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### Mediating NAGPRA: Bringing Cultural Consideration Back to the Table

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# Mediating NAGPRA: Bringing Cultural Consideration Back to the Table

Ashley Bartman Watson, The Ohio State University Moritz College of Law

"Preserving Native American and Hawaiian culture is in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation."

- Representative Patsy Takemoto Mink, 1990

## Native American Grave Protection and Repatriation Act (NAGPRA)

- Became federal law on November 16, 1990 to correct gross inequalities between the protection of Native and non-Native cultural objects.
- Requires collecting institutions to:
  - create an inventory of any Native American human skeletal remains, funerary objects, sacred objects, and items of cultural patrimony in their possession.
- Native American or Hawaiian groups can request repatriation if:
  - they can show that they have true ownership of the cultural object or are a lineal descendant of the human remains in question.

**The Problem:** Though NAGPRA established a Review Committee to mediate any repatriation disputes, repatriation often results in expensive litigation. This puts the Native American or Hawaiian group at a severe disadvantage due to a lack of resources.

**The Solution:** NAGPRA should facilitate a mediation-like process on a case-by-case basis that enables opposing parties to reach a solution that is culturally sensitive and mutually beneficial.

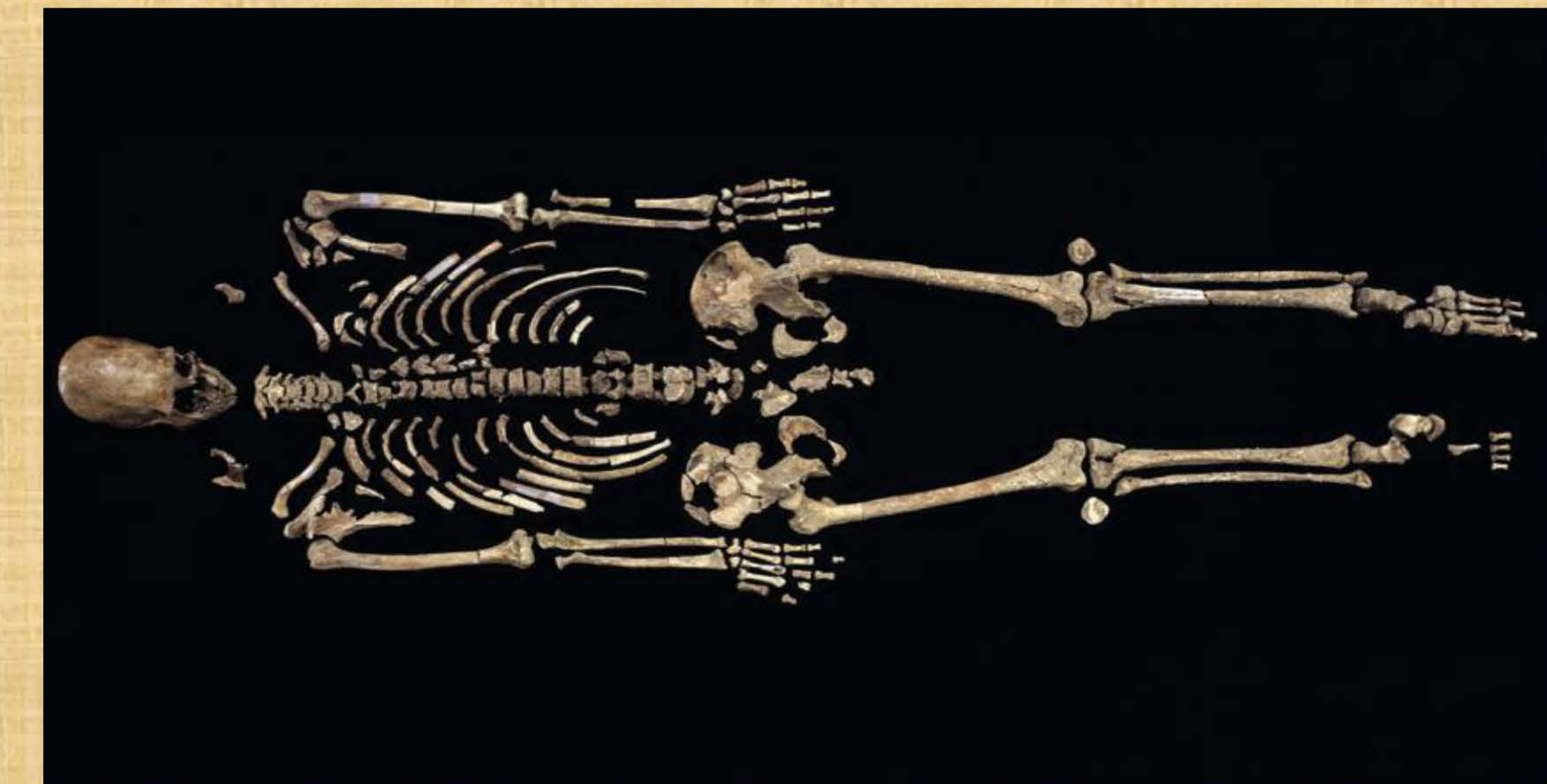
## Cross-Cultural Methods of Dispute Resolution

The Native American traditional peacemaking process is based on conciliation and building relationships. For example:

- The Navajo Nation has two court systems; one resembles the formal Anglo-American model of litigation and the other is a peacemaking court based on equality and the preservation of the relationship between the opposing parties.
- Native Hawaiian groups practice community peacekeeping techniques that focus on improving relationships and seeking conciliation. *Ho'oponopono*, for example, is a twelve step dispute resolution process that allows parties to come together within Native Hawaiian society and resolve their differences in a mutually beneficial manner.

## The Case of the Kennewick Man

- **The Facts:** The remains of a prehistoric man, later dubbed the Kennewick Man, were discovered by two teenagers in July 1996. The remains were initially sent to forensic anthropologists who determined that Kennewick Man was about 9,000 years old and was unrelated to any present day American population.
- **The Debate:** Scientists pushed for forensic study, while local Native American tribes claimed the remains and called for immediate reburial under the auspices of NAGPRA.
- **The Ruling:** The 9<sup>th</sup> Circuit ruled against the Native American tribes. They held that in order for NAGPRA to apply, the human remains must be determined to have some relationship with a presently existing Native American or Native Hawaiian tribe.
- **The Aftermath:** The Native American tribal defendants chose not to appeal their case to the Supreme Court due to a lack of financial resources and the risk of an unfavorable final decision.
- **The Twist:** The US Army Corps of Engineers recently acknowledged that DNA tests have proven that the Kennewick Man is likely related to modern Native Americans and therefore the NAGPRA repatriation process will begin anew.



*The Kennewick Man skeleton (Chip Clark / Smithsonian's National Museum of Natural History)*

## NAGPRA and Mediation

There are many similarities between Native processes of peacekeeping and mediation.

- NAGPRA, instead of encouraging adversarial processes, should facilitate individual mediation sessions that are tailored to the parties and the dispute at hand. These processes, familiar to the Native group and the collecting institution, will lead to better, more enforceable, decisions. The flexibility of mediation will also allow for more creative solutions to repatriation issues.

However, the introduction of mediation or a similar process to repatriation claims must be done intentionally and with sensitivity.

- Simply educating an existing mediator about cultural issues is not always effective.
- If a Native group suggests the use of such an alternative method, non-Native participants need to be extensively briefed on the cultural importance and process of that method.

Every dispute over a cultural object or set of human remains will be unique based on the beliefs of the claimants, the history of the object, the parties involved, and other applicable laws.



*The Field Museum of Chicago and the Pawnee Tribe have a history of working together. Pawnee Tribe members advised the Museum on the construction of the above Earth Lodge. The Museum and the Pawnee also came to an agreement concerning two medicine bundles in the Field Museum's Collection. The Museum acknowledged that they had no valid claim to the bundles but the Pawnees agreed to let the Museum keep the bundles if they adhere to specific standards set by the Pawnee. (John Weinstein, © The Field Museum)*

## Contact

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