S. at 124.

\item \textsuperscript{141} 25 U.S.C.A. § 3002(d)(1). NAGPRA does not indicate, however, whether or the extent to which the tribe may permanently preclude the activity in certain areas. Nor does it expressly acknowledge Native American involvement with the disposition and control of items left in the ground, as opposed to those excavated or removed.
development activities on tribal lands to safeguard the objects and determine their appropriate disposition. The Committee expected, however, that such intervention would not "bar," "significantly interrupt," or "impair" development on tribal lands.\textsuperscript{142}

Courts will find little direct precedent for takings claims arising from archaeological site protective measures.\textsuperscript{143} The Minnesota Court of Appeals addressed the issue in \textit{Thompson v. City of Red Wing}.\textsuperscript{144} The case involved the Thompsons' plans to extract gravel from a portion of their seventy-three-acre parcel, which were thwarted by the city's refusal to grant either a rezone or conditional use permit and the state's application of its statute protecting burial grounds.\textsuperscript{145}

The Thompsons' parcel consisted of mostly rolling hills and a peninsula-shaped bluff surrounded on three sides by a wooded ravine.\textsuperscript{146} The Thompsons had continually farmed and grazed animals on nearly all of their land, including the top of the bluff. This bluff contained a "large, unique" Indian burial mound formation with burial mounds scattered over four to five acres and was the envisioned gravel extraction site.\textsuperscript{147}

The Thompsons sued the city and state, eventually settling with the city.\textsuperscript{148} The remaining issue at trial was whether Minnesota's statute protecting human burials effectuated an inverse condemnation against the property.\textsuperscript{149} The court found for the Thompsons and ordered the state to pay attorney's fees; the state appealed.\textsuperscript{150}

Despite the court's holding that the Thompsons' claim was not ripe for adjudication,\textsuperscript{151} the court considered de novo the legal question of whether a taking had occurred. The court held that the Thompsons had failed to demonstrate that application of the statute deprived them

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  \item \textsuperscript{142} See \textit{SEN. REP. NO. 473, supra} note 51, at 10; 136 \textit{CONG. REC. S17173, 17176} (daily ed. Oct. 26, 1990) (discussion between Senators Simpson and McCain).
  \item \textsuperscript{143} See \textit{People v. Van Horn}, 267 Cal. Rptr. 804 (Ct. App. 1990). A professional archaeologist unsuccessfully challenged California's Native American artifact protection statute on Fifth Amendment grounds, alleging that the law deprived him of his right to practice his profession. \textit{Id.}
  \item \textsuperscript{144} 455 N.W.2d 512 (Minn. Ct. App. 1990).
  \item \textsuperscript{145} \textit{Id.} at 514-15.
  \item \textsuperscript{146} \textit{Id.} at 514.
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} at 515.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} The state had not issued a final decision regarding the statute's application to the parcel. \textit{Id.} at 515-16. Accordingly, the court could not determine the extent to which the statute interfered with the Thompsons' economic expectations. \textit{Id.}
\end{itemize}
of all reasonable uses of their land. The state had not sought to curtail farming and grazing activities atop the burial mounds.\textsuperscript{152} Further, the court was unconvinced that the Thompsons' property benefitted a planned city enterprise in the form of a park.\textsuperscript{153} The court concluded:

Not every regulation challenged as effecting a taking can give rise to an action for inverse condemnation. Only where the taking or damage is irreversible will such an action lie. The Thompsons have failed to demonstrate an enterprise function for which the substantial diminution in market value standard is applicable, and have failed to establish that the statute deprived them of any reasonable use of that portion of their land. As a matter of law, the requisite elements of a compensable taking are absent here.\textsuperscript{154}

Courts wrestling with the appropriate reach of tribal protective measures will apply the Supreme Court's two-prong takings analysis. The required measure must first substantially advance tribal or individual control or protection over the cultural item.\textsuperscript{155} Courts are more likely to view askance tribal or individual attempts to monetarily profit from the item solely at the expense of the landowner.\textsuperscript{156} Such profit motives might arguably fall outside of Congress' purpose in enacting NAGPRA.

Courts following the second prong of the analysis may require compensation if the tribe or individual Native American attempts to completely exclude the landowner from his property or requires demolition of an existing structure.\textsuperscript{157} Compensation would similarly be required if the tribe or individual sought permanent access to the items without acquiring an easement.\textsuperscript{158}

On the other hand, tribes and individuals may seek reasonable measures related to protection or control that fall short of denying landowners all economically viable uses of their land.\textsuperscript{159} Permissible

\textsuperscript{152} Id. at 517.
\textsuperscript{153} Id. The enterprise theory involves regulation for the sole benefit of a governmental enterprise, such as a municipal airport, which disproportionately burdens only a few individuals. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978). In these cases, the government should pay for what is essentially an easement, as opposed to a permissible arbitration between competing land uses. See Thompson v. City of Red Wing, 455 N.W.2d 512, 517 (Minn. Ct. App. 1990).
\textsuperscript{154} Red Wing, 455 N.W.2d at 518 (citations omitted).
\textsuperscript{155} See supra text accompanying notes 96-102.
\textsuperscript{156} See supra text accompanying notes 50-52.
\textsuperscript{157} See supra text accompanying notes 137-40.
\textsuperscript{158} See Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (governmental requirement of an easement deprives the landowner of the essential right to exclude others and constitutes a permanent physical occupation of the property).
\textsuperscript{159} See supra text accompanying notes 141-42.
protective requirements probably would include allowing certain continued surface uses or precluding activity on only portions of the property. These measures would allow the landowner to still reap some profit from the land.\textsuperscript{160}

If the focus of the takings claim is the cultural item, as opposed to the protective measures imposed on the land, courts defining property rights will probably consider legal and equitable principles relevant to the particular item. Landowners or finders of human remains or associated, and probably unassociated, funerary objects will rarely have vested property interests in the items. Courts may find that a tribe's communal property interest in cultural patrimony, and often in sacred objects, weighs against private ownership. Courts will also consider equitable principles related to these items, not the least of which is the importance to Native American societies. Courts following the Charrier reasoning may also inquire into the tribe's or Native American ancestor's original intent to abandon the objects.

V. CONCLUSION

By enacting NAGPRA, Congress took a significant step toward redressing past errors and granting Native Americans control over the ultimate fate of cultural items. The law stresses the importance of the items' cultural and religious values, as opposed to monetary value. NAGPRA encourages dialogue between federal agencies, museums, tribes, and individual Native Americans. It also confirms the authority of tribes and individual Native Americans over items discovered or excavated on federal and tribal lands, while not interfering with the operation of state law on off-reservation, non-federal lands.

In few instances will parties raise tenable Fifth Amendment takings claims under NAGPRA. The Act anticipates such claims in the context of the museum and federal agency repatriation process and defers to applicable law once takings claims are implicated. Rarely will parties discovering human remains or funerary objects on tribal lands hold vested property rights. Although the legal status of sacred objects and cultural patrimony is less firmly established, Native Americans have at the very least strong equitable arguments favoring ownership.

Most initial activity undertaken pursuant to NAGPRA probably will focus on the museum and federal agency repatriation process. The Department of Interior ("DOI"), however, should also develop rules

\textsuperscript{160} See supra text accompanying notes 141-52.
addressing the fate of cultural items discovered or excavated on tribal lands. The parties most likely to seek judicial review of matters left unaddressed by Congress include landowners or finders of cultural items on reservation fee lands.

DOI rules should continue the cooperative spirit evidenced in NAGPRA and its legislative history. The rules should create an orderly process and applicable burdens of proof for establishing existence of a cultural item as well as cultural affiliation (when items are discovered). Such rules should avoid excessive delay in the landowner's ability to resume activity and thereby lessen the likelihood of takings claims. NAGPRA's Review Committee can play an integral role in the process.

The rules should provide an administrative forum for parties to attempt to negotiate grievances. The DOI could also establish guidelines to assist tribes and individual Native Americans to develop reasonable measures for the protection and disposition of cultural items. The agency should also decide whether NAGPRA implicitly amends ARPA's jurisdiction over covered items and lands. Depending upon the decision, the agency should amend its regulations or encourage Congress to amend either or both of the statutes.

Situations that cannot be resolved through negotiations will end up in court. Courts should analyze takings claims on tribal lands by first considering NAGPRA and its legislative history, and then looking to tribal or federal common law. Tribal governments are advised to expeditiously enact laws addressing protection and control of cultural items found on the reservation.