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Repatriating the Buffalo: NAGPRA's Applicability to Yellowstone Bison Management

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PACE ENVIRONMENTAL LAW REVIEW

ESSAY

Repatriating the Buffalo: NAGPRA's Applicability to Yellowstone Bison Management

SAYLOR S. SOINSKI*

ABSTRACT

The American bison—also known as the buffalo—holds great significance to many Native American people and cultures. Although bison populations have grown since their near destruction in the 19th century, the last remaining wild bison are under threat by the National Park Service's Yellowstone management plan. Native representatives have had only a limited advisory role in creating the plan, and a number of Native individuals and advocacy groups have spoken out against it. This essay explores the possibility of applying the Native American Graves Protection and Repatriation Act to living animals for the first time, categorizing the bison as "objects of cultural patrimony" in order to facilitate repatriation and shift management authority to tribal representatives.

Abstract.....	428
I. Introduction	429
II. The Native American Graves Protection and Repatriation Act	432
A. Legislative Background	432
B. Elements of NAGPRA	434
i. "Native American"	434
ii. Standing	435
iii. Covered Objects.....	437
III. American Buffalo	438
A. History.....	439

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B. Yellowstone Bison.....	440
C. Native Peoples and National Parks.....	442
IV. Yellowstone Bison as Objects of Cultural Patrimony	444
A. “Native American”	445
B. Standing	445
C. Cultural Patrimony.....	446
V. Implications for Tribal Sovereignty.....	449
A. Buffalo as Objects and the Violence of Translation	450
B. NAGPRA as a Mechanism for Increasing Power	451
VI. Conclusion	453

I. INTRODUCTION

The Native American Graves Protection and Repatriation Act (“NAGPRA”) was passed in 1990 to provide a pathway for indigenous peoples to reclaim stolen property.¹ NAGPRA applies to museums and other organizations receiving federal funding and has mainly been used to repatriate human remains.² The Act was drawn into the public eye following the 1996 discovery of the Kennewick Man—a 9,000-year-old skeleton accidentally found in Kennewick, Washington.³ Controversy ensued over who could claim the bones, continuing until they were returned in 2016 to a coalition of Columbia Basin tribes claiming the Kennewick Man as their ancestor.⁴ This 20-year dispute cemented NAGPRA’s reputation as a law for the recovery of human remains. However, the Act was designed to cover

1. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002 [hereinafter “NAGPRA”]; *Native American Graves Protection and Repatriation Act*, U.S. NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/index.htm> [<https://perma.cc/6F4Y-TAJD>].

2. *Native American Graves Protection and Repatriation Act (NAGPRA) Office: Mission*, UNIV. OF ILL. URBANA-CHAMPAIGN, <https://nagpra.illinois.edu/faqs> [<https://perma.cc/3ATK-MBRC>].

3. See, e.g., Tasneem Raja, *A Long, Complicated Battle Over 9,000-Year-Old Bones is Finally Over*, NPR CODE SWITCH (May 5, 2016, 11:47 AM), <https://www.npr.org/sections/codeswitch/2016/05/05/476631934/a-long-complicated-battle-over-9-000-year-old-bones-is-finally-over> [<https://perma.cc/92QL-HMJ2>]; *The Ancient One, Kennewick Man*, BURKE MUSEUM (Feb. 20, 2017), <https://www.burkemuseum.org/news/ancient-one-kennewick-man> [<https://perma.cc/T8R3-35H2>]; Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 585 (1999).

4. The remains were transferred through an amendment to the Water Resources Development Act of 2016. See H.R. 5303, 114th Cong. § 190 (2016). Unsurprisingly, there are mixed opinions about this decision. See, e.g., Douglas Preston, *The Kennewick Man Finally Freed to Share His Secrets*, SMITHSONIAN MAG., Sept. 2014, <https://www.smithsonianmag.com/history/kennewick-man-finally-freed-share-his-secrets-180952462> [<https://perma.cc/R2ZM-V5VM>]; BURKE MUSEUM, *supra* note 3.

much wider territory, including objects of cultural patrimony—“object[s] having ongoing historical, traditional, or cultural importance central to [a] Native American group or culture itself, rather than property owned by an individual Native American.”⁵

This essay explores the possibility of applying NAGPRA’s “objects of cultural patrimony” classification, for the first time, to a *living* animal: the American bison, also known as the buffalo.⁶ The buffalo holds great significance for many Native groups,⁷ amplified by the near total destruction of American bison populations in the 19th century.⁸ The buffalo were killed not only to claim land for cattle and satisfy colonial fantasies of domination, but also as part of an organized attempt to subjugate or eliminate Native people.⁹ By the turn of the century, only a few hundred buffalo remained.¹⁰ The descendants of these buffalo now roam Yellowstone National Park, where they are viewed by both the National Park Service (“NPS”) and some Native groups as the last “true” buffalo.¹¹

The Yellowstone bison are now under threat; the park’s current management plan includes killing hundreds of bison.¹² This plan was designed by the NPS in consultation with a variety of stakeholders, including some tribal leaders.¹³ However, Native people did not have a meaningful voice in these management decisions, and Native individuals and advocacy

5. NAGPRA § 3001(3)(D); see also Dawn Elyse Goldman, *The Native American Graves Protection and Repatriation Act: A Benefit and A Burden, Refining NAGPRA’s Cultural Patrimony Definition*, 8 INT’L J. CULTURAL PROP. 229, 229 (1999).

6. The terms bison and buffalo will be used interchangeably in this essay. See *Bison*, YELLOWSTONE NAT’L. PARK SERV. <https://www.nps.gov/yell/learn/nature/bison.htm> [https://perma.cc/KJ4C-GNES].

7. See discussion *infra* Section IV.A.

8. See, e.g., J. Weston Phippen, ‘Kill Every Buffalo You Can! Every Buffalo Dead is an Indian Gone’, ATLANTIC (May 13, 2016), <https://www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349> [https://perma.cc/H2W8-X2AA].

9. *Id.*; accord P.J. Hill, *The Non-Tragedy of the Bison Commons: Why Bison Were Worth More Dead Than Alive in the 19th Century*, 35 PROP. & ENV’L RSCH. CTR. 32, 33–34 (2016).

10. Gilbert King, *Where the Buffalo No Longer Roamed*, SMITHSONIAN MAG. (July 17, 2012), <https://www.smithsonianmag.com/history/where-the-buffalo-no-longer-roamed-3067904> [https://perma.cc/UZ3P-A4VX].

11. See, e.g., Sarah Anne Tarka, *My Brother the Buffalo: An Ethnohistorical Documentation of the 1999 Buffalo Walk and the Cultural Significance of Yellowstone Buffalo to the Lakota Sioux and Nez Perce Peoples* (July 2007) (M.A. thesis, University of Montana) (on file with ScholarWorks at University of Montana); see also YELLOWSTONE NAT’L. PARK SERV., *supra* note 6.

12. Eduardo Medina, *900 Bison at Yellowstone Are Targeted for Removal*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/us/yellowstone-bison-hunt-brucellosis.html> [https://perma.cc/TG6F-26ZY].

13. *Id.*

groups have spoken out against the plan.¹⁴ By placing Native representatives in a purely advisory role, the NPS bestowed rights at the expense of power. This essay argues that NAGPRA could be used to repatriate the bison as objects of cultural patrimony on federal land, shifting power to tribal leaders and representatives and away from livestock interests.

While a number of Tribes may have a claim to the bison, this essay explores a potential claim on behalf of a Tribe of the Lakota Sioux—a group with demonstrated historical and ongoing ties to the Yellowstone bison.¹⁵ Any Tribe of the Lakota Sioux is identifiable as “Native American” for the purposes of the statute, and a Tribe may establish standing by showing an aesthetic injury—a relatively lenient standard used mainly in environmental cases—and by demonstrating that this injury is within the “zone of interests” protected by NAGPRA.¹⁶ Finally, bison could be considered an object of cultural patrimony under the current statute.¹⁷ The statute’s language is ambiguous, with little guidance on how courts or agencies should interpret “objects of cultural patrimony.” This ambiguity is ultimately to the benefit of Native groups. Federal Indian¹⁸ law canons of construction require that “statutes . . . be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”¹⁹

14. See *infra* notes 137–141 and accompanying text.

15. See Tarka, *supra* note 11, at 27, 41.

16. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RES. & ENV’T L. 259, 269–70 (2005); see also Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, 2020 A.B.A. SEC. PUB. 19 INSIGHTS ON L. & SOC. ART. 4 (Oct. 9, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment- [https://perma.cc/DKA4-L8HM].

17. It would be possible for the statute to expand the definition of objects of cultural patrimony to include animals that are similarly situated (i.e., having ongoing historical, traditional, or cultural importance central to the Native American group or culture). The modification would be simple, as “including living animals” could be added to the statute. This change would not have an unwieldy impact, as the definition would only control for interpretation of NAGPRA. However, this essay argues that the current text and implementation of the NAGPRA would not require this addition.

18. This paper refers to “Indian law” and “Indian interests” used with respect to the historical and legal classification of tribal law governing Native Americans. The terms are used in their organic form to be consistent with current law and do not reflect the author’s views on reclassification or lack of acknowledgement of Native persons’ identification as Natives or Indigenous people, rather than as Indians.

19. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citations omitted). The power of ambiguity is further demonstrated in the debate over the Kennewick man. See Susan B. Bruning, *Complex Legal Legacies: The Native American Graves Protection and Repatriation Act, Scientific Study, and Kennewick Man*, 71 AM. ANTIQUITY 501, 507 (2006).

A NAGPRA claim could provide Native people with meaningful power over the fate of the bison, but it may do so at the expense of objectifying a living being with deep cultural and spiritual significance. In light of this nuance, this essay does not seek to provide a recommendation. Rather, it simply argues that bison *could* be repatriated as objects of cultural patrimony under NAGPRA and touches on some potential consequences of such a claim. Part II details the legislative history and key elements of NAGPRA. Part III surveys the history of the American bison, the significance of the bison in Yellowstone National Park, and the historical relationship between Native peoples and national parks. Part IV argues for the applicability of NAGPRA to the Yellowstone bison, and Part V explores two implications of pursuing a NAGPRA claim on behalf of the Yellowstone bison. Part VI concludes.

II. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Following efforts by indigenous activists, NAGPRA was created to address the rampant theft and appropriation of Native objects, especially human remains, for display in museums.²⁰ To this end, NAGPRA provides a mechanism to return ownership of such objects found on federal or tribal lands to Native people.²¹ Although the Act was initially framed as a human-rights law, it has been disconnected from its initial purpose and relegated to the realm of administrative procedure.²² This Part surveys the legislative background of NAGPRA and details each of its central elements.

A. Legislative Background

NAGPRA was intended to be a human-rights law, passed to address indigenous activism in response to archaeological and museum practices.²³

20. See generally NAGPRA §§ 3001–13; see also *Native American Issues: Federal Agency Efforts and Challenges Repatriating Cultural Items*: Testimony on GAO-22-105685 Before the Committee on Indian Affairs, U.S. Senate (2022) (statement of Anna Maria Ortiz, Dir., Nat. Res. & Env't).

21. See NAT'L PARK SERV., *supra* note 1.

22. Yasaitis, *supra* note 16, at 266–69.

23. *Id.* at 266; see James D. Wilde & Clifford Brown, *Basic Consultation Requirements of NAGPRA for Federal Land Managers: What's a Manager to Do?*, 14 FED. FACILITIES ENV'T J. 29, 29 (2003) (asserting that "NAGPRA is actually civil rights law"); Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. COLO. L. REV. 593, 594 (2012) (quoting that "(NAGPRA) is, first and foremost, a human rights law"); see also Sherry Hutt, *If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans*, 24 N. ILL. U. L. REV. 527, 545 (2004) (stating that "NAGPRA is the quintessential equal protection law for Native American cultural property").

One senator described NAGPRA as an attempt to protect the “civil rights of America’s first citizens [that] have been so flagrantly violated for the past century.”²⁴ The Act was developed to fill the gaps left by earlier statutes, such as the Antiquities Act of 1906, which restricted excavation, destruction, or appropriation of tribal artifacts that remained federal property.²⁵ Although NAGPRA’s actual text is brief, it contains elements of Indian law, property law, human-rights law, and administrative-procedure law.²⁶

Despite an initial focus on human rights, NAGPRA is now treated as mainly an administrative law. In *United States v. Corrow*, a Tenth Circuit case interpreting NAGPRA, the court stated in dicta that NAGPRA was enacted to achieve two objectives: “to protect Native American . . . objects of cultural patrimony presently on Federal or tribal lands; and to repatriate Native American . . . objects of cultural patrimony currently held or controlled by Federal agencies and museums.”²⁷ The shift from human-rights law to bureaucratic checklist is likely influenced by the government’s hesitance to commit to a more-than-nominal recognition of indigenous rights. However, it is likely also a consequence of the day-to-day realities of the Act’s implementation.

NAGPRA claims and remedies typically fall into the hands of federal cultural- or natural-resource managers.²⁸ This outcome is partly due to the fact that NAGPRA’s enactment required museums and federal agencies to act quickly, meaning early engagement with the Act focused on the logistics of implementation.²⁹ In this way, NAGPRA demonstrates a common problem in administrative legislation—a policy that embodied lofty ideals is quickly watered down through rushed compliance with technical requirements. As a result, many tribal groups and Native individuals are unsatisfied with NAGPRA.³⁰ One survey found that only 61% of surveyed tribal repatriation workers believed that NAGPRA would be “a useful law for

24. Yasaitis, *supra* note 16, at 266 (quoting Senator Daniel Inouye).

25. Antiquities Act of 1906, 16 U.S.C. §§ 431–33. For more on the Antiquity Act’s limitations; see Goldman, *supra* note 5, at 230.

26. Hutt, *supra* note 23, at 546–47.

27. *United States v. Corrow*, 119 F.3d 796, 799–800 (10th Cir. 1997).

28. Wilde & Brown, *supra* note 23, at 29.

29. Harms, *supra* note 23, at 595.

30. *Id.* at 605–08.

tribes for many years to come.”³¹ The implementation of the Act is further limited by a lack of available funding and adequate enforcement.³²

NAGPRA applies to federal and tribal lands, working in conjunction with the Archaeological Resources Protection Act³³ and the National Historic Preservation Act.³⁴ Each of these acts covers a limited collection of objects, and each values these historical resources as important elements of U.S. culture rather than focusing on indigenous rights.³⁵ Demonstrating this focus, the National Historic Preservation Act states that Native American values will be “taken into account *to the extent feasible*.”³⁶ In contrast, NAGPRA “reflects the unique relationship between the Federal Government and Indian tribes.”³⁷ The Act applies only to Native objects and is recognized by the Department of the Interior as Indian legislation, meaning any ambiguities are to be resolved “liberally in favor of the Indians.”³⁸

B. Elements of NAGPRA

This Section describes the key elements of NAGPRA, including the statute’s distinct definition of “Native American,” standing requirements, and covered objects. The final subsection focuses primarily on objects of cultural patrimony—the category that is most ambiguous and most relevant to this essay.

i. “Native American”

In the litigation surrounding the Kennewick Man, the Ninth Circuit established that the first step in ascertaining the applicability of NAGPRA is to determine if the object in question is a “Native American” object.³⁹ While “Native American” and its associated terms (e.g., Indian, American Indian)

31. Chip Colwell-Chanthaphonh, *The Work of Repatriation in Indian Country*, 71 HUM. ORG. 278, 287 (2012).

32. Shannon N. Cilento, *The Road to Repatriation: NAGPRA, Its Shortcomings, and the Anthropologist’s Duty* (Mar. 19, 2015) (B.A. thesis, SUNY Oswego) (on file with SUNY Oswego).

33. Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–mm.

34. National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101–307108.

35. Elizabeth M. Koehler, *Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of U.S. and Canadian Law*, 41 INT’L L. 103, 112 (2007).

36. *Id.* (quoting 54 U.S.C. § 306108 (emphasis added)).

37. NAGPRA § 3010.

38. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

39. See Robert Van Horn, *The Native American Graves Protection and Repatriation Act at the Margin: Does NAGPRA Govern the Disposition of Ancient, Culturally Unidentifiable Human Remains?*, 15 WASH. & LEE J. C.R. & SOC. JUST. 227, 240–41 (2008) (citing “*Bonnichsen III*,” *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004)).

have been the subject of contentious legislation and litigation, NAGPRA avoids entanglement with other definitions. The statute defines “Native American” expansively: “of, or relating to, a tribe, people, or culture that is indigenous to the United States.”⁴⁰ Interpreting NAGPRA, the Ninth Circuit emphasized the word “is,” requiring a “relationship to a presently existing tribe, people, or culture” for an object to be considered Native American.⁴¹ Because most NAGPRA litigation has centered on human remains,⁴² this provision has been analyzed in that context. Nonetheless, this definition and interpretation of “Native American” applies across all categories of covered objects.

ii. Standing

NAGPRA requires Native groups to file for repatriation.⁴³ Determining standing in these cases can be complicated, as a Native person’s understanding of property ownership does not always align with those recognized in the U.S. legal system.⁴⁴ In one interesting case, plaintiffs argued that human remains themselves should have standing to pursue action under NAGPRA.⁴⁵ The claimants relied on Hawaiian customs which perceive human remains as “spiritual beings that possess all of the traits of a living person.”⁴⁶ The court rejected this claim, arguing that “[o]bjects or entities without any attributes of life in the observable or provable sense are generally not afforded a legally-protected interest for standing purposes”⁴⁷ unless “they act as surrogates for the interests of living things.”⁴⁸

In cases where living humans assert a legal interest, plaintiffs must satisfy three standing requirements.⁴⁹ In one NAGPRA case, the court summarized these criteria:

40. NAGPRA § 3001(9).

41. *Bonnichsen*, 367 F.3d at 876; Van Horn, *supra* note 39.

42. *See generally* Van Horn, *supra* note 39 (discussing the importance of the Kennewick Man and Spirit Cave Man cases as hallmark litigation with respect to NAGPRA’s reach and applicability to human remains).

43. This requirement can be burdensome. One scholar suggests providing an attorney to tribes wishing to pursue repatriation efforts. Cilento, *supra* note 32, at 14.

44. Harms, *supra* note 23, at 608–09.

45. For more on this case, see Yasaitis, *supra* note 16, at 272–73.

46. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1406 (D. Haw. 1995).

47. *Id.* at 1407.

48. *Id.*

49. *Id.*

First, the plaintiff must allege an injury-in-fact that is concrete and particularized, and actual or imminent. . . . Second, there must be a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And, third, there must be redressability - a likelihood that the requested relief will redress the alleged injury.⁵⁰

When interpreting injury-in-fact with respect to NAGPRA, courts have looked at the type of damage that may be caused to the contested property but have discounted injuries that are "conjectural and hypothetical."⁵¹ In non-NAGPRA contexts, courts have interpreted injury-in-fact to include environmental impacts on an area to which a group has cultural and religious ties,⁵² as well as impacts on a plaintiff's aesthetic or recreational interests.⁵³

One of the main difficulties in establishing injury is demonstrating that the object in question is in fact covered by NAGPRA on the basis of its relation to the Tribe.⁵⁴ Tensions arise when stories of ancestry, the use of objects, or tribal traditions are passed through oral history—a source not considered to be evidence in a U.S. court of law.⁵⁵ However, once an injury-in-fact is sufficiently alleged, a plaintiff is likely to satisfy the other two requirements. If the injury is lack of ownership over property, and a federal agency is in possession of that property, a "fairly traceable connection" can easily be demonstrated.⁵⁶ Finally, under NAGPRA, the requested relief would be a return of ownership and control over the property, satisfying the redressability requirement.⁵⁷ In NAGPRA cases where a plaintiff seeks action against a federal agency—the majority of NAGPRA actions—courts can apply a more expansive form of standing. In this version, a plaintiff meets the standard by showing an injury-in-fact that is within the statute's "zone of interests."⁵⁸

50. *Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1133 (E.D. Cal. 2010) (internal quotations omitted).

51. See, e.g., *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 396 F. Supp. 2d 1087, 1090, 1094 (D.S.D. 2005) (citations omitted); *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915 (D.C. Cir. 2003) (citations omitted).

52. *Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1134 (citations omitted).

53. *Id.* (citations omitted).

54. See *The Native American Graves Protection and Repatriation Act (NAGPRA)*, U.S. NAT'L PARK SERV., <https://www.nps.gov/archeology/tools/laws/nagpra.htm> [<https://perma.cc/QG87-KQ5R>].

55. Cilento, *supra* note 32, at 116–17; Koehler, *supra* note 35, at 13–14.

56. See Koehler, *supra* note 35, at 106; *Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1149 (discussing claims of cultural property held by federal agents and agencies).

57. See generally Koehler, *supra* note 35, at 113; *Winnemem Wintu Tribe*, 725 F. Supp. 2d at 1133.

58. Yasaitis, *supra* note 16, at 270.

NAGPRA has certain standing limitations that are either baked into the statute or read in by courts.⁵⁹ As stated in its terms, NAGPRA only applies to federal and tribal lands.⁶⁰ Courts have also found that non-Native Americans lack Article III standing to invoke NAGPRA.⁶¹ This limitation is due to the standing requirements' demand that the lineal descent or cultural affiliation between object and plaintiff be established by "a preponderance of the evidence."⁶² Finally, a case will be dismissed if a plaintiff did not exhaust available agency remedies or if the claim is in response to an agency action that is not yet final.⁶³

iii. Covered Objects

NAGPRA sets out four types of objects that are within the scope of the statute: human remains, funerary objects (divided into associated and unassociated funerary objects), sacred objects, and objects of cultural patrimony.⁶⁴ Human remains include physical body parts of the deceased that were not "freely given or naturally shed"⁶⁵—bones are the paradigmatic example. Funerary objects are those objects placed with human remains as part of a death rite.⁶⁶ Associated funerary objects are in the possession of a federal agency alongside the relevant human remains, while unassociated funerary objects are those not possessed by a federal agency.⁶⁷ Sacred objects are "specific ceremonial objects" used by Native religious leaders "for the practice of traditional Native American religions by their present day adherents."⁶⁸

Objects of cultural patrimony make up the most complicated (or at least the most vague) category. NAGPRA defines objects of cultural patrimony as items "having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual [member]."⁶⁹ These objects are often

59. *See id.* at 270.

60. *Id.* at 275.

61. *See, e.g.,* Jensen v. U.S. Nat'l Park Serv., 113 F. Supp. 3d 431, 434 (D. Mass. 2015).

62. Yasaitis, *supra* note 16, at 271–72; *see also* Idrogo v. U.S. Army, 18 F. Supp. 2d 25, 27 (D.D.C. 1998) (finding that plaintiffs lacked standing because they failed to prove they were direct descendants of the remains to be protected under the NAGPRA).

63. Yasaitis, *supra* note 16, at 273.

64. NAGPRA § 3001(3).

65. 43 C.F.R. § 10.2(d)(1) (2022).

66. NAGPRA § 3001(3)(A).

67. *Id.* § 3001(3)(A)–(B).

68. *Id.* § 3001(3)(C).

69. *Id.* § 3001(3)(D); *see also* Goldman, *supra* note 5, at 229.

those that symbolize an entire culture or a central element of that culture.⁷⁰ NAGPRA regulations promulgated by the Secretary of the Interior provide the Zuni War Gods and the Confederacy Wampum Belts of the Iroquois as examples⁷¹—two sets of discrete objects seen as belonging to an entire group rather than a single owner. In cases where an object was found to fall within this category, courts have typically recited the definition from the Act. Attempting to clarify the definition, the Tenth Circuit unhelpfully wrote that “[t]he key aspect . . . is whether the property was of such central importance to the tribe or group that it was owned communally.”⁷²

Although courts have upheld “objects of cultural patrimony” as a legitimate category,⁷³ there has been little guidance as to its boundaries. In *United States v. Corrow*, a case exploring whether NAGPRA’s definition of cultural patrimony is unconstitutionally vague, the Tenth Circuit acknowledged this ambiguity.⁷⁴ Nonetheless, the court affirmed the constitutionality of the definition and noted that the ambiguity may lead to a desirable abundance of caution before interfering with objects that may be significant to Native peoples.⁷⁵ The ambiguity is also useful considering that Indian canons of construction require ambiguity to be resolved liberally in favor of Indian interests,⁷⁶ giving this category potential as a source of power and creative advocacy for Native sovereignty.

III. AMERICAN BUFFALO

Buffalo—another name for the American bison—are emblematic of the American West. They are found on the seal of the Department of the Interior and the logo of the NPS, and the buffalo was adopted as America’s national mammal in 2016.⁷⁷ The bison at Yellowstone National Park are seen by many as the last “true” buffalo, and they are currently under attack due to claims of overpopulation.⁷⁸ This Part provides an overview of the history

70. See Goldman, *supra* note 5, at 232.

71. 43 C.F.R. § 10.2(d)(4) (2022).

72. *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997) (citation omitted).

73. See *id.* at 803.

74. *Id.*

75. *Id.* (“[A]mbiguous meanings cause citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964))).

76. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

77. National Bison Legacy Act, § 3, Pub. L. No. 114-152, 130 Stat. 373 (2016) (codified as amended at 36 U.S.C. § 301).

78. See Johnathan Hettinger, *Study Says Yellowstone’s Bison Are Exerting an Unhealthily Heavy Footprint*, MONT. FREE PRESS: WILDLIFE (Apr. 9, 2020),

of the American bison, reports on new developments for Yellowstone bison, and maps the relationship between the NPS and Native peoples.

A. History

In the 19th century, U.S. generals, politicians, and self-styled frontiersmen set out on a mission to systematically destroy the 30 million buffalo that populated the American rangeland.⁷⁹ The destruction of the buffalo is inextricably tied to Manifest Destiny and the violent subjugation of Native people, with one colonel of the time enthusiastically declaring that “[e]very buffalo dead is an Indian gone.”⁸⁰ This regime was supported by representatives of the Department of the Interior (then the “Interior Department”), who testified before Congress in 1874 “that it would be impossible to ‘civilize’ the Plains tribes” while buffalo continued to roam.⁸¹ By the end of the century, only a few hundred buffalo remained.⁸²

Conservation efforts have generally been successful, and the population of genetically pure bison has been partially restored through the creation of preserves.⁸³ However, genetically pure herds remain at risk, in part due to the crossbreeding of free-roaming buffalo with captive bison or cattle.⁸⁴

The legal landscape surrounding bison has reinforced the idea that the health of buffalo herds and that of Indian nations are linked.⁸⁵ Buffalo have great cultural importance to many Native nations and references to buffalo were written into early treaties.⁸⁶ Native groups have always been involved in the restoration of bison populations, ensuring the survival of free-

<https://montanafreepress.org/2020/04/09/study-says-yellowstone-bison-are-exerting-an-unhealthily-heavy-footprint> [<https://perma.cc/6QLE-5EJP>].

79. See Phippen, *supra* note 8.

80. *Id.*

81. Lloyd Burton, *Wild Sacred Icon or Woolly Cow? Culture and the Legal Reconstruction of the American Bison*, 23 POL. & LEGAL ANTHROPOLOGY REV. 21, 23 (2000).

82. King, *supra* note 10.

83. Jeff Schmerker, *Genetically Pure American Bison: How Many Are Left?*, INTEGRATED DNA TECH. (June 17, 2020), <https://www.idtdna.com/pages/community/blog/post/the-bison-that-grand-genetically-imperiled-ruler-of-america-s-iconic-landscapes> [<https://perma.cc/T78T-PQJ9>].

84. *Id.* The NPS reports that 31,000 bison are stewarded as wildlife while 360,000 bison are privately owned as livestock. See *People and Bison*, NAT’L PARK SERV. (Nov. 1, 2018), <https://www.nps.gov/subjects/bison/people.htm> [<https://perma.cc/FB9R-5Q6J>].

85. See Schmerker, *supra* note 83.

86. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 375 (1980) (affirming Indians retain the “right to hunt on any lands . . . so long as the buffalo may range thereon in such numbers as to justify the chase” (quoting Fort Laramie Treaty, Sioux-US, April 29, 1868, 15 Stat. 639)).

roaming bison in particular.⁸⁷ Today, many of the restoration efforts are led by the InterTribal Buffalo Council (“ITBC”), “a collection of 69 federally recognized Tribes from 19 different states whose mission is to restore buffalo to Indian Country in order to preserve [their] historical, cultural, traditional, and spiritual relationship for future generations.”⁸⁸

Bison are entangled in a web of different statutes, subject to federal, state, and tribal laws, and some western states have reclassified bison from wildlife to livestock.⁸⁹ This shift removes what little protections wild bison have by commodifying them and placing them on the level of domestic cattle—the bison can be captured or slaughtered when they wander onto state or privately owned lands. However, some state agencies have allowed bison seasonal access to land outside of the national parks, letting them safely roam.⁹⁰

Some Native groups have fought to have free-roaming bison transferred to their land where tribal groups would care for them.⁹¹ In a 2013 case, the Montana Supreme Court allowed for the transfer of Yellowstone bison to their historic home on the Fort Peck and Fort Belknap Indian Reservations.⁹² This decision was made despite lobbying on the part of the livestock industry to keep bison out of the state.⁹³ The livestock industry largely opposes the introduction of free-roaming bison based on the unsubstantiated risk of brucellosis transmission from bison to cattle and competition for forage on public ranges.⁹⁴

B. Yellowstone Bison

From a population low of less than 100 bison in the early 1900s,⁹⁵ there are now 11,000 “genetically pure” bison, meaning that they have not been

87. KEN ZONTEK, *BUFFALO NATION: AMERICAN INDIAN EFFORTS TO RESTORE THE BISON* 147 (2007).

88. *Who We Are*, INTERTRIBAL BUFFALO COUNCIL, <https://itbcbuffalonation.org> [<https://perma.cc/D83V-A5ZB>].

89. Burton, *supra* note 81, at 21.

90. Jenny Harbine & Kari Birdseye, *Montana Supreme Court Affirms Bison Can Roam*, EARTHJUSTICE (Mar. 12, 2014), <https://earthjustice.org/news/press/2014/montana-supreme-court-affirms-bison-can-roam> [<https://perma.cc/NC6P-QNTJ>].

91. See generally Jeremy Hance, *How Native American Tribes are Bringing Back the Bison from Brink of Extinction*, THE GUARDIAN (Dec. 12, 2018), <https://www.theguardian.com/environment/2018/dec/12/how-native-american-tribes-are-bringing-back-the-bison-from-brink-of-extinction> [<https://perma.cc/F7Z8-EREL>].

92. *Citizens for Balanced Use v. Maurier*, 303 P.3d 794, 799 (Mont. 2013).

93. See UM Legislative News Service, *Lawmakers Consider the Future of Bison in Montana*, MONT. PUB. RADIO (Mar. 25, 2019), <https://www.mtpr.org/montana-news/2019-03-25/lawmakers-consider-the-future-of-bison-in-montana> [<https://perma.cc/5ALJ-WWR9>].

94. Burton, *supra* note 81, at 23–24.

95. Schmerker, *supra* note 83.

crossbred with domestic cattle or captive bison.⁹⁶ While these bison are scattered across the country, the bison at Yellowstone National Park are unique in that they are viewed by some Native groups as the true descendants of the original population.⁹⁷ This population now numbers around 5,400.⁹⁸

The bison population in Yellowstone is currently managed under the Interagency Bison Management Plan (“IBMP”)⁹⁹—a management plan produced by a team of state, federal, and tribal officials who consulted on recommendations for bison management.¹⁰⁰ The NPS has recently become concerned about the potential for bison overpopulation in Yellowstone, which would manifest in overgrazing of park land,¹⁰¹ leading IBMP partners to develop a management plan to remove as many as 900 bison.¹⁰² The IBMP currently allows for three methods of population reduction: hunting outside of the park, slaughtering bison for processing and distribution by Tribes, and relocating quarantined, brucellosis-free bison to tribal lands.¹⁰³ Though hunting is included in the plan, off-park hunting has not been successful in reducing bison populations, and unauthorized hunting in the park is prohibited by federal law.¹⁰⁴ This leaves the other two methods—slaughter and relocation—to address overpopulation.

The majority of bison will be sent to slaughter, and their meat and hides will be distributed by tribal members represented in the IBMP.¹⁰⁵ Some bison who qualify for a special screening program will be quarantined to ensure that they are brucellosis-free before being transferred to tribal

96. Medina, *supra* note 12.

97. *Frequently Asked Questions: Bison*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/nature/bisonfaq.htm> [<https://perma.cc/2ZGZ-RMZ8>].

98. Medina, *supra* note 12.

99. *Interagency Bison Management Plan*, ibmp.info [<https://perma.cc/3GCK-JJW4>].

100. Morgan Warthin, *Interagency Bison Management Plan Bison Operations Begin in Yellowstone*, NAT’L PARK SERV. (Mar. 2, 2020), <https://www.nps.gov/yell/learn/news/20009.htm> [<https://perma.cc/GJK5-ASNMM>].

101. Medina, *supra* note 12.

102. *Id.*

103. *Id.*

104. National Park Protection Act of 1894, 16 U.S.C. § 26 (1894); *Alternatives, Questions & Answers About Bison Management*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/management/bison-management.htm> [<https://perma.cc/BC8N-MDU3>]; Azi Paybarah, *45,000 Apply for the Chance to Kill 12 Bison in Grand Canyon National Park*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/us/grand-canyon-national-park-bison-hunting.html> [<https://perma.cc/9LEP-WA7Y>]; see *id.* (explaining that while 836 bison were removed in the winter of 2019, only two were actually hunted and subsequently killed).

105. Medina, *supra* note 12.

lands.¹⁰⁶ In response to criticism of this plan—specifically of the slaughter—the NPS has acknowledged that it is unlikely the agency would be able to withdraw from the IBMP, force surrounding states to change their policies, or ignore the livestock industry’s preferences.¹⁰⁷

As is often the case in American animal-population management, the idea that there *is* overpopulation is, in itself, contentious. While it is true that bison populations have been growing,¹⁰⁸ their population is nowhere near the numbers that would be too high for American rangeland to support. Instead, these numbers are simply too high for the small area allotted to the bison.¹⁰⁹ The areas around Yellowstone refuse to allow bison, forcing the large animals to congregate in an even smaller area towards the center of the park.¹¹⁰ Additionally, the bison habitat surrounding the park is being replaced by human development,¹¹¹ typically in the form of farmland or urban development. Nonetheless, the NPS and the Department of the Interior are moving forward with a plan that seeks to reduce bison population numbers rather than address these other conditions.

C. Native Peoples and National Parks

There has nearly always been tension between Native people and the NPS. Congress’s stated purpose in creating the NPS was “to conserve the scenery and the natural and historic objects and the wild life [in national parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”¹¹² Yellowstone in particular was established on supposedly

106. See Helena Dore, *28 Yellowstone Bison Transferred to Fort Peck Through Quarantine Program*, BOZEMAN DAILY CHRON. (Jan. 13, 2022), https://www.bozemandailychronicle.com/news/environment/28-yellowstone-bison-transferred-to-fort-peck-through-quarantine-program/article_c6cf3871-fae2-5936-9be3-b7af7990d714.html [https://perma.cc/L2AV-WBXG].

107. See *Management*, Subheading of *Questions & Answers*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/management/bison-management.htm> [https://perma.cc/Q4BU-3XLL] (last updated June 7, 2022).

108. *Id.*

109. *Overpopulation of Wild Bison Fact Sheet*, BUFFALO FIELD CAMPAIGN, <https://www.buffalofieldcampaign.org/archives/factsheets/overpopulation.html> [https://perma.cc/47M6-EGPM]. Some argue that the numbers are not too high, but rather that the carrying capacity in the IBMP was arbitrarily chosen as a matter of convenience. *Id.*

110. Harbine & Birdseye, *supra* note 90 (“As recently as 2008, more than 1,400 bison—about one-third of the current size of Yellowstone’s bison population—were captured and slaughtered by government agencies while leaving Yellowstone in search of food.”).

111. Medina, *supra* note 12.

112. The Organic Act, 16 U.S.C. § 1.

vacant and “unspoiled lands,” demonstrating a willful disregard for the Native peoples who had lived in the area for millennia.¹¹³

Though a valuable resource, national parks are not truly preserves in the sense that they are not a place where time has stopped. Rather, national parks preserve an artificial vision of the past in which Native people did not exist. This type of park and resource management reifies the Anglo-American separation of nature and culture, and it reflects the politics of Manifest Destiny. The storied version of colonization as the work of brave frontiersmen creating a new nation relies on the idea that Europeans encountered pristine, unpopulated lands ripe for the taking.¹¹⁴ When the NPS disregards tribal claims to the land, as well as to the plants and animals living there, the agency upholds this vision and narrative.

Fortunately, the NPS has been increasingly attentive to tribal interests in response to legislation and awareness of the many injustices against indigenous people. For example, the National Environmental Policy Act requires agencies, including the NPS, to seek tribal input on planned actions that will have an environmental impact.¹¹⁵ Additionally, a 1994 executive order required national park managers to consult on a government-to-government basis with tribal representatives.¹¹⁶ The issues arising in bison management in particular have created an opportunity for the NPS to consult with Native groups. The NPS has acknowledged the perspectives of tribal leaders and recognized that the parks do not exist in a vacuum, but are instead subject to competing interests in tourism, preservation, and restoration of heritage lands.¹¹⁷ The IBMP includes a number of tribal partners, and several Yellowstone staff have recognized that buffalo are important to many Native groups with whom they have a responsibility to consult.¹¹⁸

Though this is a step in the right direction, an advisory role for tribal representatives is insufficient. Currently, bison are publicly owned and the U.S. federal government retains full management control over them, consulting tribal representatives only as an element of friendly relationships

113. Tarka, *supra* note 11, at 17.

114. Koehler, *supra* note 35, at 104.

115. 40 C.F.R. § 1501.9(b) (2022).

116. Tarka, *supra* note 11, at 22; Memorandum on Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22951 (May 4, 1994).

117. See *Tribal Tourism and Native Voices in Parks*, NAT'L PARK SERV., <https://www.nps.gov/articles/2016npstribaltourismhighlights.htm> [<https://perma.cc/F52L-83B3>] (last updated Sept. 21, 2017).

118. Tarka, *supra* note 11, at 92–93.

between neighboring governments.¹¹⁹ This dynamic is problematic in that it discounts any claim by Native people to the buffalo themselves. At best, Native groups are seen as bearers of good advice and counsel, and the information about Native groups is incorporated into park interpretive programs.¹²⁰ Native groups that see the buffalo, and especially the Yellowstone buffalo, as a pivotal character in their lives and identities are thus alienated.¹²¹ In the next Part of this essay, I propose an approach that would distribute power to Native groups: bringing a NAGPRA claim to restore tribal ownership and management authority over the Yellowstone bison.

IV. YELLOWSTONE BISON AS OBJECTS OF CULTURAL PATRIMONY

In order to restore power to Native groups with respect to the Yellowstone bison, the courts or legislature must clarify who owns (and therefore has management authority over) the animals. At present, the Yellowstone bison are publicly owned and managed by the federal government—specifically, the Department of the Interior.¹²² This status means that the government must manage the bison with an eye towards conservation for current and future generations but nonetheless has final say over any management decisions.¹²³

By mobilizing NAGPRA to reclaim the Yellowstone bison as an object of cultural patrimony, Native groups could instead own the bison. Most of these bison could remain in the park, but they would be considered resources held in trust for Native people or Native possessions “lent out” to the NPS. While several groups may be able to bring a NAGPRA claim, this essay analyzes a potential claim by the Lakota Sioux. With this context, this Part looks to NAGPRA’s “Native American” characterization, standing for the

119. See *id.* at 22; *Wild and Domestic Bison*, Subheading to *People and Bison*, NAT’L PARK SERV., <https://www.nps.gov/subjects/bison/people.htm> [https://perma.cc/MWT8-YPS2] (last updated Nov. 1, 2018); Danny Lewis, *The Bison is Now the Official Mammal of the United States*, SMITHSONIAN MAG. (May 9, 2016), <https://www.smithsonianmag.com/smart-news/bison-now-official-mammal-united-states-180958921> [https://perma.cc/XE25-U3Y6].

120. See Patricia C. Albers et al., *The Home of the Bison: An Ethnographic and Ethnohistorical Study of Traditional Cultural Affiliations to Wind Cave National Park*, U.S. NAT’L PARK SERV. PUBL’N & PAPERS i, xxv (2003).

121. See ZONTEK, *supra* note 87, at 103 (“Too fast and too institutionalized, [Montana’s bison] slaughter alienated the indigenous people.”).

122. See *Bison Management*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/management/bison-management.htm> [https://perma.cc/EHS2-BD7M]; *Wild and Domestic Bison*, *supra* note 119.

123. See Darragh Hare & Bernd Blossey, *Principles of Public Trust Thinking*, 19 HUM. DIMENSIONS WILDLIFE 397 (2014); Daniel Decker et al., *Governance Principles for Wildlife Conservation in the 21st Century*, 9 CONSERVATION LETTERS 290, 290–91 (2016).

Lakota Sioux, and the potential classification of bison as objects of cultural patrimony.

A. “Native American”

Under NAGPRA’s definition of Native American—“of, or relating to, a tribe, people or culture that is indigenous to the United States”¹²⁴— a number of groups could qualify to bring a claim with respect to the bison.¹²⁵ Although this definition has been interpreted in the context of human remains, the general principles are applicable to other types of claims. There must be a connection to an existing group with some tie to the object in question. In the potential case explored here, the bison could qualify as a Native American object with respect to the Lakota Sioux. Four out of six federally recognized Lakota Sioux Tribes are members of the ITBC.¹²⁶ Based on this ongoing relationship and the historical ties between the Lakota Sioux and the bison, the bison can likely qualify as “Native American” for NAGPRA purposes.

B. Standing

Because the plaintiffs in this case would be seeking action against a federal agency, a more expansive administrative standing is available: the plaintiff need only show injury-in-fact and that the injury is within the statute’s “zone of interests.”¹²⁷ The Lakota Sioux are well positioned to demonstrate an injury-in-fact. In *Fund for Animals v. Clark*, individual plaintiffs were granted standing based on their desire to “enjoy observing, photographing and generally commiserating” with wild bison in their natural habitat.¹²⁸ The court found that “seeing or even contemplating the type of treatment of the bison inherent in an organized hunt” was a sufficient aesthetic injury and would cause an irreparable harm.¹²⁹

In addition to their membership in ITBC, members of a Lakota Sioux Tribe would likely succeed in alleging an injury-in-fact with respect to the

124. NAGPRA § 3001(9); see Bruning, *supra* note 19 at 510 (“NAGPRA’s regulations confirm that proof of cultural affiliation for NAGPRA’s purposes does not require scientific certainty.”).

125. Relatedly, a 2002 study identified 10 Tribes with a historical, territorial, and residential connection to Yellowstone National Park. Tarka, *supra* note 11, at 18.

126. *Who We Are*, INTERTRIBAL BUFFALO COUNCIL, <https://itbcbuffalonation.org> [<https://perma.cc/LTW6-93DU>]; see note Error! Bookmark not defined. and accompanying text.

127. Yasaitis, *supra* note 16, at 270.

128. *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C 1998).

129. *Id.*

planned killing and removal of Yellowstone bison. The planned hunt and slaughter of the bison parallels the state-organized hunt in *Fund for Animals*, and the injury that would be suffered by the Sioux nation certainly exceeds the low bar for aesthetic injury set by the court. Tribal members would simply have to demonstrate that they intend to engage with the bison in their natural habitat—an argument that would be strengthened if this engagement is a significant part of their cultural and spiritual expression. The entangled survival of Tribes and free-roaming bison means that the death of the animals would create a significant injury.¹³⁰ Further, the imminence of the bison cull means the time is particularly ripe to allege injury with respect to the bison management plan.

This injury—an aesthetic injury that harms tribal members' identity and cultural continuity—is well within NAGPRA's zone of interests. NAGPRA was passed to create a remedy for Native people whose property is being withheld by federal agencies or organizations receiving federal funding.¹³¹ The NPS is a federal agency, and the argument in this case is that the bison are property appropriated by the NPS away from Native peoples. NAGPRA's zone of interests may be taken broadly to be civil rights for Native Americans or more narrowly to be the availability of procedural remedies to reclaim property. In either case, the injury suffered from a bison hunt would be within this zone. Granting Native people an advisory role in decision-making about a crucial resource is a civil-rights issue, and the issue could also be framed as a simple case of Native property being misappropriated by a federal agency.

C. Cultural Patrimony

While all bison have some significance to the Lakota Sioux and other Native groups, the Yellowstone buffalo are unique. These bison are considered to be the last true descendants of the bison originally populating the region. Lakota Sioux leaders have said that these buffalo are significant because "they are wild and still have natural wisdom."¹³² While it is apparent that these bison are important, it is less obvious whether they are

130. See Burton, *supra* note 81, at 33 ("Many Indian leaders are now coming to see that their tribes' future cultural survival and the wild bison's physical survival are intimately related, which accounts in large part for the growing number of reservations now hosting their own wild bison populations.").

131. See Francis McManamon, *The Native American Graves Protection and Repatriation Act* (NAGPRA), NAT'L PARK SERV. (2000), <https://www.nps.gov/archeology/tools/laws/nagpra.htm> [https://perma.cc/UCP3-WTBH]; U.S. NAT'L PARK SERV., *supra* note 1.

132. Tarka, *supra* note 11, at 93.

objects of cultural patrimony. As discussed, the boundaries of cultural patrimony are unclear, with most courts relying on the statutory definition without much additional interpretation. However, ambiguity can be promising, as ambiguities in Indian legislation must be resolved liberally in favor of Indian interests.¹³³

Broken down, the two criteria for an object of cultural patrimony are: (1) an ongoing historical, traditional, or cultural importance central to a Tribe; and (2) an inalienability deriving from collective tribal ownership.¹³⁴ With respect to the Lakota Sioux, the bison easily satisfy the first criteria. A study was conducted for the NPS to document the significance of Yellowstone buffalo to the Lakota Sioux, concluding that the Lakota people are connected materially and symbolically to the buffalo.¹³⁵ According to the same study, buffalo are involved in all major ceremonies of Lakota religion, and the Yellowstone bison are especially meaningful.¹³⁶

The report focuses specifically on the 1999 Buffalo Walk.¹³⁷ On February 7, 1999, a group of Native people from various nations began to travel from South Dakota to Yellowstone National Park.¹³⁸ This was in part a spiritual journey and in part, an effort to raise awareness of the Yellowstone buffalo that would be killed under the IBMP.¹³⁹ A letter shared during the walk read:

[W]e cannot abandon the buffalo that have been our source of survival and therefore, the center of our spirituality. Although there are domesticated herds elsewhere, elders and Spiritual leaders have said the Yellowstone buffalo are important in that they are wild and still have natural wisdom. With their instinctive intelligence intact, they can continue to serve their rightful place as keystone species of the ecosystem; essential to the survival of the earth and humankind.¹⁴⁰

133. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

134. See *Native American Graves Protection and Repatriation Act Summaries of Cultural Items*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/summaries-of-cultural-items.htm> [<https://perma.cc/MDS9-2338>] (last updated July 19, 2021).

135. Tarka, *supra* note 11, at 27.

136. See *id.* at 41.

137. See *id.*

138. *Id.* at 70.

139. See *id.*

140. Letter from Rosalie Little Thunder to Leaders and People of the Buffalo (Jan. 27, 1999) (on file with Walk to Save the Buffalo).

This walk, along with regular days of prayer and traditional buffalo hunts,¹⁴¹ affirms the central role of the buffalo to the Lakota Sioux along historical, traditional, and cultural axes.

It is also true that buffalo are often subjects of communal tribal engagement rather than individual ownership.¹⁴² Even collective ownership may not be an expansive enough phrase, as the relationship between the buffalo and the group is inalienable. One participant in the Buffalo Walk left the ceremony to pray for buffalo slaughtered by the Montana Department of Livestock.¹⁴³ When she was arrested for trespassing, she said that she “felt disheartened because [she] was standing on ancestral land in a traditional role protecting [her] relatives and in accordance with natural law.”¹⁴⁴ Even when bison were, and are, killed by Native people, and even when meat or hides are exchanged, the bison is not alienated from tribal groups, but rather it is entering another phase of a continuing relationship.

Access to animals as property or a property-like right has been recognized in other Indian law cases.¹⁴⁵ In the early case *U.S. v. Winans*, the Supreme Court recognized the Yakama nation’s right to take fish as more than a right to the activity of fishing.¹⁴⁶ The Court interpreted the treaty right to mean “the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned.”¹⁴⁷ In a more recent case, the Ninth Circuit similarly recognized an expansive right to possess fish based on a treaty protecting fishing rights.¹⁴⁸

141. See Tarka, *supra* note 11, at 89, 108.

142. See e.g., *Restoring Bison to Tribal Lands*, Nat’l Wildlife Fed’n, <https://www.nwf.org/Our-Work/Wildlife-Conservation/Bison/Tribal-Lands> [<https://perma.cc/S6US-4MRW>] (describing tribal rather than individual ownership); *InterTribal Buffalo Council Partnership Adds Buffalo to Native American Tribes*, Nature Conservancy (Nov. 12, 2021), <https://www.nature.org/en-us/newsroom/partnership-adds-buffalo-to-tribal-lands> [<https://perma.cc/3HGI-DJME>] (same).

143. See Tarka, *supra* note 11, at 88.

144. *Id.* See also Matt Krupnick, ‘It’s a Powerful Feeling’: the Indigenous American Tribe Helping to Bring Back the Buffalo, *Guardian* (Feb. 20, 2022), <https://www.theguardian.com/environment/2022/feb/20/its-a-powerful-feeling-the-indigenous-american-tribe-helping-to-bring-back-buffalo> [<https://perma.cc/TMR6-JYVF>] (reporting a member of the Rosebud Sioux saying, “It’s a powerful feeling bringing our relatives home”).

145. See Rob Roy Smith, *At a Complex Crossroads: Animal Law in Indian Country*, 14 *ANIMAL L.* 109, 120 (2007).

146. *United States v. Winans*, 198 U.S. 371, 381 (1905).

147. *Id.*

148. See *United States v. Washington*, 853 F.3d 946, 966 (2017).

The buffalo are similarly implicated in treaties between the United States and the Lakota Sioux.¹⁴⁹ The Treaty of Fort Laramie guaranteed tribal access to lands “so long as the buffalo may range thereon.”¹⁵⁰ Red Cloud, an Ogala leader, affirmed this link between the buffalo and his people saying that, “[W]here the buffalo ranged, that was our country. [T]he country of the buffalo was the country of the Lakotas. [T]he buffalo must have their country and the Lakotas must have the buffalo.”¹⁵¹

The argument that buffalo are objects of cultural patrimony may be a difficult one. One potential roadblock is that bison are not a single discrete object. This critique could be addressed by arguing that the “object of cultural patrimony” is not all bison, but rather the specific bison in Yellowstone National Park that are going to be killed under the IBMP. This clarification also helps to affirm the injury-in-fact argument.

Further difficulty may arise simply because this argument requires a new application of a decades-old term. However, this application would not be the first time that animals would be recognized as elements of culture. In the Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes, “cultural landscape” is defined to include wildlife or domestic animals in a certain area.¹⁵² While the historic property guidelines have not previously been applied in NAGPRA evaluations, they demonstrate a willingness on the part of agencies to recognize the cultural significance of wildlife. Further, Congress could amend the NAGPRA definition of cultural patrimony to read “items [including living animals] having ongoing historical, traditional, or cultural importance central to the Indian tribe . . . itself, rather than property owned by an individual . . . member.”

V. IMPLICATIONS FOR TRIBAL SOVEREIGNTY

Using NAGPRA to reclaim the bison would have implications for tribal sovereignty—one of the central themes in federal Indian law and tribal governance. This essay presents NAGPRA as one available and previously unexplored option for increasing tribal influence over buffalo management. While ultimately tribal leaders and representatives must decide if this is a desirable path forward, this Part examines a negative aspect of this

149. See Treaty of Fort Laramie, Sioux-U.S., Apr. 29, 1868.

150. *Id.*

151. Albers et al., *supra* note 120, at 336.

152. *The Secretary of the Interior’s Standards for the Treatment of Historic Properties: Guidelines for the Treatment of Cultural Landscapes*, NAT’L PARK SERV., <https://www.nps.gov/Tps/standards/four-treatments/landscape-guidelines/terminology.htm> [<https://perma.cc/A4CT-HQ79>].

approach—the translation of sacred animals into legally recognized objects—and a positive aspect—the expansion of power rather than rights.

A. Buffalo as Objects and the Violence of Translation

There is an ontological problem with the NAGPRA approach: a compelling argument, especially without the possible amendment noted in Part IV.C, would require indigenous people to label the buffalo as objects. While this translation is not likely to have material consequences for the bison, it may be damaging or feel untrue to groups employing this rhetoric. Some nations see the status of bison as “inextricably linked” to the survival and status of their own culture.¹⁵³ The change of bison’s categorization from wildlife to livestock can be harmful to indigenous groups in part because of the commodification and desacralization of a valued living being.¹⁵⁴ Summarizing the impact of states’ reclassification of bison as livestock, ITBC’s co-founder and Wind River Sioux herd manager, Fred duBray, said: “They tried to kill the Indian while saving the red man. Now they want to kill the buffalo while keeping the meat alive.”¹⁵⁵

This approach could also be undesirable because it requires Tribes to go through NAGPRA processes. NAGPRA can be a spiritual burden for practitioners, as they are required to translate traumatic or deeply meaningful experiences into administrative formalities.¹⁵⁶ One well-respected tribal religious and political leader described NAGPRA as a “spiritual cost of business for all of [those] who work on claims” because the process requires tribal groups to share private information with outsiders in order to have their practices legitimized.¹⁵⁷ Along with sharing information and knowledge, Native groups must craft a unified view from a variety of perspectives in order to aggregate claims.¹⁵⁸ While the issue of generalization could be somewhat relieved by individual Native groups filing their own claims to the bison, competing claims may make it harder for any group to win a NAGPRA claim.

153. See, e.g., Burton, *supra* note 81, at 21.

154. See *id.* at 22.

155. *Id.* at 34.

156. Colwell-Chanthaphonh, *supra* note 31, at 284.

157. See *id.*

158. See Lindee R. Grabouski, *Smoke and Mirrors: A History of NAGPRA and the Evolving U.S. View of the American Indian* (May 2011) (M.A. thesis, University of Nebraska-Lincoln) (on file with DigitalCommons@University of Nebraska-Lincoln).

Further, it can be challenging for tribes to draw distinctions between cultural, economic, and religious or spiritual objects.¹⁵⁹ Understanding the cultural importance of the buffalo necessarily implicates their spiritual, religious, and economic importance.¹⁶⁰ As part of the American legal system, a NAGPRA claim would likely require Tribes to draw a neat separation between the secular and the sacred. This is especially likely considering that requests to protect buffalo under the American Indian Religious Freedom Act or the National Historic Preservation Act were not granted.¹⁶¹

Finally, relocating the bison from Yellowstone to a new area under tribal governance may not be a sufficiently desirable outcome. While there are other management options that do not involve killing the buffalo, relocation has thus far been the main alternative. In many Native traditions, the spiritual significance of a location is not just the place itself, but rather the place as it is animated by the plants and animals who live there.¹⁶² For example, the cultural identity of the Lakota and Cheyenne people is linked to Wind Cave National Park, mainly due to the historical presence of bison in that area.¹⁶³ In turn, those bison are more significant because they live in proximity to natural features imbued with spiritual and historical meaning.¹⁶⁴ Like the conceptual translation, the relocation of the bison could desecralize the buffalo. The potential problems discussed in this Section demonstrate the violence of translation, as Native groups are required to fit expansive histories and beliefs into rigid administrative boxes.¹⁶⁵

B. NAGPRA as a Mechanism for Increasing Power

Despite the potential harms of translation, filing a claim for the bison under NAGPRA may ultimately serve to empower Native communities. Professor Maggie Blackhawk notes a distinction between rights and power, arguing that Native groups need access to power rather than an increase in

159. See Tarka, *supra* note 1111, at 129; see also Bowen Blair, *Indian Rights: Native Americans versus American Museums: A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 127 (1979) (quoting Chief Oren Lyons of the Onondaga saying, “Religion, as it has been and is still practiced today on the reservation, permeates all aspects of tribal society. The language makes no distinction between religion, government, or law”).

160. See Albers et al., *supra* note 120, at 48–49, 58, 375–376, 391.

161. Tarka, *supra* note 11, at 130.

162. Albers et al., *supra* note 120, at iv, xix.

163. *Id.* at xix.

164. *Id.*

165. For a discussion of procedural and substantive access to value pluralism with respect to NAGPRA, see Tsosie, *supra* note 3, at 665–76.

rights.¹⁶⁶ Blackhawk describes power as the actual transfer of decision-making authority to Native groups, whereas rights simply grant minorities the ability to enforce limits on government power.¹⁶⁷ Power, rather than rights, has been the source of affirming and lasting tribal recognition.¹⁶⁸ Centering power in the wildlife management context allows Native groups to determine their own values and implement those values through management decisions.¹⁶⁹

As discussed in Part III.C, the United States has historically excluded Native people from national parks. In recent decades, the NPS has engaged with Native groups, but only by allowing them to hold consultative roles.¹⁷⁰ Placing Tribes in an advisory role may increase their rights as it relates to the buffalo, but it does not increase their power. This is especially true because the IBMP does not privilege Native perspectives over any others—including livestock interests—or mandate more than consideration. Additionally, Native groups have protested the IBMP specifically because the plan has led to the deaths of hundreds of buffalo.¹⁷¹ The former director of the Applied Anthropology Program of the NPS Intermountain Region contended that the NPS should institutionalize a partnership in the form of joint tribal-federal management over park lands.¹⁷² While this would be a positive outcome, Tribes would be unable to initiate this action as it is in the hands of the NPS.

The IBMP, a group in which Native voices are but one advisory perspective among many, is oriented towards rights.¹⁷³ In contrast, the ITBC, a self-guided collaborative of 69 tribes, is oriented towards power.¹⁷⁴ In 2019, senators from both parties introduced the Indian Buffalo Management Act (“IBMA”),¹⁷⁵ with the support of the National Bison Association and the National Congress of American Indians.¹⁷⁶ The premise

166. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1857 (2019).

167. *Id.* at 1848, 1864–65, 1870.

168. *Id.* at 1798 (“Instead, the national government has best protected Native peoples by bestowing power, not rights, through the recognition of inherent tribal sovereignty.”).

169. *Id.* at 1871.

170. See discussion *supra* Part III.C; see also ZONTEK, *supra* note 87, at 122.

171. See *supra* notes 135 to 144 and accompanying text.

172. Tarka, *supra* note 11, at 23.

173. See *Welcome to the Interagency Bison Management Plan Website*, INTERAGENCY BISON MGMT. PLAN (2010), <https://www.ibmp.info> [<https://perma.cc/59RS-2ZUA>].

174. See *Who We Are*, INTERTRIBAL BUFFALO COUNCIL (2019), <https://itbcbuffalonation.org> [<https://perma.cc/LN7H-VT66>].

175. Indian Buffalo Management Act, H.R. 5153, 116th Cong. (2019).

176. National Bison Association, *Indian Buffalo Management Act*, INTERTRIBAL BUFFALO COUNCIL (Sept. 2019), <https://itbcbuffalonation.org/wp-content/uploads/2019/11/NBA-IBMA-Support.pdf> [<https://perma.cc/6345-AV7E>]; National Congress of American Indians,

of the bill is that the Secretary of the Interior will enter into a co-management contract with Tribes who will have the authority to implement a buffalo restoration program, plan and execute commercial activities, and carry out management plans.¹⁷⁷

The IBMA passed the House in December of 2021, and the bill has been referred to the Senate's Committee on Indian Affairs.¹⁷⁸ However, it could still be valuable to bring a NAGPRA claim. Whereas the IBMA would ask the Secretary to mete out management powers to tribal representatives, a successful NAGPRA claim would give tribal leaders full management powers that they could then mete out to the Department of the Interior. Based on Blackhawk's rights/power framework, this balance would increase power for Native groups. Even if the NAGPRA claim were unsuccessful, it may give Tribes the opportunity to articulate the importance of the Yellowstone bison to Congress and the American people. This attention could generate political power that would shift some management authority to tribal groups or increase support for the ITBC's proposed bill.

VI. CONCLUSION

In summary, the Yellowstone bison are under imminent threat as the NPS moves forward with a management plan that kills hundreds of bison. These bison are of particular significance to Native groups, and the current consultative role given to tribal representatives is insufficient. Using NAGPRA to shift management authority of the Yellowstone bison to Native peoples would require a reductive translation of the bison into purely cultural objects rather than living beings entangled in social relations. This translation could have costs for the Native representatives who bring a NAGPRA claim, and perhaps for all Native people who value the bison as a relative or spiritual figure. Nonetheless, there are some pragmatic and political advantages to bringing such a claim, including increasing indigenous power with respect to bison management. Ultimately, tribal leaders must weigh the costs and benefits of such an approach as they continue to navigate their relationship with the buffalo in a world shaped by a changing climate and ever-shifting power dynamics.

Support to Create a Permanent Program Within the Bureau of Indian Affairs for Tribal Restoration and Management of Buffalo, INTERTRIBAL BUFFALO COUNCIL (2019), <https://itbcbuffalonation.org/wp-content/uploads/2019/12/NCAI-IBMA-Support.pdf> [<https://perma.cc/L9Q8-ZQV9>].

177. H.R. 5153, 116th Cong. (2019).

178. Indian Buffalo Management Act, H.R.2074, 117th Cong. (2021).