

“My Museum’s Reluctant Undertakers”: Repatriation After the 2023 NAGPRA Rule

BY EMILY R. HOLTZMAN*

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) recognized the rights of Indian Tribes and Native Hawaiian organizations to their own ancestral human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony. The promise of NAGPRA was to repatriate hundreds of thousands of ancestral human remains and millions of cultural items held in museum and federal agency collections. For more than three decades, NAGPRA facilitated significant victories for the project of repatriation, but structural shortcomings in NAGPRA’s repatriation regime led Indian Tribes, legal scholars, and the Senate Committee on Indian Affairs to call for regulatory change. Promulgated on December 13, 2023, the newly revised final rule (hereinafter “2023 Rule”), includes updates to nearly every facet of NAGPRA. While repatriation professionals are generally supportive of the revision, its implementation has resulted in confusion and chaos.

This Note evaluates the 2023 Rule and its interpretation in the museum world in the first year after its promulgation, then proposes the Department of the Interior and the National NAGPRA Program take specific steps to respond to new and old problems with NAGPRA. Part I gives an overview of American museum practices that led to the passage of NAGPRA. Part II describes NAGPRA’s strengths and the weaknesses that led to a call for reform. Using firsthand accounts from legal and repatriation professionals, Part III begins with a survey of the 2023 Rule, reviews its most impactful reforms, and details barriers to compliance and questions that the 2023 Rule fails to address. Part IV proposes solutions to these issues,

* Exec. Managing Editor, Colum. J. L. & Soc. Probs., 2025–2026. J.D. 2026, Columbia Law School. The Author thanks her advisor Professor Cathy Kaplan for her guidance, her interviewees for their time and expertise, and the staff of the *Columbia Journal of Law & Social Problems* for their editing and support. The title of this Note is drawn from CHIP COLWELL, PLUNDERED SKULLS AND STOLEN SPIRITS 12 (2017). The Author would like to disclose that she has worked as a legal intern at the American Museum of Natural History and that all views expressed are the Author’s alone.

recommending the Department of the Interior strengthen its enforcement of NAGPRA and exploring how augmented enforcement could impact museums, federal agencies, and aggrieved parties. Part IV also suggests the National NAGPRA Program make certain changes to its online guidance and briefly addresses how public attention affects NAGPRA repatriation efforts. Although the 2023 Rule includes long-awaited reforms that will help revitalize NAGPRA, the 2023 Rule cannot reach its full potential until more attention and resources are directed toward fulfilling NAGPRA's original promise.

CONTENTS

INTRODUCTION	101
I. MAKING PROMISES: PRE-NAGPRA COLLECTING AND THE CALL FOR CHANGE	106
A. The Museum Age	107
B. Passing NAGPRA	110
C. What Does NAGPRA Do?	110
II. KEEPING PROMISES?: INDIGENOUS CULTURAL PROPERTY 1990–2023	114
A. Successes and Praise	115
B. Pitfalls and Calls for Reform.....	116
1. <i>Culturally Unidentifiable Human Remains</i>	116
2. <i>Destruction of Ancestral Human Remains</i>	118
3. <i>Institutional Sluggishness and Lack of Enforcement</i>	120
4. <i>Federal Recognition Requirement</i>	121
III. RENEWING PROMISES: TRIUMPHS AND TRIBULATIONS IN THE 2023 RULE.....	123
A. Overview: The 2023 NAGPRA Rule Revision	124
1. <i>Removing the Culturally Unidentifiable Category</i>	124
2. <i>Changes to Cultural Affiliation and Consultation</i>	126
3. <i>The Duty of Care and Consent Requirement</i>	128
4. <i>Timelines</i>	130
B. Unanswered Questions and Barriers to Completing Repatriation Work	131
1. <i>Funding and Capacity</i>	131

2025]	Repatriation After the 2023 NAGPRA Rule	101
2.	<i>Research, Compliance, and the Consent Catch-22</i>	137
3.	<i>Special Circumstances</i>	140
IV.	FULFILLING PROMISES: UNLOCKING THE 2023 RULE'S FULL POTENTIAL	143
A.	Expanding and Strengthening NAGPRA Enforcement...	143
1.	<i>Changing the Enforcement Approach</i>	143
2.	<i>Benefiting Aggrieved Parties</i>	145
3.	<i>Promoting Institutional Priorities at Museums</i> ..	146
4.	<i>Investigating Federal Agencies</i>	147
B.	Improving Guidance	148
1.	<i>Duty of Care Guidance</i>	149
2.	<i>Online Resources</i>	150
C.	Complementing Enforcement with Public Attention.....	151
	CONCLUSION.....	153

INTRODUCTION

There is a holy being at the American Museum of Natural History (AMNH) in New York City. Her name is t'əmanəwas, and she came from the sky.¹ In her seat in the Hall of the Universe, she is more often known as Willamette Meteorite, a 15.5-ton mass of iron that is the sixth-largest meteorite in the world and the largest ever found in the United States.² Her people still live in present-day Oregon, and they yearn for her to return, but she cannot go home.³ When the Confederated Tribes of Grand Ronde⁴

1. See *The Willamette Meteorite*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/exhibitions/permanent/the-universe/planets/planetary-impacts/willamette-meteorite> [<https://perma.cc/N2UJ-XQT7>] (describing t'əmanəwas's origins). "The old people said t'əmanəwas came from the Moon—a teaching that reminds us of the spiritual relationships we hold with the land, the sky, and all that connects them." T'əmanəwas is pronounced tuh-MAW-nuh-wahs.

2. *Id.* (describing the scientific uniqueness of the meteorite). The 2000 settlement agreement between AMNH and the Confederated Tribes of Grand Ronde provides for "two explanatory panels displayed with equal prominence for the public," describing the Willamette Meteorite's scientific significance and t'əmanəwas's cultural significance. See Martha Graham & Nell Murphy, *NAGPRA at 20: Museum Connections and Reconnections*, 33 MUSEUM ANTHROPOLOGY 105, 112 (2010).

3. See Graham & Murphy, *supra* note 2, at 112 (describing AMNH's decision to decline to repatriate t'əmanəwas). After the tribe was relocated, the Oregon Iron and Steel Company sold t'əmanəwas to AMNH. See *id.* at 111.

4. The Confederated Tribes of Grand Ronde is a federally recognized Indian Tribe made up of over 30 tribes and bands from the Pacific Northwest, including the Clackamas

requested t'əmanəwas be repatriated as a sacred object in 1999,⁵ AMNH refused, using its authority under the Native American Graves Protection and Repatriation Act (NAGPRA) to decide she is not a sacred object and therefore not entitled to NAGPRA repatriation.⁶ AMNH said t'əmanəwas was “a natural feature of the landscape, rather than a specific ceremonial object” and that the repatriation claim would “potentially impair[] the Museum’s ability to share this exceptional scientific specimen with the public.”⁷ AMNH also filed suit in federal court seeking a declaratory judgment that it was the rightful owner of t'əmanəwas, but the parties quickly negotiated a settlement agreement.⁸ T'əmanəwas’s story highlights the complexity of NAGPRA determinations and the inadequacies of a system that allows museums to control Indigenous access to Indigenous culture.

Across the first floor of the museum, the Red Beaver Prow hangs in the Northwest Coast Hall.⁹ It is a replica of the prow piece once beloved by the Tlingit people of Angoon, Alaska.¹⁰ In 1999, tribal elder Harold Jacobs visited AMNH to review cultural items affiliated with Angoon, stumbled upon the original Red Beaver Prow by chance in a storage area, and immediately recognized it as belonging to his community.¹¹ By the end of the

Chinook. See *Culture and Story*, CONFEDERATED TRIBES OF GRAND RONDE, <https://www.grandronde.org/culture-history/> [<https://perma.cc/2GPR-NLZE>].

5. Under NAGPRA, sacred objects are “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.” 25 U.S.C. § 3001(3)(C).

6. See Graham & Murphy, *supra* note 2, at 112 (providing an example of the power museums wield in NAGPRA decisions).

7. *Id.* (quoting Benjamin Weiser, *Museum Sues to Keep Meteorite Sought by Indian Group*, N.Y. TIMES, Feb. 29, 2000, at B3).

8. See *id.* The settlement with the museum allows tribal members to make an annual visit to t'əmanəwas and perform ceremonies with her. *Id.*

9. See *Lingít | Tlingít*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/exhibitions/permanent/northwest-coast/lingit-tlingit> [<https://perma.cc/3HRJ-QJ5R>] (listing the Red Beaver Prow in the Northwest Coast Hall exhibit).

10. See Graham & Murphy, *supra* note 2, at 110. As the sole usable canoe remaining after the United State Navy bombarded the coast of Angoon, the canoe saved the community from starvation by making it possible for the people to fish throughout the winter. See *id.* at 109. When it was no longer usable, the canoe received the same cremation rites that a human from the community would receive upon their death. See *id.* Tribal members “speak of [the canoe’s disposition] as if it were a relative’s funeral rather than a description of dismantling an old canoe.” *Id.* at 110.

11. See *id.* at 109. Of the discovery, Jacobs said “I was standing in one of the aisles, looking at objects, and I kept looking down at the end . . . I could see something of that face sticking out. I would look at more things, then look back and look at that face . . . When I got alongside it, I gasped because I knew what it was.” *Id.* (quoting David Whitney, *A Culture Comes Home: Sacred Relic Given to Tlingits*, ANCHORAGE DAILY NEWS, Sept. 12,

year, it was repatriated to Angoon under NAGPRA, and half the village met it at the ferry to “celebrate[] its return all night long.”¹² Through repatriation, the Red Beaver Prow was “brought back to life’ and [is] now fully integrated into the framework of [Angoon’s Tlingit] culture.”¹³ The community has granted it status as one of the most important objects in their culture and as a leader of their tribe.¹⁴ Here, NAGPRA successfully provided AMNH and the Angoon villagers the means to mend past losses and develop a continuing collaborative relationship.

Upstairs at AMNH, on a high floor only accessible to staff, there are seemingly endless walls of cabinets, some of which hold Native American human remains.¹⁵ In October 2023, AMNH removed all human remains from public displays, recognizing “human remains collections were made possible by extreme imbalances of power,” and the return of human remains is “an integral part of stewardship.”¹⁶ AMNH made this decision of its own volition, reflecting NAGPRA’s impact on the evolution of exhibition development and museum ethics.¹⁷

1999, at A1) (ellipses in original). The prow piece was excluded from the review because the museum catalogue gave no indication it was connected to Angoon. *See id.*

12. *Id.* at 110.

13. *Id.* at 117 (quoting Response to Interview Questionnaire by Martha Graham and Nell Murphy from Daniel Johnson Jr. (Tlingit), Clan Leader, Basket Bay House, in Angoon, Alaska (Jan 22, 2010).

14. *See id.* “The status of this piece has grown significantly in the years since its return in that when it is out, our fathers, grandfathers, children, and/or grandchildren acknowledge its presence—and speak directly to it—granting it the status of being one of our leaders of the tribe—or more importantly—viewing it as being one of their father’s people, or grandfather’s people, or their child, or grandchild. In our culture only one other item/artifact is viewed in this manner—the copper shields.” *Id.*

15. *See Human Remains Stewardship*, AM. MUSEUM OF NAT. HIST. (Oct. 12, 2023), <https://www.amnh.org/about/human-remains-stewardship> [<https://perma.cc/JAN2-AKGN>] (describing AMNH’s human osteology collection).

16. *Id.* (“We commit to the removal of human remains from public display, while continuing to display casts where appropriate to further the Museum’s education mission.”). Even in staff-only areas, the cabinets holding human remains are covered, both out of respect and to ensure unauthorized personnel do not see or access them while AMNH constructs a new facility for the storage of human remains. *See* Zoom Interview with S. Yasir Latifi, Senior Associate General Counsel, Am. Museum of Nat. Hist. (Nov. 8, 2023) (transcript on file with the *Columbia Journal of Law & Social Problems*) (discussing AMNH’s policies regarding human remains).

17. AMNH’s decision may have been influenced by the draft version of the 2023 Rule, which was published in late 2022. *See generally* Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 86 Fed. Reg. 63202 (proposed Oct. 18, 2022) [hereinafter 2022 Draft Rule] (proposing updates to the NAGPRA regulatory scheme).

In the middle, on the third floor, AMNH has closed its Hall of the Eastern Woodlands and Great Plains Hall.¹⁸ These closures are a reaction to the Department of the Interior's (DOI) new regulations governing NAGPRA, which DOI promulgated on December 13, 2023 (the "2023 Rule").¹⁹ Any potential construction of new exhibition halls is likely to take several years and cost tens of millions of dollars,²⁰ but if such halls reopen, every Native American cultural object in the museum will be displayed with the consent of its tribal community.²¹

NAGPRA was passed to "provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony."²² It recognizes the rights of lineal descendants,²³ Indian Tribes,²⁴ and Native Hawaiian

18. See Julia Jacobs & Zachary Small, *Leading Museums Remove Native Displays Amid New Federal Rules*, N.Y. TIMES (Jan. 26, 2024) <https://www.nytimes.com/2024/01/26/arts/design/american-museum-of-natural-history-nagpra.html> [https://perma.cc/ZJQ7-DHDN] ("The museum is closing galleries dedicated to the Eastern Woodlands and the Great Plains this weekend . . . to make sure it is in compliance with the new federal rules, which took effect this month.). AMNH later opened "The Changing Museum," a new exhibit outside the entrance to the Hall of the Eastern Woodlands, which is meant to explain the hall closures and teach visitors about NAGPRA. See *The Changing Museum*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/exhibitions/changing-museum> [https://perma.cc/GS9B-GVEX].

19. See Jacobs & Small, *supra* note 18 ("The changes are the result of a concerted effort by the Biden administration to speed up the repatriation of Native American remains, funerary objects and other sacred items.").

20. For example, AMNH's redesigned Northwest Coast Hall opened in 2022 after five years of development and cost \$19 million. See Gabriella Angeleti, *\$19m Renovation of American Museum of Natural History's Indigenous Collection Hall Unveiled*, THE ART NEWSPAPER (May 18, 2022), <https://www.theartnewspaper.com/2022/05/18/american-museum-natural-history-northwest-coast-hall-renovated> [https://perma.cc/DH66-A6TP].

21. See 43 C.F.R. § 10.1(d)(3) (2024). However, while Native American objects from the United States will be displayed with consent, First Nations objects from Canada, which make up much of the Northwest Coast Hall, do not have NAGPRA protections. See *Northwest Coast Hall*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/exhibitions/permanent/northwest-coast> [https://perma.cc/8V3V-2HCD] (showing that nine of the ten communities represented in the hall (Coast Salish, Gitksan, Haida, Hailzaqv, Kwakwaka'wakw, Nisga'a, Nuuchah-nulth, Nuxalk, and Tsimshian) are from Canada or both sides of the United States-Canada border).

22. S. Rep. No. 101-473, at 1 (1990).

23. A lineal descendant is "[a] living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to [the 2023 Rule]; or . . . to all the known individuals represented by comingled human remains." 43 C.F.R. § 10.2 (2024).

24. An Indian Tribe is "any Tribe, band, nation, or other organized group or community of Indians . . . recognized as eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians by its inclusion on the list of recognized Indian Tribes published by the Secretary of the Interior under the Act of November 2, 1994 (25 U.S.C. 5131)." 43 C.F.R. § 10.2 (2024). This definition distinguishes

organizations²⁵ to cultural property in five categories: ancestral human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony.²⁶ The 2023 Rule represents the most significant update to NAGPRA since its passage in 1990, reflecting reforms that Native Americans and collecting institutions have called upon DOI to implement for years.²⁷ The community of NAGPRA practitioners²⁸ has received the 2023 Rule's paradigm shift positively, albeit with some concerns about how to comply and how to fund their efforts.²⁹ This concern is relatively surprising given that noncompliance with the 2023 rule carries little risk of meaningful repercussions for museums or researchers. Even if a collecting institution drags its feet, ignores reporting deadlines, or makes decisions about cultural property in bad faith, the National NAGPRA Program ("National NAGPRA")³⁰ will not investigate the institution unless it receives a written allegation of noncompliance from an outside source.³¹ Given the private nature of collections management, National NAGPRA receives few complaints and even fewer that provide enough evidence to prompt further investigation.³² Thus,

between Indian Tribes (which have federal recognition) and Indian groups without federal recognition. For more on how Indian groups without federal recognition interact with NAGPRA, see *infra* Part II.B.4 and Part III.A.2.

25. A Native Hawaiian organization is "any organization which (A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs." 25 U.S.C. § 3001(11).

26. See S. Rep. No. 101-473 at 1 (1990) (listing the claimants and property protected by NAGPRA).

27. See *infra* Part II.B (discussing calls for reform in the 2000s and 2010s).

28. This note uses the term "NAGPRA practitioners" to broadly refer to the community of professionals who work with NAGPRA. This group includes, but is not limited to, academic researchers, Tribal Historic Preservation Officers, museum curators, museum attorneys, and their outside counsel.

29. See *infra* Part III.B (regarding barriers to compliance with the 2023 Rule).

30. The National NAGPRA Program is administered by the National Park Service in DOI. See *National NAGPRA Program*, NAT'L PARK SERV. (Oct. 18, 2019), <https://www.nps.gov/orgs/1335/index.htm> [<https://perma.cc/955K-HD4A>]. National NAGPRA Program staff support the Secretary of the Interior's efforts to implement NAGPRA by answering questions, administering grants, and publishing guidance documents and webinars. *What We Do*, NAT'L PARK SERV. (Jan. 10, 2024), <https://www.nps.gov/orgs/1335/whatwedo.htm> [<https://perma.cc/72TQ-9C5Z>].

31. See *infra* note 122 and accompanying text (identifying a lack of enforcement by National NAGPRA).

32. See Zoom Interview with David Tarler, Training, Civil Enforcement, and Regulations Officer, Nat'l NAGPRA Program, Nat'l Park Serv. (Jan. 5, 2024) (transcript on file with the *Columbia Journal of Law & Social Problems*).

NAGPRA, despite having a civil penalties provision, has never been robustly enforced.³³

This Note argues that the 2023 Rule is an essential update to NAGPRA, but it does not do enough to ensure proper enforcement and explanation of the new regulations. To push collecting institutions to devote more resources to NAGPRA and complete repatriations with greater urgency, a stronger enforcement arm, along with greater regulatory clarity and increased public attention, is required. Part I of this Note gives an overview of American museum practices that led to the passage of NAGPRA. Part II describes NAGPRA's strengths and the weaknesses that led to a call for reform. Using firsthand accounts from legal and repatriation professionals, Part III begins with a survey of the 2023 Rule, reviews several impactful reforms, and details barriers to compliance and questions that the 2023 Rule fails to address. Part IV proposes solutions to these issues, recommending DOI strengthen its enforcement of NAGPRA and exploring how greater enforcement could impact museums, federal agencies, and aggrieved parties. It also suggests National NAGPRA make certain changes to its online guidance and briefly addresses how public attention impacts NAGPRA repatriation efforts. Ultimately, this Note assesses the 2023 Rule's first year post-promulgation and demonstrates the need to hold collecting institutions to account to finally fulfill "the promise of NAGPRA."³⁴

I. MAKING PROMISES: PRE-NAGPRA COLLECTING AND THE CALL FOR CHANGE

At its passage in 1990, NAGPRA represented a major policy shift away from the statutory scheme that allowed museums and collectors to sweep up vast quantities of Native American human remains and cultural items throughout the nineteenth and twentieth centuries. Following shocking revelations regarding the Smithsonian Institution's holdings of human remains,³⁵ Congress

33. See *infra* Part III.A (advocating for the expansion of NAGPRA enforcement).

34. See *The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act's Promise After 30 Years of Practice: Hearing before the S. Comm. on Indian Affs.*, 117th Cong. 2 (2022), at 2 [hereinafter *The Long Journey Home*] (statement of Sen. Brian Schatz, Chairman, S. Comm. on Indian Affs.).

35. See *infra* note 54 and accompanying text.

heeded the call of Native activists³⁶ and developed NAGPRA, a new statutory regime aimed at repudiating the injustices of the past by declaring Native Americans' rights to their own cultural heritage. Part I.A briefly describes the collecting landscape prior to NAGPRA. Part I.B addresses the inciting incident that led to the passage of NAGPRA. Part I.C explains NAGPRA's immediate transformative impact on repatriations of Native American human remains and cultural objects. The values that drove NAGPRA in 1990—respect, collaboration, and self-determination—continue to drive the reforms of 2023.³⁷

A. THE MUSEUM AGE

Before NAGPRA, Native Americans had little, if any, legal authority to claim a right to their ancestral remains and cultural property. The Antiquities Act of 1906, the United States' first cultural patrimony law,³⁸ declared the federal government's right to control any Native American human remains and cultural items found on federal land.³⁹ The law stripped Indigenous peoples of

36. Museum and tribal representatives engaged in a yearlong process known as the "National Dialogues," during which the Panel for a National Dialogue on Museum/Native American Relations developed findings and policy recommendations for the Senate Select Committee on Indian Affairs. See generally PANEL FOR A NAT'L DIALOGUE ON MUSEUM/NATIVE AM. RELS., REPORT (1990), https://documents.saa.org/container/docs/default-source/doc-governmentaffairs/repatriation/heardreport-1990-02-28.pdf?sfvrsn=37ecad98_2 [<https://perma.cc/25UV-594T>] (reporting the findings and recommendations of the Panel). In one of its principal findings, the Panel wrote, "[r]espect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made by a Native American group that has a cultural affiliation with remains or other materials. In such cases, the wishes of the nation or group regarding the disposition of the materials must be followed." *Id.* at 1.

37. See generally *The Long Journey Home* (addressing many of the values and goals of NAGPRA).

38. Such laws "vest[] ownership of the cultural property with the state and give the state property rights over the designated cultural property." Aaron Haines, Note, *Will the STOP Act Stop Anything? The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Tribal Objects from Abroad*, 39 CARDOZO L. REV. 1091, 1109 (2018). The Antiquities Act authorized the president to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ." 54 U.S.C. § 320301. Though the Antiquities Act did not provide definitions, human skeletal remains were later defined as archaeological resources in the Archaeological Resources Protection Act of 1979 (ARPA). 16 U.S.C. § 470bb.

39. See *Antiquities Act of 1906*, NAT'L PARK SERV. (Feb. 10, 2025), <https://www.nps.gov/subjects/archeology/antiquities-act.htm> [<https://perma.cc/R5WK-U63F>] ("Concern over the loss of information galvanized a scientific and political coalition to pass a federal law to

control of their cultural heritage, and Native American human remains and cultural objects were gathered and accessioned into prominent museum collections.⁴⁰ New, grandiose natural history museums filled their halls with exhibits displaying non-white races from around the world,⁴¹ and the forces of colonial occupation, assimilation, and the United States' Indian policy strongly encouraged bulk stockpiling of Native American property.⁴²

Collecting practices of this period showed little regard for human dignity or respect for Indigenous cultures.⁴³ In one instance, the Phoebe A. Hearst Museum of Anthropology ignored the funerary wishes of a man known as Ishi, the last surviving member of the Yahi people of northern California.⁴⁴ For several years, Ishi lived at the museum and worked as a living exhibit, displayed to non-Indigenous museum visitors who watched him make tools and sing Yahi songs—an arrangement that the

preserve America's archeological places and the information they contained on public lands.”).

40. Under the Antiquities Act, archaeological permits were available only to “institution[s] that the Secretary concerned considers properly qualified to conduct the examination, excavation, or gathering.” 54 U.S.C. § 320302(a). Permits are granted only if the project “is undertaken for the benefit of a reputable museum, university, college, or other recognized scientific or educational institution . . . [and] the gathering shall be made for permanent preservation in a public museum.” 54 U.S.C. § 320302(b).

41. The placement of Indigenous peoples and cultures within natural history museums is fraught. See Siân Halcrow et al., *Moving beyond Weiss and Springer's Repatriation and Erasing the Past: Indigenous Values, Relationships, and Research*, 28 INT'L J. CULTURAL PROP. 211, 212 (2021) (“The skeletons of Indigenous peoples, along with those of Africans and Asians, were seen as curiosities, representing ‘the other’ for the West to purchase, collect, and store in personal collections or public museums as they pleased.”).

42. See, e.g., Helen A. Robbins & Leigh Kuwanwisiwma, *Hopi Renewal and (Ritualized) Performance Under American Law*, 5 MUSEUM WORLDS 60, 62 (2017) (describing the “corrosive processes” of North American collecting in the late 19th and early 20th centuries and characterizing this collecting era as “intensely aggressive”).

43. For example, some institutions deliberately engaged in curatorial practices that dehumanized Indigenous people, even those who the curators had known personally. In one case, at AMNH, Franz Boas held a fake funeral for Qisuk, an Inuk man from Greenland. He wrapped a log in furs to simulate a body and had it buried in the museum's garden on Central Park West. It took years for Minik, Qisuk's young son, to discover the truth: his father's remains had been transported to Bellevue Hospital, taken apart, studied, and returned to AMNH, where they were allegedly displayed by Boas' team of anthropologists. See Dinitia Smith, *An Eskimo Boy And Injustice In Old New York; A Campaigning Writer Indicts An Explorer and a Museum*, N.Y. TIMES (Mar. 15, 2000), <https://www.nytimes.com/2000/03/15/books/eskimo-boy-injustice-old-new-york-campaigning-writer-indicts-explorer-museum.html> [<https://perma.cc/MN87-M3WA>].

44. See *Ishi*, PHOEBE A. HEARST MUSEUM OF ANTHROPOLOGY, <https://hearstmuseum.berkeley.edu/ishi/> [<https://perma.cc/B3GT-G53N>] (“Following custom, Ishi refused to speak his name to outsiders without introduction by someone from his tribe. Instead, he was referred to by the word that means ‘man’ in the language of his people, the Yahi.”).

museum now admits “resembled indentured servitude.”⁴⁵ Upon his death, instead of cremating Ishi according to Yahi custom, the museum performed an autopsy and sent his brain to the Smithsonian Institution for study.⁴⁶ Ishi’s brain remained at the Smithsonian until 2000, 84 years later, when it was finally repatriated and rejoined with his cremated remains for burial.⁴⁷

In the Pacific Northwest, anthropologist Franz Boas paid a league of informants and suppliers \$20 per complete Native American skeleton and \$5 per Native American skull,⁴⁸ and his contemporary George Amos Dorsey robbed Native Americans’ homes and burial grounds.⁴⁹ The United States also participated in collecting and grave robbing: in 1868, the Surgeon General directed Army officers to send him Native American human remains for study, resulting in the destruction of countless grave sites.⁵⁰ The respective collections of Boas, Dorsey, and wealthy collector George Heye eventually filled the halls of AMNH, the Field Museum of Natural History (the “Field Museum”),⁵¹ and the Smithsonian’s National Museum of the American Indian⁵² with

45. *Id.* (“He spent much of his time on display for white museum audiences, fashioning obsidian and colored glass projectile points and recording Yahi songs and stories . . . Ishi also worked as a live-in custodian and research assistant at the [m]useum.”).

46. *See id.*

47. *See id.* (recognizing the repatriation efforts of the Maidu, Redding, and Pitt River tribes of California).

48. *See* Nancy Mithlo, “Red Man’s Burden”: *The Politics of Inclusion in Museum Settings*, 28 AM. INDIAN Q. 743, 749 (2004) (“Boas both purchased and collected his own skulls by grave robbing, an activity he called ‘repugnant work’ but ‘someone has to do it,’ reasoning, [sic] skeletons were ‘worth money.’”).

49. *See* Susanne Belovari, *Professional Minutia and Their Consequences: Provenance, Context, Original Identification, and Anthropology at the Field Museum of Natural History, Chicago, Illinois*, 13 ARCHIVAL SCI. 143, 162 (2013) (describing Boas, an admitted grave-robbler, as disdainful of Dorsey’s particular grave-robbing methods).

50. *See* H.R. REP. NO. 101-877, at 9 (1990) (referencing the Surgeon General’s desire to support studies comparing the skulls of different races). As of 2024, the Army Corps of Engineers still held the human remains of over 1,400 Native Americans. *See* NAT’L NATIVE AM. GRAVES PROT. & REPATRIATION ACT PROGRAM, FISCAL YEAR 2024 REPORT 4 (2024) [hereinafter 2024 National NAGPRA Program Report] (listing the 20 largest holdings of Native American human remains in institutions subject to NAGPRA as of September 2024).

51. *See* Belovari, *supra* note 49, at 162 (“At the time, there was an intense competition between the Field Columbian Museum and the American Museum in New York (where Boas had ended up) and particularly with regard to their respective collecting efforts of Native American and Northwest Coast materials.”).

52. *See History of the Collections*, NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/explore/collections/history> [<https://perma.cc/H3N6-9UYJ>]. Heye’s private collection was housed at the Museum of the American Indian in New York City. Shortly before NAGPRA was passed, assets of the Heye Foundation were transferred to the Smithsonian and became much of the founding collection of the National Museum of the American Indian. *See* 20 U.S.C. § 80q-2.

thousands of objects and ancestors taken from Native Americans. In this era, which lasted well into the twentieth century, museums had legal latitude and authority to treat human beings as scientific specimens and ignore the agency of both individual Indigenous people and their tribes.

B. PASSING NAGPRA

The modern call for NAGPRA began in February 1987.⁵³ Testifying before the Senate Select Committee on Indian Affairs, Smithsonian Secretary Robert McCormick Adams exposed that over 50% of human remains held by the Smithsonian, comprising over 17,000 specimens, belonged to Native American and Alaska Native people.⁵⁴ Though some earlier grassroots repatriation projects had found isolated success,⁵⁵ Native activists responded to the shocking testimony by calling for comprehensive legislation addressing their rights to their ancestors and solutions facilitating

53. See S. REP. NO 101-473, at 1 (1990) (explaining NAGPRA “had its origins in a hearing that was held by the Select Committee on Indian Affairs in February of 1987”). Federal law on archaeology and conservation had expanded to include the 1966 National Historic Preservation Act (NHPA) and ARPA, but neither addressed the repatriation of Native American human remains and cultural items. See Marina F. Rothberg, Note, *Indiana Jones and the Illicit Excavation and Trafficking of Antiquities: Refining Federal Statutes to Strengthen Cultural Heritage Protections*, 63 B.C. L. REV. 1555, 1566–67 (2022) (describing the aims of the NHPA and ARPA); see also Robbins & Kuwanwisiwma, *supra* note 42, at 61 (“Within the United States, the emergence of repatriation as a significant political and social objective in the 1980s had been preceded by decades of Native American rights advocacy and catalyzed by revelations about the history and magnitude of Native American holdings in museums.”).

54. See S. REP. NO 101-473, at 1 (1990) (“Adams indicated that of the 34,000 human remains currently in the Institution’s collection, approximately 42.5% or 14,523 of the specimens are the remains of North American Indians, and another 11.9% or 4,061 of the specimens represent Eskimo, Aleut, and Koniag populations.”).

55. The return of dozens of War Gods to the Zuni Pueblo set the stage for NAGPRA. See Michael Haederle, *War Gods Are Finally at Peace*, L.A. TIMES: ARTS & ENT. (Aug. 12, 1991), <https://www.latimes.com/archives/la-xpm-1991-08-12-vw-381-story.html> [<https://perma.cc/JKY8-A8FW>]. Beginning in the 1970s, Zuni anthropologist and curator Edmund J. Ladd oversaw the effort to return 80 of the carved wooden statues to the Zunis through 38 separate repatriations. See Mithlo, *supra* note 48, at 744. The work was piecemeal (thirteen War Gods were repatriated from the Brooklyn Museum, six from the Denver Museum of Natural History, and others from the Tulsa Zoo, the Andy Warhol estate, and additional public and private collections), but the Zunis never resorted to litigation; every repatriation was the result of goodwill and negotiation. See Haederle, *supra*.

their repatriation.⁵⁶ On May 17, 1989, Senator John McCain (R-AZ) introduced the bill that would eventually become NAGPRA.⁵⁷

While not legally binding, the congressional report recommending passing NAGPRA shows a Senate Select Committee on Indian Affairs sympathetic to the Native fight for repatriation. The report begins by stating NAGPRA's purpose: "to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony."⁵⁸ The report then unequivocally declares that "human remains must at all times be treated with dignity and respect."⁵⁹ It addresses tribal leaders' testimony describing the difficulties they face in trying to protect their ancestors and their property, such as lack of recourse against uncooperative museums; inability to provide a proper burial to identifiable ancestors held in museum collections; and looting of their gravesites on tribal and federal land, leading to commercial sales of tribal funerary objects.⁶⁰ Testifying before the House Committee on Interior and Insular Affairs, Native representatives explained "the spirits of their ancestors would not rest until they are returned to their homeland."⁶¹ Others testified that unearthed Indigenous human remains are typically sent to and curated by museums, in contrast to non-Indigenous human remains, which are typically quickly studied and reburied.⁶² On November 16, 1990, nearly four years

56. See S. REP. NO 101-473, at 1 (1990) ("Tribal reaction to Secretary Adams' testimony was swift.").

57. See *id.* at 2. On May 11, 1989, Senator Daniel Inouye (D-HI) introduced the National Museum of the American Indian Act, which directly addressed the disposition of Native American human remains and cultural items in the Smithsonian collection. NAGPRA addresses all other collections held by institutions that receive federal funding. See *id.* For more on the creation of the National Museum of the American Indian, see *supra* note 52 and accompanying text.

58. S. REP. NO 101-473, at 1. The report also shows support for the missions of museums, recognizing the importance of museums' public educational function and the opportunity for NAGPRA to "encourage a continuing dialogue" and "promote greater understanding" between tribes and museums. *Id.* at 4.

59. *Id.* at 4.

60. See *id.* at 3 (listing the concerns of tribal representatives as conveyed in their testimony).

61. H.R. REP. NO. 101-877, at 13 (1990).

62. See *id.* ("The non-Indian remains tend to be quickly studied and then reburied while so many Indian remains are sent to museums and curated."); accord Halcrow et al., *supra* note 41, at 212 ("[S]keletons of white Americans recovered in archaeological excavations were reburied, while skeletons of Indigenous people were stored in museums and laboratories" (citing generally CHIP COLWELL, PLUNDERED SKULLS AND STOLEN SPIRITS (2017))). The committee also noted the findings of the Panel for a National Dialogue on Museum/Native American Relations, which was convened to discuss issues surrounding

after Secretary Adams' testimony on the Smithsonian's collection of human remains, NAGPRA became law.⁶³

C. WHAT DOES NAGPRA DO

NAGPRA has two primary transformative effects: (1) recognizing Native Americans' right to repatriation⁶⁴ and (2) affirming the legitimacy of traditional forms of Indigenous knowledge.⁶⁵ NAGPRA defines five categories of Native American items eligible for protection, often referred to collectively as "human remains and cultural items"⁶⁶: human remains, associated funerary objects, unassociated funerary objects, sacred objects,⁶⁷ and objects of cultural patrimony.⁶⁸ Under the law, items held in the collections of federal agencies and federally-funded museums prior to NAGPRA are treated differently from items not yet excavated or removed from federal or tribal lands.⁶⁹ For human

repatriation and produce recommendations. The Panel struggled to come to a consensus about how to handle culturally unidentifiable human remains, but it agreed that federal legislation on this matter was needed. See Panel for a Nat'l Dialogue on Museum/Native Am. Rels., *supra* note 36, at 1 ("With regard to Native human remains which are not culturally identifiable with specific, present-day nations or people, the Panel is divided. A majority believes that a respect for Native human rights requires that a process be developed for disposition of these remains in cooperation with, and with the permission of, Native nations"); H.R. REP. NO. 101-877, at 10 (1990).

63. See *The Law*, NAT. PARK SERV. (Apr. 1, 2025), <https://www.nps.gov/subjects/nagpra/the-law.htm> [<https://perma.cc/XTY4-G3JM>] (listing important dates, hearings, and reports related to NAGPRA).

64. See Rothberg, *supra* note 53, at 1570 ("Perhaps most importantly, NAGPRA affirmed the right to repatriation of cultural items and created procedures to return indigenous human remains and cultural objects to Native American individuals and tribes.").

65. See *infra* note 76 and accompanying text.

66. See 25 U.S.C. § 3001(3) (defining the categories of objects eligible for repatriation under NAGPRA).

67. A sacred object is "a specific ceremonial object needed by a traditional religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization." 43 C.F.R. § 10.2 (2024).

68. An object of cultural patrimony is "an object that has ongoing, historical, traditional, or cultural importance central to a Native American group . . . according to the Native American traditional knowledge of an Indian Tribe or Native Hawaiian organization . . . The object must be reasonably identified as being of such importance central to the group that it: (1) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and (2) Must have been considered inalienable by the group at the time the object was separated from the group." 43 C.F.R. § 10.2 (2024).

69. See H.R. REP. NO. 101-877 (1990), at 8–9 (identifying two main objectives of NAGPRA). Aspects of NAGPRA related to new excavations are outside the scope of this Note. For further reading, see *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

remains and cultural items already in their possession, collecting institutions had to produce summaries and inventories within three or five years, respectively, and follow NAGPRA's rudimentary outline of a repatriation process.⁷⁰ Repatriation procedure, enforcement, and grantmaking is left to the Secretary of the Interior's discretion.⁷¹

For all newly discovered human remains and cultural items on federal or tribal land, NAGPRA dictated that ownership lies in the lineal descendant of a particular ancestor, if identifiable, or in the Indian Tribe or Native Hawaiian organization (NHO)⁷² "culturally affiliated" with the human remains or cultural object.⁷³ Under the statute, cultural affiliation refers to "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."⁷⁴ Cultural affiliation is the key to repatriation—a museum's legal obligation to repatriate under NAGPRA arises only when that museum has culturally affiliated an item with a lineal descendant, Indian Tribe, or NHO that requests repatriation. Lacking a cultural affiliation determination by the museum, the obligation to repatriate may also arise when an interested party proves cultural affiliation by a preponderance of the evidence.⁷⁵ Crucially,

Bonnichsen, the single most infamous NAGPRA court decision, concerns the disposition of the 8,000-year-old remains of the Ancient One, found near Kennewick, Oregon in 1996 on lands managed by the Army Corps of Engineers. Though DOI determined that the remains were Native American, the Ninth Circuit disagreed. It found in favor of the plaintiffs, a group of anthropologists who argued Indian Tribes did not have a right to the Ancient One's remains because the remains were too old to be considered Native American. See Allison M. Dussias, *Kennewick Man, Kinship, and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 60 (2005) (arguing the *Bonnichsen* decision is a "controversial and fundamentally flawed rewriting of NAGPRA" and a "failure to understand and respect Native American perspectives and rights").

70. See 25 U.S.C. §§ 3003–5 (outlining museums and federal agencies' duties under NAGPRA).

71. See *id.* §§ 3005, 3007–8 (delegating these responsibilities). NAGPRA directs the Secretary of the Interior to promulgate regulations within twelve months, but the first final rule was not promulgated until 1995. See Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 232 (Dec. 4, 1995).

72. For further explanation of the terms lineal descendant and NHO, see *supra* notes 23 and 25 and accompanying text.

73. See 25 U.S.C. § 3002(a) (establishing ownership rights to Native American human remains on federal land).

74. *Id.* § 3001(2).

75. See *id.* § 3005(a) (laying out the repatriation procedure for Native American human remains and cultural items in the possession or control of museums and federal agencies).

NAGPRA does not confine evidence to the Western, academic forms of knowledge museums may typically rely on, such as biological, archaeological, anthropological, or linguistic evidence.⁷⁶ NAGPRA states that a variety of Indigenous forms of knowledge, including kinship, folkloric, and oral traditional evidence, can be used to meet this evidentiary burden.⁷⁷ The Antiquities Act excluded Native Americans from accessing their cultural property because they generally lacked Euro-American anthropological or archaeological education.⁷⁸ NAGPRA, in contrast, invites its practitioners to weigh Indigenous knowledge forms equally or more heavily than Western forms.⁷⁹

II. KEEPING PROMISES: INDIGENOUS CULTURAL PROPERTY 1990–2023

At its passage in 1990, NAGPRA was first-of-its-kind legislation recognizing the rights of Indigenous peoples of the United States to their own cultural property and ancestral remains.⁸⁰ Nonetheless, by the 2020s, problems with NAGPRA's implementation led to widespread calls for reform.⁸¹ Part II.A describes NAGPRA's successes and Part II.B identifies the pitfalls that arose between NAGPRA's passage in 1990 and the promulgation of the 2023 Rule.

76. See *id.* § 3005(a)(4) (“[T]he requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”).

77. See *id.*

78. See *supra* note 40 and accompanying text.

79. Whether or not NAGPRA practitioners accepted this invitation was another matter; many archaeologists and anthropologists insisted NAGPRA was meant to balance the needs and authority of both Indigenous peoples and scientists. But see COLWELL, *supra* note 62 at 248–249 (“It was a long, hard struggle to get archaeologists and curators to listen, to understand. Despite archaeologists’ earnest beliefs about compromise, the word ‘balance’ appears nowhere in NAGPRA or its regulations. . . . Even if we accept the idea of NAGPRA as a balance of Native and scientific interests, the status quo is not a ‘balanced’ solution.”).

80. See Stephen E. Nash & Chip Colwell, *NAGPRA at 30: The Effects of Repatriation*, 49 ANN. REV. ANTHROPOLOGY 225, 227 (2020) (“NAGPRA went to the heart of Native America’s rights to its ancestors, cultural practices, and religious freedoms. . . . Few would agree the law is perfect, but no other country has (yet) created a similar national law.”).

81. See *infra* Part II.B; see generally The Long Journey Home, *supra* note 34 (addressing NAGPRA’s impact).

A. SUCCESSES AND PRAISE

NAGPRA's structured process and respect for Indigenous knowledge have been undeniably successful in facilitating the repatriation of Native American human remains and cultural items to tribes and lineal descendants.⁸² In 2020, National NAGPRA reported that, over the course of its 30-year history, NAGPRA had led to the repatriation of approximately 67,000 ancestral human remains, 1.9 million associated and unassociated funerary objects, and 15,000 sacred objects and objects of cultural patrimony.⁸³ Additionally, NAGPRA has encouraged improved and collaborative relationships between museums and tribes.⁸⁴ By shifting property rights to Native Americans and obligating museums to consult with culturally affiliated tribes and lineal descendants, NAGPRA gives Native Americans opportunities to reconnect with their ancestors.⁸⁵ It facilitates storage and treatment of their cultural items in a manner compatible with their own knowledge, religion, culture, and traditions.⁸⁶ With the support of NAGPRA, "tribes are demanding a paradigm that adheres to community-based research protocols and Indigenous methodologies."⁸⁷ Consultations arising from NAGPRA obligations can lead to long-term collaboration between museums

82. See Rothberg, *supra* note 53, at 1580–84 (characterizing NAGPRA as filling in gaps left by ARPA and the NHPA); see also 2024 National NAGPRA Program Report, *supra* note 50, at 2 (showing that, as of September 30, 2024, the dispositions of 126,299 Native American human remains and 3,659,028 associated funerary objects have been resolved).

83. See Nash & Colwell, *supra* note 80, at 226 (discussing NAGPRA's successes 30 years post-passage). The rate of repatriations increased over time; in 2005, 30,000 ancestors or individuals, 600,000 associated and unassociated funerary objects, and 1,200 sacred objects had been repatriated. See Rothberg, *supra* note 53, at 1564.

84. See Wendy Giddens Teeter et al., *Creating A New Future: Redeveloping The Tribal-Museum Relationship In The Time Of NAGPRA*, 28 INT'L. J. CULTURAL PROP. 201, 201 (2021) ("Continuous discussions with tribes and Indigenous communities, initiated through NAGPRA consultation, have resulted in more innovative and collaborative exhibitions and programming, a holistic approach to collection curation that includes cultural sensitivity and respect, and revamped and expanded interpretative materials that discuss Indigenous communities' present and future, not just their past.").

85. See *id.* at 204 ("Through NAGPRA consultation, a major shift has occurred allowing tribes and Indigenous communities to reconnect with their ancestors and cultural items and control access, arrange for appropriate cultural care, and inform interpretation.").

86. See *id.* (listing accommodations such as asking the community for permission to conduct research and subsequently presenting research findings to the community).

87. *Id.* at 206.

and tribes resulting in community projects, exhibits, museum education, and more.⁸⁸

B. PITFALLS AND CALLS FOR REFORM

Despite NAGPRA's successes, its repatriation process was flawed.⁸⁹ Prior to the 2023 Rule, disposition of so-called "culturally unidentifiable" human remains was a primary area of concern among many NAGPRA practitioners.⁹⁰ Practitioners also took issue with the destruction of ancestors, institutional sluggishness, lack of agency enforcement, exclusion of Indian groups without federal recognition, and limited tribal influence in dealings with museums. Calls to address these concerns led collectively to the reforms in the 2023 Rule.⁹¹

1. *Culturally Unidentifiable Human Remains*

NAGPRA places most determinations of cultural affiliation in the hands of museums.⁹² Prior to 2023, when a museum could not culturally affiliate human remains or an associated funerary object with a sufficient degree of certainty, the item was listed as "culturally unidentifiable" (CUI).⁹³ NAGPRA regulations defined CUI as referring to "human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian

88. See *id.* (describing on example in which the Harvard Peabody Museum and the Cape Fox Corporation, on behalf of the Teikweidi Saanya Kwaan clan, collaborated on the creation of a carving entitled "Kaats' and Brown Bear Totem Pole (Kaats' Xóots Kooteeya)"). Another example of a successful collaboration is the Red Beaver Prow at AMNH. See *Lingít* | *Tlingít*, *supra* note 9 and accompanying text.

89. See Halcrow et al., *supra* note 41, at 217 ("A 2010 survey of tribal repatriation workers in the United States, for example, showed that 37 percent of respondents indicated that NAGPRA has led to new and positive collaborations with museums; however, most respondents also agreed that NAGPRA needs to change to become more efficient and effective." (citing Chip Colwell-Chanthaphonh, *The Work of Repatriation in Indian Country*, 71 HUM. ORG. 278, 287-88 (2012))).

90. See *infra* Part II.B.1.

91. See *infra* Part II.B.2-4.

92. See 25 U.S.C. § 3003(a) ("Each Federal agency and each museum which has possession or control over holdings or collections . . . shall . . . identify the geographical and cultural affiliation of such item[s]."); accord § 3004(a).

93. See Sherry Hutt, *Bones in Contention: A Journey and a Cautionary Tale*, 59 ARIZ. ATT'Y. 16, 20 (2023) (defining CUI as referring to human remains and cultural items "without reasonable basis to ascertain affiliation on existing data").

organization has been identified through the inventory process.”⁹⁴ Because NAGPRA’s repatriation requirements are triggered by findings of cultural affiliation, if an object is CUI, the obligation to consult with a tribe on possible repatriation claims never accrues.⁹⁵

CUI designations relieve museums of some of their burdens under NAGPRA while allowing them to retain possession of certain human remains and associated funerary objects, which stay available for museum study.⁹⁶ This incentivizes museums to be more conservative in their assessments of cultural affiliation of Native American human remains and associated funerary objects. By 2022, only 21% of museums and federal agencies had repatriated their full collections of Native American human remains,⁹⁷ and only 42% of all Native American human remains had been repatriated.⁹⁸ It is “a well-known fact among Native American communities” that museums use the CUI category to stymie the repatriation efforts of tribes.⁹⁹ Sherry Hutt, former director of National NAGPRA, referred to this practice as “self-elimination from compliance obligation by deft use of CUI.”¹⁰⁰ Indeed, in inventories submitted in compliance with NAGPRA, institutions “overwhelmingly” categorize human remains as CUI.¹⁰¹ As of 2022, there were approximately 117,000 ancestors still housed in collections,¹⁰² of those, a staggering 94% were

94. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12378, 12403 (Mar. 15, 2010) [hereinafter 2010 Rule].

95. See Hutt, *supra* note 93, at 20 (“Listing individuals as CUI relieved museums and federal agencies of tribal consultation obligations.”).

96. See *id.* (“CUI inventories went into a closet at NPS, so challenges to CUI listing were impossible.”).

97. See The Long Journey Home, *supra* note 34, at 3 (statement of Sen. Lisa Murkowski).

98. See *id.* at 2 (testimony of Sen. Brian Schatz).

99. Miakan-Garza Band of the Coahuiltecan, Comment Letter on Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony (Jan. 16, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0110> [<https://perma.cc/Z7VJ-BYWS>] (supporting eliminating CUI designations).

100. Hutt, *supra* note 93, at 20.

101. See *id.*

102. See The Long Journey Home, *supra* note 34, at 4 (testimony of Joy Beasley, Associate Director, Cultural Resources, Partnerships and Science, National Park Service) (recognizing a lag in repatriations).

CUI.¹⁰³ It was clear: NAGPRA's goals could not be achieved while the CUI regime remained in place.¹⁰⁴

2. *Destruction of Ancestral Human Remains*

The CUI system allowed museum scientists to continue to destroy Native American human remains in the name of scientific research despite decades of outcry from lineal descendants, Indian Tribes, and NHOs.¹⁰⁵ While NAGPRA sets limits on scientific study *after* a culturally affiliated party makes a request for repatriation,¹⁰⁶ a loophole allowed museums to continue performing destructive analysis on CUI remains because CUI remains were, by their nature, not culturally affiliated with any lineal descendant, Indian Tribe, or NHO.¹⁰⁷ Some researchers still

103. See *id.* at 4–5 (testimony of Joy Beasley) (emphasizing the high number of CUI remains).

104. See *id.* at 2 (testimony of Sen. Brian Schatz) (noting that, at NAGPRA's passage, the Congressional Budget Office expected NAGPRA repatriations to be completed in 10 years).

105. See Zoom Interview with Steve Nash, President & CEO, Archaeology Southwest (Nov. 29, 2024) (transcript on file with the *Columbia Journal of Law & Social Problems*) (explaining that destructive analysis “destroys a small sample, but if that’s your ancestor, that’s still doing harm”). The United States District Court for the District of Oregon has recognized that, for many tribes, “[h]andling human remains, the scientific study of human remains, and particularly the destructive study of human remains are extremely sensitive issues.” See *Bonnichsen v. U.S., Dep’t of Army*, 969 F. Supp. 628, 632 (D. Or. 1997).

106. See 25 U.S.C. § 3005(b) (“If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.”).

107. See Amanda Daniela Cortez et al., *An Ethical Crisis in Ancient DNA Research: Insights from the Chaco Canyon Controversy as a Case Study*, 21 J. SOC. ARCHAEOLOGY 157, 162 (2021) (“[V]agueness in the law and the diversity of consultation practices that have resulted help explain how museums often designate ancestral remains as ‘culturally unaffiliated’ even when there are present-day tribes who can claim a connection to them.”). Anthropologist Elizabeth Weiss and attorney James Springer incorrectly argue this loophole is central to NAGPRA, providing for the repatriation of culturally affiliated human remains while maintaining a rich collection of CUI human remains for anthropologists to study. See Elizabeth Weiss & James W. Springer, *NAGPRA: From Compromise to Collapse*, 45 REGULATION 16 (2022–23) (“Yet, the [culturally] unidentifiable category is not a loophole; it was put in place as part of NAGPRA’s compromise.”). This claim is supported by neither the Act nor the legislative history. See generally S. REP. NO. 101-473 (1990) (never mentioning such a compromise); see also Halcrow et al., *supra* note 41, at 216 (“Weiss and Springer have cherry-picked scholarly work in the field of bioarchaeology and have misinterpreted federal US law in order to make the point that science has more right than do Indigenous people over the disposition of their dead.”). Weiss and Springer’s fringe arguments against repatriation have been repeatedly condemned by anthropologists

study Native American human remains using destructive analytical techniques, such as radiocarbon dating, that require the removal and loss of a small amount of bone.¹⁰⁸

This issue shot to the forefront in 2017, following the publication of a controversial study that used destructive analysis on a collection of human remains originally from Chaco Canyon, an ancient holy site in New Mexico.¹⁰⁹ The remains were under the legal control of AMNH, and the museum permitted the research.¹¹⁰ Although several present-day Indian Tribes are affiliated with the lands in and around Chaco Canyon, AMNH deemed the remains CUI based on factors including the age of the human remains and competing claims of cultural affiliation from the Hopi Tribe and Navajo Nation.¹¹¹ In performing destructive analysis, “AMNH’s approach to tribal consultation was incongruous with that employed by other institutions holding ancestral remains and objects from the same archaeological culture” and was decades behind industry standards for consultation.¹¹² Consequently, the study and subsequent outcry from tribes and academics¹¹³ underscored the need to revise and strengthen the regulatory protections for Native American human remains and cultural items in research institutions.¹¹⁴ Nonetheless, AMNH had acted within the letter of NAGPRA.¹¹⁵

worldwide. See, e.g., Halcrow et al., *supra* note 41, at 213 (“[W]e write this article to publicly reject the racist views that [Weiss and Springer] espouse.”).

108. See Zoom Interview with Steve Nash, *supra* note 105 (identifying examples of destructive analysis).

109. See Cortez et al., *supra* note 107, at 159–61. For the study in question, see generally Douglas M. Kennett et al., *Archaeogenomic Evidence Reveals Prehistoric Matrilineal Dynasty*, 8 NATURE COMM’N. 14115 (2017).

110. See Cortez et al., *supra* note 107, at 160 (describing the study).

111. See *id.* at 164 (explaining the CUI determination). The remains are approximately 900–1,200 years old—a far cry from the 8,000-year-old remains of the Ancient One at issue in *Bonnichsen*. See *id.* at 160; Dussias, *supra* note 69, at 59 (regarding the age of the Ancient One’s remains).

112. Cortez et al., *supra* note 107, at 167. The study exemplifies the problematic results of CUI designations. AMNH could not determine whether the remains should be culturally affiliated with the Hopi Tribe or the Navajo Nation; rather than affiliate with one or both, they were designated CUI. See *id.* at 164.

113. See *id.* at 159 (describing extensive responses to the study from Indigenous leaders and their allies). David Hurst Thomas, the AMNH curator and archaeologist who permitted Kennett and his co-authors’ use of the human remains in the study, “acknowledges that his decision to not consult with tribes about the research was a mistake, and he would approach the process differently now if presented with the same situation.” *Id.* at 168.

114. See Zoom Interview with Steve Nash, *supra* note 105 (“NAGPRA was twenty years old at that point. We knew better. Common decency knew better.”).

115. See Cortez et al., *supra* note 107, at 165–66 (“[T]he museum was arguably not legally required to consult.”).

3. *Institutional Sluggishness and Lack of Enforcement*

Prior to the 2023 Rule, widespread institutional sluggishness and weak enforcement prevented NAGPRA from reaching its full potential.¹¹⁶ Under that regime, the repatriation process was purely reactive and was only initiated after a culturally affiliated lineal descendant, Indian Tribe, or NHO brought a repatriation claim.¹¹⁷ Even when there was a claim, museums were not held accountable for missed deadlines and non-compliance; the Fiscal Year 2024 Report for National NAGPRA shows less than \$60,000 in penalties collected across the entire lifetime of NAGPRA.¹¹⁸ These shortcomings persisted because NAGPRA's enforcement system was too weak to compel minimum compliance from museums and federal agencies and National NAGPRA lacked capacity to complete its ongoing investigations in a timely manner.¹¹⁹

By 2024, of the 141 allegations of failure to comply received since 1996, 73 were still pending,¹²⁰ and the backlog was growing.¹²¹ Until recently, National NAGPRA had never had a full-time staff member assigned to support the Assistant Secretary's investigations, which aggravated this problem.¹²²

116. See Jenna Kunze, *Repatriation Delays a Matter of Priorities, Not Funding, Experts Say*, NATIVE NEWS ONLINE (Jan. 20, 2022) [hereinafter Kunze, *Repatriation Delays*], <https://nativenewsonline.net/sovereignty/repatriation-delays-a-matter-of-priorities-not-funding-experts-say> [<https://perma.cc/NR9Q-MJ4Q>] (“[T]here are several excuses institutions use that do little to facilitate respect for tribes and compliance with federal law.”).

117. See 25 U.S.C. § 3005(a)(1–2) (placing the responsibility to bring claims on tribes and lineal descendants).

118. See 2024 National NAGPRA Program Report, *supra* note 50, at 9 (listing all penalties collected for noncompliance). In 1990, the statute set out a five-year timeline for museums to submit their inventories and a three-year timeline for summaries, and many museums submitted their documents late, if at all. See 25 U.S.C. §§ 3003–3004 (setting out these requirements); see, e.g., Graham & Murphy, *supra* note 3, at 108 (noting AMNH received an extension to submit its inventory late).

119. See Zoom Interview with David Tarler, *supra* note 32 (explaining that the amount of time it takes to conduct an investigation of an allegation of failure to comply with NAGPRA “depends on whether there’s staff available to do that . . . On and off we had a part time investigator . . . We’ve had in the last two years a full time investigator”).

120. See 2024 National NAGPRA Program Report *supra* note 50, at 9 (reporting current status of investigations).

121. Compare *id.* at 9, with NAT’L NATIVE AM. GRAVES PROT. & REPATRIATION ACT PROGRAM, FISCAL YEAR 2022 REPORT 10 (2022) (reporting 63 allegations pending of 122 received).

122. See Jenna Kunze, *Department of the Interior Has Hired its First Full-Time Investigator to Ensure Museum Compliance with the Native American Graves Protection and Repatriation Act*, NATIVE NEWS ONLINE (Feb. 1, 2022) [hereinafter Kunze, *Department of*

Investigations can involve gathering information from reporters, museums, Indian Tribes and NHOs, confidential informants, and the individual who submitted the allegation. However, because National NAGPRA only conducts investigations in reaction to written allegations of failure to comply submitted by the public, it often has insufficient information to stage a full inquiry.¹²³ Though National NAGPRA Program Manager Melanie O'Brien has stated that the civil penalties assessed do not represent the degree of enforcement that has occurred,¹²⁴ in practice, enforcement has been lackluster, self-administered by museums, and difficult for tribes and individuals to access.

4. Federal Recognition Requirement

Finally, Indian Tribes and Indian groups without federal recognition have criticized NAGPRA for the fact that it only applies to federally recognized tribes.¹²⁵ As a result, NAGPRA excludes from its protections both Indigenous groups that were never federally recognized by the United States and tribes that were stripped of their federal recognition in the 1950s and 60s and

the Interior], <https://nativenewsonline.net/currents/departments-of-the-interior-has-hired-its-first-full-time-investigator-to-ensure-museum-compliance-with-the-native-american-graves-protection-and-repatriation-act> [https://perma.cc/ZP7F-EXL7]. National NAGPRA has employed a full-time investigator since early 2022. See *id.* Earlier, it employed a part-time investigator “on and off.” See Zoom Interview with David Tarler, *supra* note 32.

123. See Zoom Interview with David Tarler, *supra* note 32 (describing the investigative process). Some judicial alternatives are available; NAGPRA provides a private right of action that allows parties to sue to enforce the law. See 25 U.S.C. § 3013 (“The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.”); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003), *aff’d*, 417 F.3d 1091 (9th Cir. 2005) (“There is a private right of action under NAGPRA.”). But see *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1406 (D. Haw. 1995) (finding that an NHO could not bring suit to enforce NAGPRA on behalf of plaintiff Native Hawaiian human remains because “the court assume[d] Congress did not consider human remains as having a legally-protected interest under the Act”). A party may also challenge a final agency decision regarding NAGPRA under the Administrative Procedure Act. See, e.g., *Bonnichsen v. United States*, 367 F.3d 864, 882 (9th Cir. 2004) (rejecting DOI’s determination that the Ancient One was a Native American within NAGPRA’s definition). For additional information regarding *Bonnichsen* and the Ancient One, see *supra* note 69.

124. See Kunze, *Department of the Interior*, *supra* note 122.

125. See Manda N. McElrath, Note, *Empty Graves and Full Museums: The Need to Include Non-Federally Recognized Tribes in NAGPRA Claims*, 55 U.C. DAVIS L. REV. 2463, 2472 (2022) (arguing NAGPRA’s federal recognition requirement ignores tribal perspectives). Federal recognition confers a status that creates a government-to-government relationship between the tribe and the United States, often via treaty. See *id.*

never restored.¹²⁶ Excluding Indian groups without federal recognition from NAGPRA makes it easier for museums to hold onto CUI human remains that could otherwise be repatriated.¹²⁷ For example, in Texas, ancestors claimed by the Karankawa Kadla are listed as CUI on museum inventories.¹²⁸ Due to their lack of federal recognition, descendants of the Karankawa, a tribe once thought to be extinct, have been unable to bring repatriation claims under NAGPRA.¹²⁹ Despite their attempts to negotiate the return of these ancestral human remains, museums have no legal obligation to cooperate with the Karankawa Kadla, and the group's efforts have been largely unsuccessful.¹³⁰ The result is that, in some instances, rather than open doors to museum transparency and repatriation, NAGPRA can create statutory bars that deny certain groups the right to their cultural heritage and ancestors.¹³¹

In 1990, NAGPRA represented a victory for Indigenous peoples of the United States and an unequivocal departure from the ills of past collecting eras.¹³² By the 2020s, however, facing the forces of

126. See *id.* at 2472 (noting how recognition status creates inequities among Indigenous groups). From 1953 to 1970, Congress terminated the federal recognition of dozens of Indian Tribes, stripping them of federal aid, federal services, and the protections of the federal trust relationship. See *Bureau of Indian Affairs Records: Termination*, NAT'L ARCHIVES (Sep. 9, 2024), <https://www.archives.gov/research/native-americans/bia/termination> [<https://perma.cc/XW27-XMPY>].

127. See McElrath, *supra* note 125, at 2488 (arguing many such remains are affiliated with these Indian groups).

128. See Indigenous Peoples of Coastal Bend, Comment Letter on Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, at 1 (Jan. 17, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0106> [<https://perma.cc/49VS-29QX>] ("The museums have determined that these human remains are unaffiliated, but they actually belong to the Karankawa and their ancestors.").

129. See *id.* at 1–2 (explaining this conflict).

130. See *id.* at 2 ("Their application was rejected because they were not a federally recognized tribe, nor could they establish cultural affiliation or lineal descent with the remains. Parties on both sides agreed the remains were ancestral to the Karankawa, but the Karankawa were then believed to be extinct."). The California Native American Graves Protection and Repatriation Act ("CalNAGPRA") is the best-known and most comprehensive state statute that seeks to fill the federal recognition gap in NAGPRA by including in its purview Indian groups that have state recognition but not federal recognition. Naturally, CalNAGPRA only applies in California, and is therefore of limited utility. Most other states, including the Karankawa Kadla's home state of Texas, have not adopted similar statutes. For additional commentary, see McElrath, *supra* note 125, at 2490.

131. See McElrath, *supra* note 125, at 2492–93 ("Despite NAGPRA's goal of protecting the rights of the disenfranchised, it actually results in the elimination of rights for [Indian groups without federal recognition] . . . The federal recognition process is flawed, state recognition is limited, and standards are often impossible to meet.").

132. See *supra* Part I.B.

CUI designations, destructive analysis, inadequate enforcement, widespread museum and federal agency inaction, and statutory red tape, NAGPRA stakeholders called for change. To bring home all of the ancestors and all of the cultural objects remaining in collections, the NAGPRA regulations needed a modern overhaul.¹³³

III. RENEWING PROMISES: TRIUMPHS AND TRIBULATIONS IN THE 2023 RULE

In response to criticisms of NAGPRA and calls for reform from stakeholders across the country, DOI promulgated the 2023 Rule on December 13, 2023.¹³⁴ According to one DOI official, the primary goal of the 2023 Rule is “to simplify and improve the regulatory process for repatriation.”¹³⁵ Part III.A provides an overview of the 2023 Rule by describing the benefits and drawbacks of four of its most significant changes: eliminating the CUI category, changes to cultural affiliation, the addition of a duty of care, and the imposition of new timelines for compliance. The 2023 Rule has largely been well-received by NAGPRA practitioners, but its failure to provide sufficient guidance, funding, or incentives threatens its potential for efficacy. Drawing on interviews with active anthropologists, attorneys, and repatriation professionals, Part III.B presents several unanswered questions and barriers to compliance, including lack of funding and confusion around research prohibitions, that could impede the 2023 Rule’s implementation and prevent interested parties from meeting its goals.

133. See Hutt, *supra* note 93, at 22 (“Publication of pending comprehensive NAGPRA regulations will rectify over 30 years of confusing guidance that enabled stalled repatriation and litigation.”).

134. See Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86452, 86452 (Dec. 13, 2023) [hereinafter Preamble to the 2023 Rule] (listing the date of publication in the Federal Register). The 2023 Rule went into effect on January 12, 2024. See 43 C.F.R. § 10.1 (2024) (setting the effective date). After a thirteen-year wait for revised regulations, institutions impacted by NAGPRA reform had only thirty days (which included Christmas and the New Year) to comply with the requirements of the new regime. See *id.*; see generally 2010 Rule, *supra* note 94 (revising NAGPRA regulations in 2010, the last revision prior to 2023).

135. The Long Journey Home, *supra* note 34, at 5 (testimony of Joy Beasley) (“The goal of the revisions is to simplify and improve the regulatory process for repatriation by streamlining existing regulatory requirements, shifting excessively burdensome and complicated procedures, and clarifying timelines.”).

A. OVERVIEW: THE 2023 NAGPRA RULE REVISION

1. *Removing the Culturally Unidentifiable Category*

The centerpiece of the 2023 Rule is the elimination of the entire category of CUI human remains and cultural items.¹³⁶ Because museums and federal agencies had no repatriation obligations for CUI collections, the status quo presented an enormous hurdle to the fulfillment of NAGPRA's purpose.¹³⁷ The 2023 Rule attempts to remedy this state of affairs by requiring that museums and federal agencies determine the cultural affiliations of these collections in consultation with lineal descendants, Indian Tribes, and NHOs.¹³⁸

Though it is still technically possible to find that “[n]o lineal descendant or any Indian Tribe or [NHO] with cultural affiliation can be clearly or reasonably identified,”¹³⁹ this outcome is meant to be exceedingly rare, and three elements will distinguish such findings from CUI determinations made before the 2023 Rule.¹⁴⁰ First, museums and federal agencies are now required to use the information currently available to them to invite lineal descendants, Indian Tribes, and NHOs to consult on determinations of cultural affiliation.¹⁴¹ Second, no later than January 10, 2029, the museums and federal agencies must submit revised inventories of their previously-CUI holdings to National NAGPRA for publication in the Federal Register.¹⁴² If they cannot clearly or reasonably identify cultural affiliation, they must

136. See generally NAT'L PARK SERV., *Deep Dive into Repatriation of Human Remains and Associated Funerary Objects* (ZOOM Feb. 16, 2024) [hereinafter *Repatriation of Human Remains*], https://doitalent.zoomgov.com/rec/share/hXbXvkyq_uxTmwxyzLlVOoc30WVLcf7fDADk9N0W1exd23nJ1E6KFtAsbT-rkgFh.5GrSR-Dw1wxN_EW3 [https://perma.cc/RR2Z-EH52] (explaining new procedures for formerly-CUI human remains).

137. See *supra* Part II.B.1.

138. See 43 C.F.R. §§ 10.10(c)–(d) (2024) (setting out new procedures for creating inventories of human remains).

139. *Id.* § 10.10(d)(1)(iii)(D) (2024).

140. See Zoom Interview with David Tarler, *supra* note 32 (distinguishing the pre-2023 Rule CUI category from the post-2023 Rule category of human remains and cultural items that cannot be culturally affiliated).

141. See 43 C.F.R. § 10.10(b) (2024) (“As soon as possible after compiling an itemized list, a museum or Federal agency must identify consulting parties based on information available and invite the parties to consult.”); *infra* Part III.A.2.

142. See *id.* § 10.10(e) (2024) (“No later than six months after completing or updating an inventory under paragraph (d) of this section, a museum or Federal agency must submit a notice of inventory completion for all human remains or associated funerary objects in the inventory.”).

include in their inventory a brief description of the information considered and a justification of how the determination was made.¹⁴³ Third, while CUI collections were not previously published in notices of inventory completion, the 2023 Rule requires published notices of inventory completion to include all NAGPRA-eligible human remains and cultural items regardless of cultural affiliation.¹⁴⁴ This new system provides tribes with far more access and transparency in cultural affiliation decisions.¹⁴⁵

The elimination of the CUI category¹⁴⁶ impacts the rest of the 2023 Rule.¹⁴⁷ Museums and federal agencies must attempt to determine the cultural affiliation of more than 100,000 formerly-CUI individuals¹⁴⁸ through consultation, while simultaneously navigating several changes to cultural affiliation itself,¹⁴⁹ a new duty of care with stringent requirements for handling human remains and cultural items,¹⁵⁰ and tight compliance deadlines.¹⁵¹ This long-awaited increased pressure on museums and federal agencies to determine cultural affiliation for these remains has already had—and will continue to have—an enormous positive impact on the pace of repatriations.¹⁵²

143. See *id.* § 10.10(d)(1)(iii)(D) (2024) (“[I]f no lineal descendant or any Indian Tribe or Native Hawaiian organization with cultural affiliation can be clearly or reasonably identified[, t]he inventory must briefly describe the information considered under § 10.3(a) of this part and the criteria identified under § 10.3(b) of this part to explain how the determination was made.”).

144. See *id.* § 10.10(d) (2024) (setting inventory requirements). Publication gives notice to potential interested parties that were not invited to consult on the inventory. See Zoom Interview with David Tarler, *supra* note 32.

145. See *Repatriation of Human Remains*, *supra* note 136, at 28:54–30:37 (listing topics that should be addressed in consultation, including the duty of care, timelines for consultation, methods of consultation, and financial support for the repatriation process).

146. In other words, although it remains possible to determine that some human remains or cultural items cannot be culturally affiliated, such property will no longer be designated CUI. Under the 2023 rule, stricter reporting requirements apply to human remains or cultural items than applied to CUI human remains under the previous regime. Contrast 43 C.F.R. § 10.10 (2024) with 2010 Rule, *supra* note 94, at 12402–05 (revising 43 C.F.R. § 10 to add § 10.11, regarding disposition of culturally unidentifiable human remains, with a focus on consultation).

147. See *Repatriation of Human Remains*, *supra* note 136 *passim* (addressing concerns about the consent requirement and new processes for repatriating human remains).

148. This figure is based on 2022 testimony reporting that of 117,000 individuals remaining in museum and federal agency collections, 94% were designated CUI. See *The Long Journey Home* (testimony of Joy Beasley), *supra* note 34, at 4–5; *supra* notes 102 and 103 and accompanying text.

149. See *infra* Part III.A.2.

150. See *infra* Part III.A.3.

151. See *infra* Part III.A.4.

152. See 2024 National NAGPRA Program Report, *supra* note 50, at 4 (listing the 20 largest remaining collections).

2. *Changes to Cultural Affiliation and Consultation*

Under the 2023 Rule, lineal descendants, Indian Tribes, and NHOs gain increased opportunities and flexibility to demonstrate cultural affiliation.¹⁵³ For example, museums and federal agencies must now identify appropriate lineal descendants, Indian Tribes, or NHOs and proactively invite them to consult on the disposition of human remains and cultural items and participate in the repatriation process.¹⁵⁴ Additionally, the 2023 Rule responds to the issue of multiple possible affiliations¹⁵⁵ by allowing multiple Indian tribes or NHOs to be culturally affiliated with the same human remains or cultural item and bring joint requests for repatriation.¹⁵⁶ In the event of competing requests, the 2023 Rule also provides a detailed hierarchy that can be used to determine the “closest” culturally affiliated Indian Tribe.¹⁵⁷ The 2023 Rule also stresses that the ten listed types of evidence—including folkloric and oral traditional evidence—are “equally relevant” for determining cultural affiliation¹⁵⁸ and allows human remains and cultural items to be affiliated solely on the basis of geographic evidence.¹⁵⁹ These changes collectively prioritize consultation with

153. See 43 C.F.R. § 10.3(c)–(d) (2024) (providing for multiple affiliations).

154. See, e.g., *id.* § 10.1(d)(1) (2024) (requiring museums and federal agencies to “[c]onsult with lineal descendants, Indian Tribes, or Native Hawaiian organizations on the appropriate storage, treatment, or handling of human remains or cultural items”); *id.* § 10.9(b) (2024) (“No later than 30 days after compiling a summary, a museum or Federal agency must identify consulting parties based on information available and invite the parties to consult” on unassociated funerary objects, sacred objects, and objects of cultural patrimony.); *id.* § 10.10(b) (2024) (“As soon as possible after compiling an itemized list, a museum or Federal agency must identify consulting parties based on information available and invite the parties to consult” on human remains and associated funerary objects.).

155. See *supra* Part II.B.2.

156. See 43 C.F.R. § 10.3(c)–(d) (2024) (discussing joint repatriation requests, which are not considered competing requests).

157. See *id.* § 10.3(e) (“In support of a competing claim or request, each claimant or requestor may provide information to show by a preponderance of the evidence that it has a stronger relationship of shared group identity to the human remains or cultural items.”). The 2023 Rule prioritizes clear affiliation, followed by reasonable affiliation based on geography and acquisition history, followed by reasonable affiliation based on geography only, followed by reasonable affiliation based on acquisition history only. See *id.*

158. *Id.* § 10.3(a)(1) (2024).

159. See *id.* § 10.3(c)(1)(ii) (2024) (“Cultural affiliation [may be] identified reasonably by the geographical location or acquisition history”). This standard of “reasonabl[e]” identification via geographic evidence is lower than the “clearly” identifiable evidentiary standard required for a determination of cultural affiliation based on any other type of evidence (e.g. archaeological, biological, historical, or oral traditional). See *id.* § 10.3(c)(1)(i)–(ii) (2024).

lineal descendants, Indian Tribes, and NHOs as the foundation of determining cultural affiliation.¹⁶⁰

Despite the openness, information-sharing, and collaboration encouraged by the changes to cultural affiliation, these updates severely disadvantage Indian groups without federal recognition by completely removing any references to them from the text of the regulations and prioritizing the rights of federally recognized Tribes in “disposition and repatriation.”¹⁶¹ Prior to the 2023 Rule, museums had no obligation to work directly with Indian groups without federal recognition.¹⁶² Now, museums are barred from repatriating human remains and cultural items to these groups under NAGPRA.¹⁶³ Though this change was meant to “emphasize[] and recognize[] that the Act reflects the unique relationship between the federal government and Indian Tribes and NHOs,”¹⁶⁴ it ignores the reality that Indian groups without federal recognition nonetheless claim ancestral remains and cultural items that museums and federal agencies continue to hold.¹⁶⁵ The suggestion in the Preamble to the 2023 Rule that “Indian groups without Federal recognition can work with

160. See *id.* §§ 10.9(b), 10.10(b) (2024) (requiring consultation early and often in the repatriation process).

161. See Preamble to the 2023 Rule, *supra* note 134, at 86453 (“[T]he final rule . . . [r]emoved all reference to Indian groups without Federal recognition and prioritized the rights of federally recognized Indian Tribes in disposition and repatriation.”). In contrast, previous regulations required museums to acknowledge Indian groups without federal recognition that may have a relationship to collections of human remains and associated funerary items. This provision is absent from the 2023 Rule. See *id.* at 86457 (“Under the [2010 Rule], museums and Federal agencies were required to [] provide to Indian Tribes and NHOs a list of Indian groups without Federal recognition that may have a relationship to human remains and associated funerary items.”).

162. See *supra* Part II.C.4.

163. Because the definition of cultural affiliation in the 2023 rule entails federal recognition, it is not possible for human remains or funerary objects to be culturally affiliated with an Indian group without federal recognition. However, National NAGPRA guidance indicates that Indian groups without federal recognition can partner with a federally-recognized Indian Tribe to bring a joint repatriation claim. See NAT’L PARK SERV., *NAGPRA and Indian Groups without Federal Recognition*, at 13:21 (ZOOM, July 19, 2024) [hereinafter *NAGPRA and Indian Groups without Federal Recognition*], https://doitalent.zoomgov.com/rec/share/R3v_Ncz1cyjk3HR53PAeyJ9cy2mD22Chta0zF4D6li6EiyC-ov8zwrLcPg74EHd8.2YtlAsDEvd1CRzwX?startTime=1721408513000 [https://perma.cc/93YT-LKYR] (“I want to be very clear at the very beginning of this webinar that Indian groups are not excluded from the repatriation or disposition process. As is the current practice prior to these new regulations, Indian groups without Federal recognition, can, and have very successfully worked with Federally recognized Indian tribes as a part of a joint request for repatriation. That option is still there.”).

164. Preamble to the 2023 Rule, *supra* note 134, at 86505.

165. See Indigenous Peoples of Coastal Bend, *supra* note 128 (regarding Karankawa ancestral remains).

federally recognized Indian Tribes as part of a joint request for repatriation,” awkwardly pushes such groups to the outskirts of the rule, technically acknowledging them but formally excluding them from the benefits of NAGPRA.¹⁶⁶

3. *The Duty of Care and Consent Requirement*

The 2023 Rule’s new duty of care requirement charges each museum and federal agency with the responsibility to “care for, safeguard, and preserve any human remains or cultural items [as defined under NAGPRA] in its custody or in its possession and control.”¹⁶⁷ It lists three specific duties, one of which is the duty to “[o]btain free, prior, and informed consent from lineal descendants, Indian Tribes, or [NHOs] prior to allowing *any exhibition of, access to, or research on* human remains or cultural items.”¹⁶⁸ The same provision in the 2022 Draft Rule required museums and federal agencies to, “to the maximum extent possible,” “[l]imit access to and research on human remains or cultural items.”¹⁶⁹ The latter would have let museums maintain discretion to access their collections and update exhibits.¹⁷⁰ Instead, the 2023 Rule suddenly

166. Preamble to the 2023 Rule, *supra* note 134, at 86505.

167. 43 C.F.R. § 10.1(d) (2024).

168. *Id.* § 10.1(d)(3) (2024) (emphasis added). The other two duties require museums and federal agencies to “[c]onsult . . . on the appropriate storage, treatment, or handling of human remains or cultural items” and “[m]ake a reasonable and good-faith effort to incorporate and accommodate [] Native American traditional knowledge” in storage, treatment, and handling. *Id.* § 10.1(d)(1)–(2) (2024).

169. 2022 Draft Rule, *supra* note 17, at 63237 (emphasis added).

170. Some commenters on the 2022 Draft Rule asserted that even this standard was beyond the scope of NAGPRA. *See, e.g.*, Field Museum of Natural History, Comment Letter on Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony (Jan. 30, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0136> [<https://perma.cc/T5ES-8592>] (opposing the provision). Others, including both Indian Tribes and museums, called for higher standards. *See, e.g.*, Miccosukee Tribe of Indians of Florida, Comment Letter on Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony (Jan. 30, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0124> [<https://perma.cc/66PC-KYTW>] (supporting the provision from the tribal perspective); School of Human Evolution and Social Change, Arizona State University, Comment Letter on Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony (Jan. 11, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0125> [<https://perma.cc/DJ3U-W7HH>] (supporting the provision from the institutional perspective).

and unexpectedly stripped museums of this discretion, and many institutions needed to scramble to change, cover, and close exhibits.¹⁷¹ This was a dramatic shift that shocked and confused even museums that generally supported the revision.¹⁷²

As it applies to access and research, the duty of care plays a large role in shaping how museums can identify consulting parties and determine cultural affiliation.¹⁷³ Good-faith attempts to comply with this standard have raised questions about how to begin to assess CUI collections that, by their nature, are not yet determined to be culturally affiliated with any lineal descendant, Indian Tribe, or NHO.¹⁷⁴ Lacking sufficient capacity to handle these requests, museums have attempted to pass on the consent duty to individual scientists and researchers.¹⁷⁵

171. See Jacobs & Small, *supra* note 18 (reporting on AMNH's hall closures). But see Mary Hudetz & Logan Jaffe, *Some Museums Scrambled to Remove Native American Items From Display. These Museums Didn't Need To.*, PROPUBLICA (Feb. 21, 2024), <https://www.propublica.org/article/why-museum-of-us-history-colorado-didnt-scramble-meet-new-repatriation-rules> [<https://perma.cc/9ZZY-Y7WQ>] (highlighting the Museum of Us in San Diego, California, which was not impacted by this aspect of the rule because it had revised its internal policies to require consent for exhibition years earlier). The Field Museum covered some display cases housing Native American cultural items, but it struggled to find a method that both protected the cultural items from the public eye and kept them accessible to consulting parties. See Zoom Interview with June Carpenter (Osage/Shawnee), NAGPRA Director, Center for Repatriation, Field Museum of Natural History (Dec. 16, 2024) (transcript on file with the Columbia *Journal of Law & Social Problems*) (describing this problem). For example, an early solution involved covering the cases with paper, but curious museum attendees peeled back the paper to look inside the case. See *id.* Meanwhile, AMNH President Sean Decatur announced that AMNH would close two of its three Native American exhibition halls because it lacked sufficient consent for all of the cultural items on display. Despite leading an institution so heavily impacted by the new rule, Decatur remained supportive of the revision. Jacobs & Small, *supra* note 18.

172. But see Jacobs & Small, *supra* note 18 (reporting Decatur told his staff “[a]ctions that may feel sudden to some may seem long overdue to others.”).

173. See *Repatriation of Human Remains*, *supra* note 136, at 1:07:21 (“Duty of care is part of the consultation process. . .”).

174. See Zoom Interview with Steve Nash, *supra* note 105. “[Under] the old regulations you had to have good numbers on . . . number of individuals, age, and sex. It’s less clear that the new regulations require such precision in [inventories]. But the tribes that I’ve dealt with over the years want to know—again, because *they* don’t. Sometimes you handle men differently. Sometimes you handle women differently. Sometimes knowing those numbers is important . . . They’re supposed to have inventories done. But there are some museums that say ‘we can’t go to do the inventories without permission from the tribes.’” *Id.* See *infra* Part III.B.2.

175. See Zoom Interview with June Carpenter, *supra* note 171 (“Generally, we’re asking the researchers to get permission”).

4. *Timelines*

The 2023 Rule pushes back on institutional sluggishness by setting deadlines for nearly every step in the repatriation process.¹⁷⁶ In addition to the five-year deadline for submitting inventories of formerly-CUI collections, § 10.10 of the 2023 Rule sets deadlines for completion of inventories of certain other collections, submission of notices of inventory completion, responses to requests for repatriation, and repatriations.¹⁷⁷ National NAGPRA estimates that, based on these deadlines, repatriation under § 10.10 can take as few as 40 days or as many as three or more years to complete.¹⁷⁸ The deadlines put pressure on museums and federal agencies by leaving them with much less flexibility regarding the speed of repatriation work than they had under the former rule.¹⁷⁹ Sarah Ebel, General Counsel of the Field Museum, expressed concerns that responding in a timely manner to multiple simultaneous requests would be a “substantial burden” on repatriation staff.¹⁸⁰ Despite these concerns,¹⁸¹ the 2023 Rule

176. See 43 C.F.R. §§ 10.9–10 (2024) (setting compliance timelines).

177. See *id.* § 10.10 (2024) (listing each step of the repatriation process and associated deadlines). The inventory requirement supports transparency and oversight. Inventories of human remains and associated funerary objects are provided to National NAGPRA and consulting parties, and notices of inventory completion are published in the Federal Register. See *id.* §§ 10.10(d)–(e) (2024). Likewise, summaries of collections of unassociated funerary objects, sacred items, and objects of cultural patrimony must be submitted to National NAGPRA and used to identify lineal descendants, Indian Tribes, and NHOs to invite to consult. See 43 C.F.R. §§ 10.9(a)–(b) (2024).

178. See *Steps to Repatriation*, NAT'L PARK SERV. (June 27, 2024), <https://www.nps.gov/subjects/nagpra/upload/National-NAGPRA-Program-Steps-to-Repatriation.pdf> [<https://perma.cc/A8S3-NW7G>] (compiling such estimates). § 10.10 governs repatriation of human remains or associated funerary objects. 43 C.F.R. § 10.10 (2024). § 10.9, which governs repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony, sets even tighter deadlines. See *id.* § 10.9 (2024). National NAGPRA estimates these repatriations could occur in as few as 39 days or in as many as 15 months plus consultation time. See *Steps to Repatriation*, *supra*.

179. See Zoom Interview with Sarah Ebel, General Counsel, Field Museum of Natural History (Dec. 2, 2024) (notes on file with the *Columbia Journal of Law & Social Problems*). This is especially true for steps of § 10.9 that must occur within 90 or even 30 days. *Id.*

180. *Id.* (concerning limited resources).

181. In comments on the 2022 Draft Rule, stakeholders mention these concerns repeatedly. See, e.g., Native American Graves Protection and Repatriation Review Committee, Comment Letter on Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony (Jan. 10, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0096> [<https://perma.cc/FZ28-EZ7P>] (characterizing proposed timelines as “almost impossible to meet”). National NAGPRA points out that the 2023 Rule does extend the proposed inventory deadline from two to five years. See Zoom Interview with David Tarler, *supra* note 32 (“If you take a look at the

kept these deadlines to provide what National NAGPRA calls a “roadmap” through the steps of the repatriation process¹⁸² with clear expectations for what constitutes timely compliance.¹⁸³

Overall, most disagreements about NAGPRA arise out of conflicting views of how best to fulfill its promise, not conflicts over the validity of the law itself.¹⁸⁴ Despite mixed reactions to the draft rule and new challenges presented by the 2023 Rule, even heavily impacted institutions recognize the importance of the revision and generally support its goals.¹⁸⁵

B. UNANSWERED QUESTIONS AND BARRIERS TO COMPLETING REPATRIATION WORK

Though the 2023 Rule fills many of the gaps in the previous NAGPRA regime, it has also exacerbated funding problems, confused museums into inaction, and neglected to address the potential nuances of relationships between tribes. National NAGPRA can ensure the 2023 Rule realizes its full potential by incentivizing museums to invest in their repatriation efforts and providing more comprehensive guidance that reflects an understanding of stakeholder expectations.

1. *Funding and Capacity*

The single greatest barrier to repatriation is lack of resources for both tribes and museums, and the 2023 Rule does not

proposed regulation, we had a two-year timeline to complete inventories for human remains that had been in [collections] prior to January 12th, 2024. That was two years. Based on the comments we got, we increased that to five years. That was a response to museums.”).

182. See *NAGPRA and Indian Groups without Federal Recognition*, *supra* note 163, at 04:55 (“The overall goals for the regulations were to clarify and improve these processes, to provide a step by step roadmap with timelines throughout the regulations, and to better align the processes with the Act and Congressional intent.”).

183. See Zoom Interview with David Tarler, *supra* note 32 (arguing the timelines should not be burdensome because most repatriation claims are discussed in advance during consultation and museums will rarely be surprised by an unexpected new claim). Whether or not museums will be held accountable for non-compliance is another matter. See *infra* Part IV.A.

184. See, e.g., Zoom Interview with Steve Nash, *supra* note 105 (expressing consent requirement concerns).

185. See Zoom Interview with June Carpenter, *supra* note 171 (describing benefits of the 2023 Rule’s new obligations for museums, such as developing new relationships with tribes and deferring to traditional knowledge).

adequately respond to this problem.¹⁸⁶ NAGPRA practitioners struggle to fund consultation efforts, repatriations, and staff salaries. The Secretary of the Interior does offer grants to support repatriation work,¹⁸⁷ but these grants are highly competitive and heavily qualified.¹⁸⁸ Moreover, the federal grant application system can be “cumbersome and onerous,” creating additional barriers for Indian Tribes and museums.¹⁸⁹

a. *Funding Tribal Historic Preservation Offices*

The 2023 Rule spurred action on the part of museums and federal agencies, inundating Tribal Historic Preservation Officers (THPOs) with far more requests for consultation and consent for research than they typically receive.¹⁹⁰ Dedicated federal funding

186. See Zoom Interview with Trevor Reed (Hopi), Professor of Law, Sandra Day O'Connor College of Law, Arizona State University (Dec. 13, 2024) (transcript on file with the *Columbia Journal of Law & Social Problems*) (“Resources have always been a challenge. I’ve seen some of these NAGPRA offices, and they’re woefully understaffed, especially for tribes that don’t have an alternative source of revenue . . . There needs to be a more robust system of providing resources to tribes.”).

187. See 25 U.S.C. § 3008(a) (“The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.”); § 3008(b) (“The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 3003 and 3004 of this title.”). For example, in 2024, National NAGPRA distributed \$3.4 million in grants to 13 Indian Tribes and 21 museums, bringing its total distribution since 1994 to over \$62 million. See 2024 National NAGPRA Program Report, *supra* note 50, at 10 (calculating grants to date).

188. For example, the grants are made on a per-project basis for repatriation and consultation and cannot be used to cover the cost of hiring and paying employees. See *The Long Journey Home*, *supra* note 34, at 25–26 (testimony of Valerie Grussing, Executive Director, National Association of Tribal Historic Preservation Officers) (“Funding needs from Tribes exceed the available grant appropriation and the maximum grant cap ensures that progress towards repatriation is piecemeal and slow.”).

189. Zoom Interview with Trevor Reed, *supra* note 186.

190. See Zoom Interview with Steve Nash, *supra* note 105 (“I believe that museums overreacted and the work of tribal nations just went up exponentially.”). Under the 2023 Rule’s duty of care, any museum that wants to exhibit Native American cultural items and any academic that wants to perform research must request consent from the tribe culturally affiliated with each item. See *supra* Part III.A.1. Christopher Caseldine, Assistant Research Professor and Curator of Collections at Arizona State University, explained in a May 2024 presentation to the NAGPRA Review Committee that “increased engagement from museums and Federal agencies is stretching the capacity of Tribes we consult with.” 2024 NAT’L NAGPRA PROGRAM, NAGPRA REVIEW COMMITTEE MEETING 88, at 17 (2024) (testimony of Chris Caseldine) [hereinafter 2024 NAGPRA REVIEW COMMITTEE MEETING], <https://irma.nps.gov/DataStore/DownloadFile/707465> [https://perma.cc/PZG4-8U22]. Caseldine supports a strong duty of care provision, but he recognizes that it creates an overwhelming additional burden on THPOs without a matching increase in funding. See Zoom Interview with Chris Caseldine, Ph.D., Assistant Research Professor and Curator of

for Tribal Historic Preservation Offices covers an average of only one staff member and cannot be used to cover a THPO's NAGPRA duties.¹⁹¹ Most THPOs simply do not have sufficient resources to keep up with the demand to fulfill these requests, let alone to produce annual NAGPRA grant applications.¹⁹² The 2023 Rule has only exacerbated the problem by increasing the burden of responding to so many requests.¹⁹³ Additionally, turnover in THPO roles can be high due to the emotional difficulty¹⁹⁴ of their work, and vacancies can be difficult to fill because the job requires both expertise and, often, a willingness to live near the tribe.¹⁹⁵ In some cases, when an Indian Tribe does not have a THPO, it will cede control of a repatriation to another Indian Tribe with more resources, meaning a lack of funding for THPOs has a direct

Collections, Ctr. for Archaeology & Society, Sch. of Human Evolution & Soc. Change, Ariz. State Univ. (Dec. 4, 2024) (transcript on file with the *Columbia Journal of Law & Social Problems*) ("It's putting a lot of undue burden onto museums that are actually trying to do it right, and onto the tribes themselves.").

191. See *The Long Journey Home*, *supra* note 34, at 25 (testimony of Valerie Grussing) (regarding funding difficulties). A relatively large and well-funded THPO's office may have two or even three employees, but most have no more than one overextended officer. See Zoom Interview with Chris Caseldine, *supra* note 190 (discussing insufficient tribal capacity to support repatriations).

192. See Zoom Interview with Chris Caseldine, *supra* note 190 ("Tribal entities, like tribal historic preservation offices or cultural entities, are now getting slammed, going from [managing consultation requests from] maybe ten institutions and museums at a time to ninety. There's no additional funding going to them, and they have to compete for the same pool of money as everybody else.").

193. See Zoom Interview with Steve Nash, *supra* note 105 ("We've just overwhelmed the tribal nations with responsibilities, particularly with a strident read of the new regulations.").

194. Lengthy, sometimes fruitless battles for the return of important ritual objects and the bodies of stolen ancestors can be taxing and distressing for Indigenous stakeholders. See Logan Jaffe et al., *The Repatriation Project: America's Biggest Museums Fail to Return Native American Human Remains*, PROPUBLICA (Jan. 11, 2021), <https://www.propublica.org/article/repatriation-nagpra-museums-human-remains> [<https://perma.cc/L98V-MSA3>] (describing how a lack of enforcement leaves tribes to shoulder the emotional burden of NAGPRA work). THPOs assume responsibility for the preservation of their tribe's history, culture, and lands. Their work may include operating museums, archives, and tourism programs; providing technical expertise for language rejuvenation projects; implementing NAGPRA at the local level; locating and documenting tribal cemeteries; or liaising with state and federal agencies. See NAT'L ASSOC. OF TRIBAL HIST. PRESERVATION OFFICERS, *Letter on Tribal Historic Preservation Officers Services* (May 2006), https://growthzonecmsprodeastus.azureedge.net/sites/1222/2021/07/2006_success_stories-6b47c3ea-fb62-4cf3-b3eb-d79ca68b3348.pdf [<https://perma.cc/VFE6-D6VR>].

195. See Zoom Interview with Steve Nash, *supra* note 105 (explaining factors that lead to understaffing in tribal historic preservation offices and NAGPRA offices); Zoom Interview with June Carpenter, *supra* note 171 (noting high turnover among THPOs and NAGPRA practitioners).

impact on Indian Tribes' ability to participate in NAGPRA repatriations.¹⁹⁶

b. *Funding Museum NAGPRA Teams*

NAGPRA offices at museums—even major institutions—also lack funds to shoulder their new NAGPRA duties. For example, in January 2023, as part of an investigative journalism series calling out museums with collections of human remains, ProPublica reported the Field Museum “has received more federal money to comply with NAGPRA than any other institution in the country.”¹⁹⁷ Still, Field Museum Repatriation Director Helen Robbins explained that, despite these grants, the museum’s repatriation work suffers from insufficient funding and staff.¹⁹⁸ Since 2023, the Field Museum has doubled its repatriations team from three to six employees and, for the first time, initiated fundraising efforts to directly support its repatriation work.¹⁹⁹ According to Field Museum NAGPRA Director June Carpenter, this type of expansion requires repatriation professionals to engage in the difficult task of convincing their superiors that NAGPRA must be treated—and funded—like an organizational priority.²⁰⁰

Even with institutional support, the costs of repatriation can be immense.²⁰¹ In a presentation to the NAGPRA Review Committee, Curator of Collections Chris Caseldine reported that from 2021 to 2024, Arizona State University required \$1.5 million to support its

196. See Zoom Interview with June Carpenter, *supra* note 171 (“It may be one main group that’s taking the lead on the request and the actual return . . . One tribe may have more resources, more capacity to be able to handle a request. There’s a lot of turnover, too, in these positions within tribes. One may not have a NAGPRA representative at the moment.”).

197. Jaffe et al., *supra* note 194. The article was published as part of an investigative journalism series calling out museums with collections of human remains. See *id.*

198. *Id.* (defending the amount of grant funding the Field Museum has received).

199. Zoom Interview with June Carpenter, *supra* note 171 (explaining that seeking repatriation-directed donations is “something [the museum] hadn’t really done in the past”). However, even with increased staff, Carpenter’s team did not have the capacity to prepare NAGPRA grant applications in 2024. See *id.* (“I’m not applying for [grants] right now, because I don’t even have time to do that.”).

200. See *id.* (“It’s been a process of working with our president, vice president, etc. to really emphasize how much the museum needs to make NAGPRA a priority . . . [T]he museum recognizes that more funding needs to be put towards repatriation.”).

201. See Zoom Interview with Chris Caseldine, *supra* note 190 (explaining that Arizona State University is more financially supportive of NAGPRA efforts than some peer institutions).

NAGPRA repatriation efforts.²⁰² He estimates that over the next ten years, without expanding his team, the costs of repatriation at Arizona State University will reach over \$10 million.²⁰³ These projections shine a light on the extraordinary inadequacy of the National NAGPRA grant system.²⁰⁴

c. Funding NAGPRA at DOI

DOI has been dismissive of practitioners' claims that NAGPRA work is so costly. In its responses to comments on the draft version of the 2023 Rule, DOI rejected several methodologies that estimated the industry-wide annual cost of NAGPRA repatriation in the tens of millions of dollars or more.²⁰⁵ DOI "believe[s] that any estimate based on current practice or past grant awards is inherently flawed and does not account for the specific objective of [the 2023 Rule] to simplify and improve the systematic processes within specific timeframes."²⁰⁶ It asserts that past practice is not indicative of future costs because, while the estimates undersell how much time museums and federal agencies *actually* spend on repatriation, the estimates reflect the amount of time the 2023 Rule *requires* institutions to spend.²⁰⁷ This is a flawed assessment of how the 2023 Rule will "simplify" NAGPRA processes; while it clarifies requirements for each step of the repatriation process, the timelines imposed by the 2023 Rule mean that museums are likely to need to spend *more* time and resources on NAGPRA in the coming years, not less.²⁰⁸

202. See 2024 NAGPRA REVIEW COMMITTEE MEETING, *supra* note 190, at 17 (discussing funding needs). Arizona State University's School of Human Evolution and Social Change houses substantial federal and state collections. See Zoom Interview with Chris Caseldine, *supra* note 190 (describing the School of Human Evolution and Social Change's collection, which serves as a repository for the Arizona Board of Regents and includes objects excavated on private land and collections controlled by federal agencies).

203. See Zoom Interview with Chris Caseldine, *supra* note 190 ("Over ten years, just keeping the teams we have now, for both [Arizona Board of Regents] and federal agency collections], it's going to be over \$10 million.").

204. See 2024 NAGPRA REVIEW COMMITTEE MEETING, *supra* note 190, at 17 ("Federal funding provided for NAGPRA is insufficient . . . We are grateful for the funding we have received and put it to its intended use, but it's not enough.").

205. See Preamble to the 2023 Rule, *supra* note 134, at 86509 (assessing various calculations).

206. *Id.*

207. *Id.*

208. See, e.g., Zoom Interview with Chris Caseldine, *supra* note 190 ("My concern is, the current tenor and messaging coming out of National NAGPRA could give museums the impression that once we get the notices out and we move on with it, it's fine. That's not

Meanwhile, even the funding provided by National NAGPRA grants may be in jeopardy.²⁰⁹ Prior to President Donald Trump's second inauguration, National NAGPRA had quietly continued its grantmaking through multiple administrations led by either political party, but if NAGPRA is targeted by the current administration as a diversity, equity, and inclusion (DEI) measure, these grants could be on the chopping block.²¹⁰ On January 27, 2025, the Office of Management and Budget released a memorandum ordering a pause in federal grants to ensure that federal programs met the priorities of President Trump's administration.²¹¹ The National Institutes of Health has dramatically slashed funding, and employees at the National Science Foundation have combed through grant proposals and excised forbidden keywords, often related to DEI.²¹² Although the memorandum was quickly rescinded and the measure was blocked by two federal judges, federal grants remain in jeopardy.²¹³ So far, NAGPRA has not been threatened directly, but the administration could decide at any time that NAGPRA's benefits to Native Americans or its goal of providing redress for historical wrongs by

really how we view what should be done with repatriation.”). As Caseldine puts it, “If we do it right, there needs to be a lot more funding, and it's just going to take time.” *Id.*

209. See, e.g., Evan Bush et al., *Science Under Siege: Trump Cuts Threaten to Undermine Decades of Research*, NBC NEWS (Feb. 18, 2025), <https://www.nbcnews.com/science/science-news/trumps-nih-budget-cuts-threaten-research-stirring-panic-rcna191744>

[<https://perma.cc/8AYD-6CL4>] (“[The Trump] administration has frozen federal grants, ordered sweeping layoffs across federal agencies, cut funding for biomedical research and issued executive orders that threaten to shutter government programs focused on gender or diversity.”).

210. See, e.g., *id.* (“Desai, the White House spokesman, said in a statement that . . . the president had a mandate from voters to scrap diversity, equity and inclusion efforts he said were ‘choke-holding’ institutions.”).

211. See David A. Farenthold et al., *Trump's Attempt To Freeze Grant Funding Leaves Nonprofits Reeling*, N.Y. TIMES (Feb. 6, 2025), <https://www.nytimes.com/2025/02/04/us/politics/grant-funding-freeze-nonprofits.html> [<https://perma.cc/PF3J-VXR3>] (“The nonprofits whose funding remained blocked included several that focus on issues President Trump has targeted with his executive orders, like climate change, diversity and sexuality.”).

212. See Bush et al., *supra* note 209 (“At the [National Science Foundation], employees were enlisted to comb through tens of thousands of research grants in search of keywords that violated Trump's executive orders. Employees also scrubbed the keywords from project proposals and announcements.”).

213. See Farenthold et al., *supra* note 211 (“For the lucky others whose access to the funds was renewed, the episode demonstrated how easily the government could break their finances, by canceling contracts that previous administrations had agreed to. This vulnerability has forced them to slow spending, hand out pink slips and scrub websites of content that the new administration might deem too ‘woke.’”).

the United States support DEI and are opposed to the administration's goals.

Additionally, Indian Tribes are “eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians,” which reflects the particular relationship between the United States and Indian Tribes.²¹⁴ Nonetheless, programs meant to benefit Native Americans have been challenged in recent years based on the erroneous argument that these special programs and services are products of unlawful racial discrimination.²¹⁵ If the Trump Administration takes up this position, it may target any federal funding for these programs and services, including National NAGPRA grants.

2. *Research, Compliance, and the Consent Catch-22*

National NAGPRA and museum professionals often talk past one another in discussions of the research consent requirement, and National NAGPRA's reluctance to confront the issue directly in its guidance has created unnecessary confusion. The 2023 Rule's consent requirement is an important development that strengthens the right of Native Americans to control and protect their ancestors and cultural heritage, but a lack of sufficient guidance has left museums confused about how to implement it.²¹⁶

214. 43 C.F.R. § 10.2 (2024).

215. See, e.g., *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023) (rejecting petitioners' equal protection challenge to the Indian Child Welfare Act); *id.* at 310 (Gorsuch, J., concurring) (“Indian status is a ‘political rather than racial’ classification” (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974))). In *Mancari*, the Court found that “[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.” *Mancari*, 417 U.S. at 553 n. 24; accord *Halcrow*, *supra* note 41, at 214 (“NAGPRA and the recognition of tribal sovereignty over their archaeological human remains does not mean that there is ‘discrimination’ or ‘unfair advantage’ when it enables parts of society to achieve equality.”).

216. See NAT'L PARK SERV., *Deep Dive into Repatriation of Cultural Items*, at 39:55 (ZOOM, Mar. 15, 2024) [hereinafter *Repatriation of Cultural Items*], https://doitalent.zoomgov.com/rec/share/7mYJkquHMDUEzwWsfWJVtkzE7ujgicFIz22I6VDMzjVB7Z_0P5EYLTcMz-BjWqWLSe360KhK5yCg2AXt [https://perma.cc/EC62-8SXA] (“Where you're lacking consultation information to clearly identify those objects you have, as a museum, you have to exercise that discretion in your decision making. I hope that's an answer that helps, even if it may not be as clear of an answer as you were hoping for.”).

The duty of care provision requires museums to acquire “free, prior, and informed consent” before allowing research on human remains and cultural items.²¹⁷ It defines research as including, but not limited to, “any study, analysis, examination, or other means of acquiring or preserving information about human remains or cultural items.”²¹⁸ To many NAGPRA practitioners, such a broadly-defined prohibition on research is incompatible with the mandate to reassess CUI collections and invite lineal descendants, Indian Tribes, and NHOs to consult.²¹⁹ This is because the first step in the inventory process is creating an itemized list of human remains and associated funerary objects in the museum’s possession or control,²²⁰ and some practitioners read that provision to mean they must open containers storing NAGPRA material to identify accurate numbers, genders, and ages of human remains.²²¹ These practitioners find their good-faith repatriation efforts stymied by what they perceive as a catch-22 in which the museum must ask for consent to do research so it can determine who to ask for consent to do research.²²²

217. 43 C.F.R. § 10.1(d)(3) (2024).

218. *Id.* For additional discussion of the duty of care requirement, see *supra* Part III.A.3.

219. See Zoom Interview with Steve Nash, *supra* note 105 (noting that many museums have not fully catalogued their holdings and do not have sufficient information about what is in their collections); Zoom Interview with Eden Burgess, Partner, Schindler Cohen & Hochman LLP (Dec. 9, 2024) (transcript on file with author) (“With the new regulation[s], it’s a little difficult, because you’re not supposed to examine or research objects unless you have tribal permission. But how do you get tribal permission if you can’t do any research?”).

220. See 43 C.F.R. § 10.10(a) (2024) (“Based on information available, a museum or Federal agency must compile a simple itemized list of any human remains and associated funerary objects in a holding or collection . . . A museum or Federal agency must ensure the itemized list is comprehensive and covers all holdings or collections relevant to this section.”).

221. See Zoom Interview with David Tarler, *supra* note 32 (“Boxes and bags do not have to be opened, and it’s a shock to archaeologists and anthropologists when they hear it, because their discipline requires that.”).

222. See Zoom Interview with Trevor Reed, *supra* note 186. “We know that museums, researchers, especially in the past, weren’t great with collecting metadata information about the objects that they had in their collections. In fact, a lot of times it’s really sparse and very poorly documented . . . [W]e don’t have a lot of information, and so there’s a real need for research. The problem is that . . . researchers have used NAGPRA as a way to compel tribes to do more research, or for researchers to get an ‘in’ to do more research on tribes without tribal consent, saying that it’s under the guise of NAGPRA. And I think that was a real concern for a lot of tribes going into the new regulations and the consultations.” *Id.* Steve Nash, former Director of Anthropology at the Denver Museum of Nature and Science, suggests a distinction between prohibited forms of research, such as destructive DNA analysis, and collections management. The latter, he argues, is necessary “to be able to describe what you’ve got on your shelves” and properly comply with inventory requirements. See Zoom Interview with Steve Nash, *supra* note 105 (discussing duty of care confusion). To Nash, these collections management activities are necessary because

Even though NAGPRA has been enforced so sparingly,²²³ NAGPRA practitioners at museums approach their work with a desire to properly understand and comply with the law and the 2023 Rule. The chances of a museum facing civil enforcement under NAGPRA are extremely low.²²⁴ Since 1996, the Assistant Secretary for Fish and Wildlife and Parks has collected a total of only \$59,111 in penalties and settlements enforcing NAGPRA.²²⁵ Compliance, then, is driven not by fear of enforcement but by factors like museum professionals' good-faith desire to be respectful and accurate in returning Native American human remains and cultural items to their descendant communities.²²⁶ National NAGPRA, however, often fails to understand this museum practitioner perspective.²²⁷ In the monthly National NAGPRA webinar and Q&A, practitioners' questions regarding what kind of research is permissible are repeatedly met with a stock answer—"[r]esearch of any kind on human remains or cultural items is not required by the Act or these regulations"—that fails to directly answer the question.²²⁸ Even though research

museums possess old, uncatalogued collections and cannot compile accurate inventories without at least some minimal access and research. "To my mind," he says, "the museum shouldn't have to get permission to go and consult with 50 regional tribes to get permission to work on that box," especially if doing so will add to THPO workloads. *See id.*

223. *See* 2024 National NAGPRA Program Report, *supra* note 50, at 9 (reporting all enforcement actions taken since 1996); *see also* Zoom Interview with Steve Nash, *supra* note 105 ("It wasn't even self-policing—it certainly wasn't enforced.").

224. *See supra* Part II.B.3.

225. *See* 2024 National NAGPRA Program Report, *supra* note 50, at 9. From 1996 to 2024, National NAGPRA received 141 allegations of failure to comply. Of those, 68 have been resolved, 23 of which were substantiated, and 12 of which resulted in civil penalties or monetary settlements. *See id.* at 9.

226. Zoom Interview with Eden Burgess, *supra* note 219 (describing research concerns and lack of tribal resources as museums' "two big barriers to compliance, even with the best intentions"); Zoom Interview with Sara Ebel, *supra* note 179 ("People ascribe malice, when really it's a bunch of overworked people trying to do the best they can with the resources they have.").

227. *See Repatriation of Human Remains*, *supra* note 136, at 22:30 (dismissing a question about how to properly identify hazardous substances in or on collections by saying identification of hazardous substances is not required).

228. 43 C.F.R. § 10.1(d)(3) (2024); *accord Repatriation of Human Remains*, *supra* note 136, at 17:24 ("The itemized list . . . does not require research of any kind, nor study or analysis."). National NAGPRA notes other types of information can be used to identify consulting parties without researching NAGPRA material, such "previous inventories, catalog cards, accession records, visual inspection, etc." However, it is unclear how this permissible "visual inspection" differs from "physical inspection or review," which is prohibited without consent. *See* NAT'L NAGPRA PROGRAM, GUIDANCE ON THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) 43 CFR PART 10, at 3 (2024), <https://www.nps.gov/subjects/nagpra/upload/Duty-of-Care-FAQ.pdf> [<https://perma.cc/VN97-36PK>] [hereinafter Guidance on 43 C.F.R. § 10.1(d)].

is not *required*, most practitioners *want* to be as accurate as possible, and they are seeking guidance on how to do so in compliance with the 2023 Rule.²²⁹

3. *Special Circumstances*

It is difficult to create a system that is broad enough to encapsulate the needs of 574 federally recognized Indian Tribes yet specific enough to make compliance feasible.²³⁰ The 2023 Rule attempts to handle this problem by (1) imposing its requirements only on museums and federal agencies and never on lineal descendants, Indian Tribes, or NHOs,²³¹ and (2) including a common refrain: consult, consult, consult.²³² This piece of guidance is a core fallback answer for National NAGPRA.²³³ Technically, this suggestion is consistent with the 2023 Rule, which does establish consultation as the appropriate method of answering questions about “storage, treatment, or handling of human remains or cultural items.”²³⁴ Even so, this refrain fails to provide specific guidance to inquiring practitioners and fails to consider the possibility that a lineal descendant, Indian Tribe, or NHO is unable or unwilling to consult, leaving the museum or federal agency with no clear path forward.²³⁵

Even when Indian Tribes do consult with museums or federal agencies, the 2023 Rule lacks clarity on how to resolve specific

229. See Zoom Interview with Steve Nash, *supra* note 105 (describing practitioners’ difficulty identifying how to properly implement this rule).

230. See, e.g., Zoom Interview with Trevor Reed, *supra* note 186 (identifying how this issue may impact the Hopi Tribe and Navajo Nation).

231. See *Repatriation of Human Remains*, *supra* note 136, at 28:03 (“Indian Tribes and [NHOs] are not compelled to respond to this invitation [to consult].”). For example, museums and federal agencies must attempt to contact lineal descendants, Indian Tribes, and NHOs at certain steps in the repatriation process, but lineal descendants, Indian Tribes, and NHOs are under no obligation to respond. See *id.*

232. See *id. passim* (repeatedly advising consultation); *Repatriation of Cultural Items*, *supra* note 216, *passim* (advising consultation).

233. In National NAGPRA’s series of monthly webinars, questions from community members that lack a clear textual answer in NAGPRA or the 2023 Rule are almost always answered by National NAGPRA Program Manager Melanie O’Brien with advice to consult. See generally *Repatriation of Human Remains*, *supra* note 136 *passim* (repeatedly recommending consultation); *Repatriation of Cultural Items*, *supra* note 216 *passim* (returning to consultation as the solution to museums’ questions).

234. 43 C.F.R. § 10.1(d)(1) (2024).

235. For discussion of why a culturally affiliated party may be unable to consult, see *supra* Part III.B.1.a.

cultural needs.²³⁶ For example, two tribes made competing requests to the Field Museum for repatriation of cultural items, and the Field Museum concluded that it could not determine the appropriate requestor.²³⁷ The tribes needed to come to a decision themselves, and in the meantime, prior to the promulgation of the 2023 Rule, the cultural items were available for both tribes to visit.²³⁸ Now, one tribe wishes to restrict access to the items using the 2023 Rule's consent requirement, but the other tribe does not.²³⁹ The Field Museum is faced with either restricting access according to the first tribe's wishes—potentially infringing on the rights of the second tribe to access cultural items with which it is culturally affiliated—or allowing access based on the second tribe's consent—potentially breaching its duty of care with regard to the first tribe.²⁴⁰ In a situation this complex, National NAGPRA's one-size-fits-all prescription to answer questions through consultation is plainly inadequate.²⁴¹

Additionally, on some tribal lands, disparities between historical homelands and modern reservation borders mean geography is a matter not only of *where* but of *when*, and this nuance is overlooked in the 2023 Rule. In the Southwest, longstanding tensions among particular tribes could exacerbate repatriation disputes.²⁴² The current Navajo Nation and Hopi Reservation borders are the result of federal legislation that settled a decades-long land dispute in northeast Arizona, but these

236. See Zoom Interview with Sarah Ebel, *supra* note 179 (describing a case with no clear analog in the 2023 Rule).

237. See *id.* (explaining the Field Museum's role in the stalled repatriation and the steps it had taken to store the cultural items according to the tribes' wishes). Under the 2023 Rule, when a museum receives competing requests for repatriation of cultural items, the appropriate requester is the lineal descendant, if any, or the "Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at § 10.3(e)." 43 C.F.R. § 10.9(h) (2024). If the most appropriate requester cannot be determined, the repatriation is stayed. See *id.* § 10.9(h)(4)(iii) (2024).

238. See Zoom Interview with Sarah Ebel, *supra* note 179 (explaining the status of the repatriation before the promulgation of the 2023 Rule). The NAGPRA Review Committee does not hear disputes between two lineal descendants, Indian Tribes, or NHOs. See 25 U.S.C. § 3006(c)(4) (2024).

239. See Zoom Interview with Sarah Ebel, *supra* note 179.

240. See 43 C.F.R. § 10.1(d) (2024) (setting out the duty of care and consent requirement).

241. According to David Tarler, "if [the 2023 Rule] had required unanimous consent, [DOI] would have put that in the regulations." However, he also stated that in a situation with a holdout tribe, "that's going to be something for the museum to figure out as well." Zoom Interview with David Tarler, *supra* note 32.

242. See Zoom Interview with Trevor Reed, *supra* note 186 (referencing a history of territorial disputes between the Hopi Tribe and the Navajo Nation).

borders, drawn by the United States government, do not reflect the historical homelands of these communities.²⁴³ Trevor Reed, an Associate Justice of the high court of the Hopi Tribe and professor of Native American law, foresees potential “mayhem” arising from the 2023 Rule provision that allows cultural affiliation to be determined through geographic evidence alone.²⁴⁴ If human remains or cultural items are geographically affiliated with Navajo Nation and the Hopi Tribe brings a competing claim, the Hopi Tribe may lose the dispute unless it can come up with sufficient evidence to overcome the geographic affiliation.²⁴⁵ On the other hand, Reed allows, “there has to be some way to draw those [formerly CUI] ancestors and items in, and geography is one of the better ways to do it.”²⁴⁶

The 2023 Rule is undeniably a much-needed paradigm shift for NAGPRA practice.²⁴⁷ The changes to how NAGPRA handles CUI human remains and the imposition of clearer compliance timelines will be particularly useful for speeding the pace of future repatriations.²⁴⁸ Nonetheless, underfunding, communication failures between National NAGPRA and collecting institutions, and general confusion threaten the efficacy of the new regulations.²⁴⁹ To finally bring all of the ancestors and cultural

243. See Eric Cheyfitz, *Theory and Practice: The Case of the Navajo-Hopi Land Dispute*, AM. UNIV. J. GENDER, SOC. POL'Y & L. 619, 625, 628 (2002) (“It was during this time, between 1882 and 1958, that a Navajo-Hopi land dispute was in the making [sic] but it is important to emphasize that it was not initially the Navajos and the Hopis who instigated this dispute but the federal government through the manipulation of traditional Navajo and Hopi lands.”); see also Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649 (resulting from mediation between the tribes and attempting to resolve the dispute). Determining historical homelands in the Southwest can be particularly fraught because the Diné (Navajo) were semi-nomadic. See Patricia Biggs, *Navajo*, HIST. AT THE GRAND CANYON, <https://grcahistory.org/history/native-cultures/navajo/> [<https://perma.cc/4TSP-NCDN>] (“The earliest tree-ring date from a Navajo hogan ruin is 1541 in northern New Mexico, and it is believed they traveled west from there. . . . Navajo oral history tells of their travels as semi-nomadic hunters and gatherers.”).

244. Zoom Interview with Trevor Reed, *supra* note 186.

245. See *id.* “Navajo Nation was a later comer [to the Four Corners region]. They came around 1600 or 1700. However, their recognized territory surrounds our nation. And so if you take the straight geographical reading of [the 2023 Rule], they’re going to win conflicts of our ancestors of our cultural materials. They’re going to win these conflicts over who is the cultural affiliate unless we can produce the amount of knowledge necessary to overcome [the geographical evidence].” *Id.*

246. *Id.*

247. Contrast Part III.A (discussing long-awaited regulatory updates from the 2023 Rule) with Part II.B (highlighting issues with the pre-2023 NAGPRA regime).

248. See generally *Steps to Repatriation*, *supra* note 178 (laying out clear timelines).

249. See Zoom Interview with Steve Nash, *supra* note 105 (addressing underfunding and guidance confusion).

items home to their proper caretakers, real oversight and enforcement by National NAGPRA is a necessity.

IV. FULFILLING PROMISES: UNLOCKING THE 2023 RULE'S FULL POTENTIAL

The 2023 Rule is a crucial update to NAGPRA, but it has no teeth. Part IV.A first recommends DOI expand its NAGPRA enforcement capacity and begin proactively investigating failures to comply, then addresses how increased enforcement could affect museums, federal agencies, and aggrieved parties and mitigate funding problems. Part IV.B suggests additional methods and forms of guidance that National NAGPRA should provide to support practitioners, and Part IV.C addresses the importance of public pressure as a social solution operating alongside these legal solutions.

A. EXPANDING AND STRENGTHENING NAGPRA ENFORCEMENT

1. *Changing the Enforcement Approach*

DOI should expand its NAGPRA enforcement capacity and begin proactively investigating failures to comply.²⁵⁰ To complete more investigations more quickly, DOI needs to devote more resources to National NAGPRA's compliance work and provide National NAGPRA with the funds required to support more robust enforcement.²⁵¹

In practice, the current system makes it almost impossible to hold museums accountable for their failure to comply with

250. See *supra* Part II.B.3. The Federal government has considered large-scale changes to the enforcement system before, primarily regarding moving enforcement duties from the Assistant Secretary for Fish and Wildlife and Parks to another part of DOI or outside DOI entirely. See Zoom Interview with David Tarler, *supra* note 32. In 2020, then-Congresswoman Debra Haaland introduced H.R. 8298, *To Amend The Native American Graves Protection And Repatriation Act To Move The Enforcement Office To The Bureau Of Indian Affairs, To Increase The Civil Monetary Penalties For Failure To Follow The Processes Established By That Act, To Protect Confidential Information, And For Other Purposes*. The bill was referred to the House Committee on Natural Resources but received no further congressional attention. See H.R. 8298, 116th Cong. (2020).

251. The 2023 Rule adds a step at the beginning of the enforcement process requiring the Assistant Secretary to assess and respond to allegations no later than 90 days after receipt, so increased staff attention is already an element of the new regime. See 43 C.F.R. § 10.11(b) (2024).

NAGPRA.²⁵² Investigations exclusively begin reactively.²⁵³ Fortunately, National NAGPRA's enforcement practices can be made more proactive without revising the 2023 Rule—the authority to do so already lies within the text of the regulations.²⁵⁴ While previous NAGPRA rules have always relied on allegations from the public as the starting point for enforcement,²⁵⁵ nothing in the 2023 Rule explicitly *prohibits* the Assistant Secretary from opening an investigation proactively.²⁵⁶ In fact, the Preamble to the 2023 Rule seems to presume that DOI could initiate an investigation without a written allegation, noting that “[w]hile not an allegation, an anonymous tip could provide information for the Assistant Secretary to investigate and determine if a failure to comply has occurred.”²⁵⁷ DOI can use this power to expand NAGPRA enforcement immediately, without attempting to amend NAGPRA or waiting until a future rule revision.

Once it increases its enforcement capacity, DOI should use this power to proactively initiate new investigations of failure to comply. Waiting for individuals to bring written allegations identifying “the specific provision or provisions of the Act or [2023 Rule] that the museum is alleged to have violated” makes it more difficult to hold museums accountable.²⁵⁸ Sometimes, DOI already has the information it needs to begin its own investigations. For example, DOI set January 10, 2029 as the deadline for revised inventories²⁵⁹ and knows that 407 museums will be required to submit them.²⁶⁰ On January 11, 2029, it should be able to

252. See *supra* Part II.C.3.

253. See *id.* § 10.11(a) (2024) (“Any person may file an allegation of failure to comply by sending a written allegation to the Manager, National NAGPRA Program.”).

254. See 43 C.F.R. § 10.11 (2024) (laying out regulations for civil penalties).

255. See Zoom Interview with David Tarler, *supra* note 32 (describing current National NAGPRA practice).

256. See 43 C.F.R. § 10.11 (2024) (not including any such prohibition).

257. Preamble to the 2023 Rule, *supra* note 134, at 86506; see also, NAT'L PARK SERV., *Civil Penalties*, at 01:00:21 (ZOOM, Sep. 20, 2024) [hereinafter *Civil Penalties*], https://doitalent.zoomgov.com/rec/share/l9sRXJuyg_MqsqXCBlCfjDiPG0pgz7tewPMQtNbxiv6UOcSFdwhXxZ_y6bkjDhWV.Ufg2yjUkWYPV2N81 [<https://perma.cc/HF3F-TM7B>] (“[A]n anonymous tip could provide information for the Assistant Secretary to investigate and determine if a failure to comply has occurred.”). However, David Tarler suggests that “anonymous tip” refers to a confidential allegation, which must include the same information as a regular written allegation. See Zoom Interview with David Tarler, *supra* note 32.

258. 43 C.F.R. § 10.11(a)(2) (2024).

259. See *id.* § 10.10(d)(3) (2024) (regarding revised inventories).

260. See Preamble to the 2023 Rule, *supra* note 134, at 86510 (listing the total number of institutions subject to NAGPRA). DOI estimates that “122 Federal agencies will be required to update inventories within five years after promulgation of a final rule.” *Id.*

determine which museums have failed to comply with that deadline whether or not a third party sends a written allegation.

In other circumstances, it is difficult for a third party to discover or describe instances of noncompliance with any specificity.²⁶¹ For example, in the past, there may have been no publicly available evidence of a museum's bad-faith determination that human remains and cultural items are CUI.²⁶² In contrast, DOI, acting in its official capacity to enforce compliance, can gain access to museum information and personnel to investigate potential bad faith or unreasonableness in cultural affiliation decisions.²⁶³ By changing its approach, expanding its team, and opening proactive investigations, National NAGPRA can completely reshape the landscape of NAGPRA enforcement without waiting for the next rule revision.²⁶⁴

2. *Benefiting Aggrieved Parties*

When DOI substantiates an allegation of failure to comply, it may resolve the matter through civil penalties, settlements involving payment, settlements without payment, or a finding that no penalty is warranted.²⁶⁵ To remedy harms suffered by lineal descendants, Indian Tribes, and NHOs due to museum noncompliance, the Assistant Secretary should, whenever possible, favor settlement over civil penalties.²⁶⁶ Under the current regime, civil penalties offer no direct redress; any funds

261. See Zoom Interview with David Tarler, *supra* note 32 (describing vague allegations lacking sufficient detail to support investigation).

262. See *supra* Part II.B.1.

263. See 43 C.F.R. § 10.11(b)(1) (2024) (“The Assistant Secretary may conduct any investigation that is necessary to determine whether an alleged failure to comply is substantiated.”).

264. A solution that avoids promulgating new regulations is particularly necessary given the deregulatory priorities of the Trump administration. On January 31, 2025, President Trump issued Executive Order 14192, requiring that “whenever an executive department or agency [] publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least 10 existing regulations to be repealed.” Exec. Order No. 14,192, 90 Fed. Reg. 9065 (Feb. 6, 2025).

265. See 2024 National NAGPRA Program Report, *supra* note 50, at 8 (listing all enforcement outcomes).

266. The 2023 Rule gives the Assistant Secretary substantial discretion to assess civil penalties and raise or lower the per-violation cost to a museum. See 43 C.F.R. § 10.11(c) (2024).

collected are deposited in the United States Treasury, not directed to the aggrieved parties.²⁶⁷

In contrast, settlements can incorporate terms that *do* provide a remedial benefit to those parties.²⁶⁸ A settlement (i) requires the museum to achieve compliance, and (ii) may include a compensatory benefit to the aggrieved party, such as paying costs associated with transferring custody of repatriated human remains or cultural items.²⁶⁹ This compensatory benefit is distinct from any settlement payment (or civil penalty) owed to the federal government; it functions instead as a negotiated opportunity to channel resources toward Indigenous repatriation efforts.²⁷⁰ Of the available enforcement options, this approach most effectively advances NAGPRA's dual aims of ensuring compliance and promoting repatriation to lineal descendants, Indian Tribes, and NHOs.²⁷¹

3. *Promoting Institutional Priorities at Museums*

Calling on museums to increase their pace of repatriation in 2021, Shannon O'Loughlin, the Chief Executive and Attorney for the Association of American Indian Affairs, said, "[i]f the institution took seriously its federal legal obligations under NAGPRA, it would prioritize NAGPRA work, direct staff to complete it, and request funding to support it where needed."²⁷² Increasing National NAGRPA's enforcement capacity and proactivity will increase museums' incentives for compliance and push them to prioritize their repatriation efforts.²⁷³ While

267. See *Civil Penalties*, *supra* note 257, at 56:20 ("[T]he money received from a penalty assessment goes to the general account of the US Treasury. So, it goes to the general account of the US federal government. It does not go to the communities or aggrieved parties directly."); Zoom Interview with David Tarler, *supra* note 32 ("A settlement involving a payment is always going to go to the U.S. Treasury. . . . and civil penalties recovered for any civil action will go to the Treasury."). Typically, penalties are inappropriate when the substantiated allegation concerns a past failure to comply that was cured prior to the museum becoming aware of the allegation. See '.

268. See Zoom Interview with David Tarler, *supra* note 32 (distinguishing possible remedies).

269. See *id.* (explaining settlements following a finding of failure to comply). These costs would otherwise be covered by the lineal descendant, Indian Tribe or NHO receiving custody. See *id.*

270. See *id.*

271. See *id.* (noting settlements may include payment of certain repatriation costs).

272. Kunze, *Repatriation Delays*, *supra* note 116.

273. See *id.* ("Oftentimes . . . they're not even aware of the fact that their institutions are not proactively pursuing repatriation or disposition of culturally unidentifiable

NAGPRA teams are often under-funded,²⁷⁴ museum administrators are empowered to direct more money to repatriation if they so choose.²⁷⁵ Some museum administrators continue to drag their feet on NAGPRA compliance, but a legitimate threat of monetary penalties and regulatory investigations could provide the incentives needed to convince them to make NAGPRA an institutional priority.²⁷⁶ Additionally, an official finding that the museum has failed to comply with NAGPRA will produce negative press, which, as the general public becomes more familiar with and supportive of repatriation issues,²⁷⁷ has the potential to impose significant indirect financial effects on the museum.²⁷⁸ The desire to avoid these outcomes will motivate museums to comply.²⁷⁹

4. *Investigating Federal Agencies*

The Assistant Secretary should use proactive investigative procedures to hold federal agencies accountable for failing to comply with NAGPRA and not fulfilling their regulatory obligations. As in the investigative process for museums, a third party must become aware of the federal agency's failure to comply and submit an allegation before any enforcement efforts are triggered.²⁸⁰ However, since federal agencies are not subject to the 2023 Rule's civil penalty provision,²⁸¹ the only way to report an agency's failure to comply is to submit an allegation to the head of the agency or the agency's inspector general.²⁸² If DOI were to

ancestors" (ellipses in original) (quoting Interview by Native News Online with Jan Bernstein, Founder and Managing Director, Bernstein & Associates (2022)).

274. See *supra* Part III.B.1.

275. See Kunze, *Repatriation Delays*, *supra* note 116 ("The bottom line is that repatriating human remains held by institutions is a matter of institutional priorities, not funding, experts agree.").

276. See Zoom Interview with Chris Caseldine, *supra* note 192 (explaining that some collecting institutions' administrators still refuse to prioritize NAGPRA and provide their teams with necessary resources).

277. See *infra* Part IV.C.

278. See Zoom Interview with Eden Burgess, *supra* note 219 ("That's damaging to the reputation, which affects donations. It affects your board members. It affects your ability to get loaned objects from any number of sources.").

279. See Kunze, *Repatriation Delays*, *supra* note 116 (showing that incentives may shift museums' priorities).

280. See *Civil Penalties*, *supra* note 257, at 42:30.

281. See 25 U.S.C. § 3007 (only addressing museums).

282. See *Civil Penalties*, *supra* note 257, at 42:15 ("The most broadly applicable way to allege that a Federal agency has failed to comply with the Act or the regulations is to send

increase the resources available to National NAGPRA's investigative staff, it could direct resources toward proactive preliminary investigations of federal agencies and produce allegations to submit to the appropriate inspectors general for full investigation. Moreover, DOI should move away from its current practice of effectively absolving itself of its responsibility to comply with its own rules.²⁸³ Within DOI alone, several agencies maintain collections of Native American human remains and associated funerary objects, including the National Park Service, which houses National NAGPRA,²⁸⁴ and the Bureau of Indian Affairs, which holds the nation's 20th largest collection of NAGPRA-eligible Native American human remains.²⁸⁵

B. IMPROVING GUIDANCE

In addition to strengthening NAGPRA through increased enforcement, National NAGPRA can smooth implementation of the 2023 Rule through targeted improvements to its online guidance for practitioners.²⁸⁶ In its continuing monthly webinar series, it should become more willing to stray from repetition of the statutory and regulatory text and use examples and plain language for increased clarity.²⁸⁷ Until National NAGPRA begins responding to practitioners in a manner that reflects an understanding of their concerns, the confusion surrounding research will continue unresolved.²⁸⁸

an allegation to the head of the appropriate federal agency or to the federal agency's Office of the Inspector General.”).

283. See *id.* (explaining National NAGPRA does not enforce agency compliance).

284. See *Inventories*, NAT'L PARK SERV., <https://apps.cr.nps.gov/nagprapublic/Home/Inventory> [<https://perma.cc/2JH2-3V6M>] (showing data on all NAGPRA inventories). The Bureau of Land Management, Fish and Wildlife Service, and Bureau of Reclamation also have collections of human remains and associated funerary objects. As of August 2025, DOI agencies still held collections of human remains as follows: Bureau of Indian Affairs, 1,012; Bureau of Land Management, 385; National Park Service, 207; Fish and Wildlife Service, 98; Bureau of Reclamation, 8. Additionally, the Department of Agriculture held 693 human remains; the Department of Energy held 19; and the Department of Defense held 1,801, of which 1,349 were held by the Army Corps of Engineers. See *Inventories*, *supra*.

285. 2024 National NAGPRA Program Report *supra* note 50, at 4 (listing remaining large collections of human remains).

286. See *generally Facilitating Respectful Return*, NAT'L PARK SERV. (Apr. 29, 2024), <https://www.nps.gov/subjects/nagpra/index.htm> [<https://perma.cc/5KRZ-ZXMA>] (providing a broad variety of guidance material).

287. See *supra* Part III.B.2.

288. See *Repatriation of Human Remains*, *supra* note 136, at 01:06:04–01:08:16 (including several practitioner questions on this topic).

1. *Duty of Care Guidance*

When asked about the gap between practitioner questions and National NAGPRA's public guidance, National NAGPRA staff member David Tarler gave a simple explanation: practitioners want to conform to the norms of their academic fields, which require research and accuracy, but that is not what NAGPRA requires.²⁸⁹ He believes they struggle to internalize that "NAGPRA is not archaeology, NAGPRA is not anthropology; NAGPRA is repatriation."²⁹⁰ Tarler's framing emphasizes that, regardless of practitioners' desire for accuracy, NAGPRA prioritizes the rights of lineal descendants, Indian Tribes, and NHOs to control their ancestral human remains and cultural items, including in exhibition, access, and research.²⁹¹ His explanation, which centers Indigenous needs and values, bridges the gap between National NAGPRA and museum practitioners' readings of the rule, yet it is rarely used in publicly available guidance.²⁹²

This attitude toward research conflicts with elements of anthropological and archaeological industry practice,²⁹³ and museum personnel may struggle to adjust to this new standard. National NAGPRA, which currently tries to avoid answering this question directly,²⁹⁴ should openly acknowledge this discomfort and encourage NAGPRA practitioners to accept it as a deliberate

289. See Zoom Interview with David Tarler, *supra* note 32 ("You don't have to open bags and boxes. That's never been required, never will be required.").

290. *Id.*

291. See *id.* ("You want to open every bag, and you want to open every box so that you know exactly how many individuals are there? Well, thank you very much, archaeologist and anthropologist. But maybe the tribe doesn't want that. Maybe they don't want their human remains being touched."); 43 C.F.R. § 10.1(d)(3) (2024) (stating museums must "[o]btain free, prior, and informed consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations prior to allowing any exhibition of, access to, or research on human remains or cultural items."). Admittedly, this system does entail certain sacrifices. Consider the Red Beaver Prow, discussed *supra* notes 9–14 and accompanying text. It was rediscovered because a tribal elder was walking through a collections storage area and spotted the Red Beaver Prow, which had not been previously culturally affiliated with his village. Under the 2023 Rule, this type of organic discovery is not possible.

292. See, e.g., *Repatriation of Human Remains*, *supra* note 136 *passim* (falling back on encouraging consultation without providing substantive advice); *Determining Cultural Affiliation*, *supra* note 158 *passim*; Guidance on 43 C.F.R. § 10.1(d), *supra* note 228 (not using Tarler's approach). But see *Repatriation of Human Remains*, *supra* note 136, at 49:08 ("I think that it's a key opportunity to think about how the practice of repatriation over the last thirty years might be different from these specific requirements in the regulations.").

293. See *supra* Part III.B.2.

294. See *supra* Part III.B.2.

element of the 2023 Rule. Honest engagement with well-intentioned museum personnel regarding that contradiction will help assuage the present confusion over the duty of care provision.

2. *Online Resources*

National NAGPRA's online guidance will play a critical role in the expansion of NAGPRA enforcement. Once more investigators are hired and DOI begins proactively investigating failures of museums and federal agencies to comply with NAGPRA and the 2023 Rule, National NAGPRA's website will be the primary source of guidance for practitioners seeking to understand the new regime.²⁹⁵ National NAGPRA should start by preparing guidance documents, such as a step-by-step guide to cooperating with DOI investigations. They should also develop a written explanation of the changed system, the legal basis for the changes, and relevant dates, including when the changes will go into effect.²⁹⁶ Once these documents are available, National NAGPRA can host at least one session of its monthly webinar series on the topic of the new enforcement regime, providing a deep dive into the guidance documents.²⁹⁷ This session could be publicized through industry groups such as the American Alliance of Museums, the Association of American Indian Affairs, and the NAGPRA Community of Practice.²⁹⁸ As it has done for other aspects of the 2023 Rule, National NAGPRA should prepare a dedicated page of its website that includes all of this guidance material and the answers to frequently asked questions.²⁹⁹ Finally, the National NAGPRA staff should prepare for some amount of confusion and concern from practitioners.

295. Cf. *Facilitating Respectful Return*, *supra* note 286 (already the main source of current guidance).

296. Cf. Guidance on 43 C.F.R. § 10.1(d), *supra* note 228 (providing detailed guidance on a different provision).

297. Cf. *Repatriation of Human Remains*, *supra* note 136 (presenting a webinar on a different topic).

298. To learn more about these organizations and the resources they provide for museum professionals and NAGPRA practitioners, see AM. ALL. OF MUSEUMS, <https://www.aam-us.org> [<https://perma.cc/EN8V-LX8J>]; ASS'N ON AM. INDIAN AFFS., <https://www.indian-affairs.org> [<https://perma.cc/MV4H-C6WJ>]; NAGPRA CMTY. OF PRAC., <https://www.nagpracomunityofpractice.com> [<https://perma.cc/85F7-YNLY>].

299. Cf. *Notices and Statements*, NAT'L PARK SERV. (Jun. 3, 2024), <https://www.nps.gov/subjects/nagpra/notices-and-statements.htm> [<https://perma.cc/V7SD-DWSB>] (including answers to frequently asked questions and links to other guidance).

Moreover, improving guidance does not necessarily mean providing *more* guidance; upgrading National NAGPRA's website itself would be beneficial. While it provides extensive and comprehensive information on NAGPRA, including guidance for the 2023 Rule, the site is so challenging to navigate that practitioners cannot find the resources National NAGPRA has worked hard to produce.³⁰⁰ Several pages can only be accessed by following an unintuitive path of links, and some pages have abnormal headers that trap the user in dead ends.³⁰¹ Practitioners might believe National NAGPRA has not produced a necessary guidance resource, unaware it is available on a difficult-to-find corner of the website.³⁰² Luckily, this is a solution that can be achieved relatively quickly and easily by the administrator of the National Park Service website and provide immense gains to the NAGPRA practitioner community.

C. COMPLEMENTING ENFORCEMENT WITH PUBLIC ATTENTION

Regulatory efforts to improve and enforce NAGPRA are driven by and work in tandem with social pressure from the public.³⁰³ ProPublica's 2023 exposé on museums' failure to finish repatriating Native American human remains³⁰⁴ brought NAGPRA to the forefront for a population that is increasingly aware of high-profile global attempts at repatriation.³⁰⁵ Eden

300. See generally *Facilitating Respectful Return*, *supra* note 286 (linking to other main areas of the website).

301. See, e.g., *id.*; *National NAGPRA Program*, *supra* note 30 (both of which are accessed by clicking "Home" on the navigation bar, depending on which of two possible navigation bars is at the top of a given page on the National NAGPRA website).

302. See, e.g., *Consultation Resources*, NAT'L PARK SERV. (Feb. 25, 2025), <https://www.nps.gov/subjects/nagpra/consultation-resources.htm> [<https://perma.cc/2B5J-4AQ3>] (linking a variety of resources compiled by National NAGPRA that museums can use to identify consulting parties).

303. See Zoom Interview with Eden Burgess, *supra* note 219 ("If you're a public institution that has these objects, and a tribe is talking to the press about how they've been ignored, or about how an object is out [on display] that shouldn't be out, or was sold without notification to the tribe, that's not great. That's damaging to the reputation, which affects donations . . . So there are repercussions even if the legal enforcement is not significant.").

304. See generally Jaffe et al., *supra* note 194 (calling attention to museums that still hold collections of human remains).

305. High-profile debates regarding the Parthenon Marbles and Benin Bronzes bring mainstream attention to repatriation efforts. See, generally, e.g., LASTWEEKTONIGHT, *Museums: Last Week Tonight with John Oliver (HBO)*, (YouTube, Oct. 3, 2022), <https://www.youtube.com/watch?v=eJPLiT1kCSM> (on file with the Columbia *Journal of Law & Social Problems*) (regarding worldwide museum collections, including the Parthenon Marbles and Benin Bronzes at the British Museum); Matt Stevens, *Smithsonian to Return*

Burgess, an attorney who has worked on repatriation and restitution cases for decades, observed that, compared to earlier generations, today's museum attendees are "much more vocal and interested in this particular subject area . . . it really has changed the way that collecting institutions view their objects and their stakeholders."³⁰⁶ Given the massive amount of donor funding necessary to support NAGPRA,³⁰⁷ public attention will have a direct impact on the success of the 2023 Rule and should be considered by museums, federal agencies, and National NAGPRA in future decision-making.

In summary, solutions to the 2023 Rule's problems do not need to be extreme in order to be effective. Small changes, like improving the National NAGPRA website, can have large impacts on practitioners, and, subsequently, on NAGPRA outcomes.³⁰⁸ Likewise, it can be tremendously helpful to use guidance language that departs from the exact text of the 2023 Rule in order to more effectively convey its meaning.³⁰⁹ Expanding DOI's NAGPRA enforcement capacity and engaging in proactive investigation is a larger task, but it is not extreme.³¹⁰ The authority to do so already lies within the 2023 Rule, and these efforts will incentivize museums and federal agencies to approach their NAGPRA duties with speed, care, and accuracy, especially now that the museum-going public is paying more and more attention.³¹¹ These solutions fill in the gaps of the 2023 Rule, reinforcing its goals of revitalizing NAGPRA, completing decades of repatriation work, and fulfilling the promise of 1990.

Most of its Benin Bronze Collection to Nigeria, N.Y. TIMES (Mar. 8, 2022) <https://www.nytimes.com/2022/03/08/arts/design/smithsonian-benin-bronze-nigeria.html> [<https://perma.cc/G2DE-S6RG>] (regarding Benin Bronzes held by the Smithsonian); Sophie Lewis, *Greece May Demand Britain Give Back Parthenon Marbles as Part of Brexit Deal*, CBS NEWS (Feb. 19, 2020) <https://www.cbsnews.com/news/brexit-greece-britain-return-parthenon-elgin-marbles-trade-deal/> [<https://perma.cc/UX6D-23TT>] (regarding the role of the Parthenon Marbles in Brexit negotiations between the United Kingdom and the European Union).

306. Zoom Interview with Eden Burgess, *supra* note 219.

307. *See supra* Part III.B.1.b.

308. *See supra* Part IV.B.

309. *See supra* Part IV.B.

310. *See supra* Part IV.A.

311. *See supra* Part IV.A; *supra* Part IV.C.

CONCLUSION

In discussing the legal minutiae of NAGPRA, it can be easy to forget its significance for the social, cultural, emotional, and religious lives of Native Americans. When NAGPRA repatriations are complete, ancestors and their possessions will be put to rest, sacred items will be properly cared for, and future generations will have access to their own cultural patrimony. Museums will not be empty, and they will have forged productive, cooperative relationships with Indigenous partners. The 2023 Rule makes great strides in drawing the NAGPRA community closer to this future, but, as it exists today, it lacks both the funding and the incentives necessary to complete its task. By expanding its enforcement capacity and proactively investigating failures to comply with the 2023 Rule, National NAGPRA can push collecting institutions to make NAGPRA an institutional priority backed by sufficient financial support, leading to full and timely compliance. With NAGPRA practitioners guided by the 2023 Rule, using all the resources available to provide dignity and respect to collections, the promise of NAGPRA may yet be fulfilled.