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The repatriation of culturally unidentifiable human remains

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For nearly two decades, the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) left unresolved a complex problem: the fate of Native American human remains that could not be affiliated with federally recognized tribes. In the spring of 2010, the US Department of Interior finally promulgated regulations for the disposition of these remains, providing a pathway for the potential return of 115,000 human remains. This paper presents the work at the Denver Museum of Nature & Science (DMNS) to address culturally unaffiliated human remains in its collection. Since 2008, the DMNS has received three National Park Service NAGPRA grants to consult with 142 tribes on human remains from across the USA. Drawing from the lessons of these consultations, this paper examines the philosophical, logistical, legal, and ethical issues confronting museums as they seek to contend with the quandaries posed by these remains.

Keywords: repatriation; NAGPRA; Native American human remains; consultation; law; ethics

Introduction

When the US Congress passed into law the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990, legislators left unresolved a complex problem: the fate of Native American human remains that could not be affiliated with any federally recognized tribe.[1] In the last 20 years, only some 27% of human remains in US museums subject to NAGPRA have been culturally affiliated.[2] To date, more than 42,000 Native American remains have been affiliated with a tribe under NAGPRA, paving the way for the legal repatriation of these human bodies. But the unaffiliated remains of more than 115,000 individuals and nearly one million associated funerary objects have sat on museum shelves in legal purgatory.[3]

Under NAGPRA, cultural affiliation 'means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.'[4] Hence, cultural affiliation is established by ascertaining: (1) an identifiable earlier group, (2) the federally recognized tribe, and (3) the shared identity between the past group and the present-day tribe. The law specifies that 10 lines of evidence should be used to make this determination: geographic, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant

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information or expert opinion. The law explicitly states that the level of certainty to make this decision is not 'scientific certainty,' but rather a 'preponderance of the evidence,' or about 51% certainty. Consequently, under the law, affiliation is not simply a biological connection but a 'reasonable' determination 'based upon an overall evaluation of the totality of the circumstances and evidence.' Despite these broad guidelines, the vast majority of human remains and associated funerary objects in museums have been deemed culturally unaffiliated.

The regulations that guide the implementation of NAGPRA had held in 'reserve' the rule – specifically, 43 CFR 10.11 – that would dictate who can claim unaffiliated remains, under what conditions they would be returned, and reporting requirements. Over the last decade establishing this new rule proved controversial, in large part because of the question of whether the rule should compel museums to repatriate all Native American human remains. Other problematic issues included the role of non-federally recognized Indian groups,[5] the possibilities of DNA analyses, how to resolve multiple or competing claims, and whether associated funerary objects must also be returned.

In the absence of a final rule guiding the repatriation of unaffiliated human remains, over the last two decades museums have only had one legal option to deal with remains in this category. They could collate all the historical records possible and conduct basic non-invasive, bio-metric documentation of the human remains, and then consult with every possible tribe associated with the remains and attempt to arrive at a consensus about disposition. This agreement would be formally presented before the NAGPRA Review Committee, which, in turn, made a recommendation to the US Secretary of the Interior, who was given the sole authority to make a final decision on the proposed agreement. This process was as complex as it was drawn out, although between 1994 and 2010, institutions and government agencies – as varied as Grand Canyon National Park and the Detroit Institute of Arts – asked the Secretary of the Interior 82 times for permission to return more than 4000 unaffiliated human remains.

Since 1995, principles and drafts for the rule on unaffiliated remains had been proposed, but none settled on (McKeown 2010, 227). Then, in the early months of 2010, rumors abounded that the final rule for 43 CFR 10.11 would soon be promulgated. On 15 March, the Department of the Interior published the final regulations in the *Federal Register* (Strickland 2010). After a brief but mostly hostile public comment period, in which more than 75 wide-ranging comments were submitted to the Department of the Interior, the new rule took effect on 14 May 2010. After nearly two decades, an established legal process now allows US museums and tribes to systematically address nearly all of the human remains in collections. In brief, this new legal process requires museums to offer transfer of control to tribes of unaffiliated remains from known tribal or aboriginal lands and, with the permission of the US Secretary of the Interior, it allows museums to offer transfer of control to non-federally recognized tribes or to reinter remains based on state law.

This paper examines the contentious issue of culturally unidentifiable remains through the lens of the Denver Museum of Nature & Science (DMNS), a leading regional natural history museum in the Rocky Mountains of Colorado, USA, with a collection of nearly 60,000 cultural artifacts (Colwell-Chanthaphonh, Nash, and Holen 2010). For the last three years, the museum has actively worked on addressing the unaffiliated human remains in its collection, receiving three NAGPRA grants to

consult with 142 tribes on remains from across the USA. This paper consists of two parts – the first describing in detail how consultations and repatriations have proceeded before the new regulations, and the second part discussing the new regulations. The DMNS is perhaps an ideal case study to consider these issues. While most US museums elected to wait for the promulgation of 43 CFR 10.11 before addressing these issues, the DMNS staff has direct experience with analyzing unaffiliated remains with the goal of repatriation and laboring to build consensus among scores of tribes on these difficult issues.[6] Additionally, because the DMNS has worked on these questions both before and after the new regulations, the DMNS example uniquely illuminates the limitations and potential of these latest legal developments.

Repatriation of the unknowns

In 2007, the DMNS staff decided that it had the obligation to proactively address through consultation the future of the 67 unaffiliated human remains left in its collection.[7] The staff acknowledged that museums have perhaps too often waited for legislative or regulatory direction before doing what is right, as they also tend to view historical problems as presenting only obstacles instead of opportunities. Although museum staff hoped that all of the remains could be repatriated, it was understood from the start that only the tribes could help to determine the final disposition of these remains. Extensive consultation with tribes would be needed.

Most of these 67 remains came to the museum in discomforting circumstances – burials disturbed out of idle curiosity and skulls and scalps purchased at trading posts. The majority of these donations have only vague information about their geographical, historical, or cultural contexts, which would provide evidence for a reasonable determination of cultural affiliation under the law. Distressingly, many remains were discovered in the collections and inventoried and examined for the first time in 1994, when the museum worked to comply with the inventory process that NAGPRA requires.

Although several of these individuals have been the subject of published research (e.g., Wormington 1935, 36), none of these remains has been the source of extensive research or significant scientific findings. The museum has not exhibited human remains in decades, and no museum records indicate that they were ever used in outreach or educational programs. Aside from the recent NAGPRA work, the majority of the remains have simply sat forgotten – unvisited, untouched, and unstudied – in the collection for decades.[8] The DMNS staff came to understand that it had an ethical duty to address the fate of these remains, even in the absence of legal obligations. The remains could not serve the museum's stated mission of public education and good stewardship, and likely could jeopardize fulfilling it. As we looked toward future plans, such as renovating the museum's permanent hall of Native American cultures and developing outreach programs, we realized that the human remains issue would be the proverbial shadow hanging over all our efforts. We understood that the institution could not have a future with tribes until it had resolved its past.

Significantly, while the DMNS staff in part rationalized the repatriation of these remains by calculating that the remains lacked museological value, tribal representatives objected to this argument. At one consultation when we presented this

reasoning, a tribal representative quietly, though sternly, said that he felt like he was 'being slapped on the back and punched in the face at the same time.' He resented the museum's utilitarian logic and insisted that even in the repatriation process we remember that his ancestors are not scientific play-things – that the significance of these remains not be estimated by what intellectual harvests the museum could reap from them. For traditional Native communities, these remains in museums are not, and have never been, mere specimens (Woodbury 1992). They are ancestors, human beings with spirit.

The consultation process: laying the groundwork

In 2008, the museum received its first National Park Service NAGPRA grant to consult with 84 tribes on the culturally unaffiliated human remains in its collection from the greater Rocky Mountain region. Because of the number of tribes involved and the geographic location of the remains, we strategically divided the work into two (occasionally overlapping) consultations: Rocky Mountain West and Rocky Mountain East.

As a beginning point, the museum used grant funds to contract a physical anthropologist (Marni LaFleur) to examine the remains and determine the minimum number of individuals and describe each element's condition and any unique features (such as disease, wear on teeth, and flattening of the skull from cradleboards), as well as to establish, when possible, age, sex, and Native American biological ancestry. The role of the physical anthropologist was not to overemphasize the biological line of evidence in the NAGPRA process, but to provide as much information as possible to the tribes. The new non-destructive methods allowed for another inventory, the opportunity to establish any new data that could inform the consultation process, and to ensure that the remains were of Native American ancestry, since NAGPRA only applies to Native Americans.

Through the months leading up to both consultation meetings, museum staff continually updated documents synthesizing information on the human remains. Constantly re-examining the records and seeking other information sources produced an evolving understanding of the human remains' biological characteristics, historical context, and possible cultural identity. Meeting announcements and invitations included synopses of records, part of NAGPRA's mandate for information sharing (Trope and Echo-Hawk 2000, 141). The museum strove for 'honesty and frequent personal contacts' with tribes, an important part of the collaborative model of repatriation (Ladd 2001, 114). This approach helps counter the colonialist histories of museums, a history often characterized by subterfuge, obfuscation, and distrust (e.g., Harper 2000). Humility, transparency, and patience proved to be the most useful virtues when interacting with tribal representatives.

After researching which tribes hold or once held traditional lands in the Rocky Mountains, the museum compiled a list of 41 tribes to consult with on remains from the western Rocky Mountains, and 43 to consult with on remains from the eastern Rocky Mountains. A hard copy letter was sent to each tribe, announcing the grant and seeking initial input. Several months later, tribal political officials and traditional leaders were formally invited to consult and participate in planned inter-tribal meetings. A hard copy letter was sent to every tribe, and then museum staff followed up with calls and emails. Those tribes that could not participate in the

inter-tribal consultations were still included in all subsequent decisions, as conversations proceeded via telephone, email, and fax.

The consultation process: using video-conference technology

With invitees from all over the greater Rocky Mountains, museum staff decided to attempt holding the inter-tribal meeting using state-of-the-art, video-conference technology. The goal of this experiment was to use innovative technology to substantially reduce the travel time and funds required to consult, and thereby increase tribal participation. Video-conferencing is preferable to conference calls because the interaction is a closer simulacrum of a physical, in-person meeting. The DMNS's video-conferencing capacity is based on its 'Science in Action' distance learning program in which museum curators broadcast classes via a live, two-way digital satellite/Internet system that connects feed-sites anywhere in North America. Participants in each location can see and speak to each other seamlessly in near real time.

Despite its potential, museum staff foresaw several potential complications with the video-conference technology. Most pressing was the possibility that the equipment would malfunction or catastrophically fail during a consultation. Anthropology department staff worked closely with museum IT (information technology) personnel during the planning phase to implement preventative measures against communication loss and to develop contingency plans. Several other potential problems arose, such as whether to record on DVD the consultation and if tribal members in non-Denver locations might want to see the human remains or funerary objects, and whether it would be deemed culturally appropriate to transmit such images. Museum staff also wondered how we would setup an executive session – in which museum staff or a subset of tribes leave the room to allow for a private conversation – should one be requested during the meeting. An executive session presented a problem because museum IT staff needed to monitor the equipment.

The museum addressed these thorny issues during the tribal invitation process by including questions about these issues and directly asking for feedback from tribal officials. Substantial responses were given to the museum staff. In the end, it was decided that the consultation would be recorded (so that tribes not attending could later watch the discussion), and that remains and objects would not be broadcast via the live feed. It was also decided that if an executive session was requested, IT staff would stop the recorder and step just outside the door where they could be called upon in case of a technical malfunction.

The consultation process: meetings, results, and more meetings

The Rocky Mountain West inter-tribal consultation was held on 7 May 2009 and attended by 20 tribal officials representing 15 federally recognized tribes meeting together 'virtually' in Santa Fe, Phoenix, and Denver. The discussion proved to be swift, although several technical difficulties interrupted the flow of the meeting and, at one location, visual (but not audio) connection was completely lost. After a blessing and introductions, museum staff provided an overview of the 16 remains (and 17 associated funerary objects) in this region and the background work done to

date. After about an hour of conversation, the tribes agreed that four Pueblo tribes – Acoma, Hopi, Zia, and Zuni, with Hopi taking the lead – would shoulder the responsibility for repatriation and reburial. This approach is typical of such inter-tribal agreements, in which a subset of tribes that have the cultural protocols and administrative capacity to handle reburials take the lead on behalf of those tribes that desire but are unable to rebury remains. The four Pueblo tribes would seek to secure a reburial site in the Four Corners area. By lunch time, the meeting was over. In this way, the video-conference technology proved especially efficient – instead of having tribal officials travel for two days to Denver for a three-hour meeting, nearly everyone was home by afternoon.

Following the consultation, museum staff consulted with tribes not present at the meeting, and secured official letters of support for the proposed disposition. This was a laborious and intense undertaking, as we sought to make the fast-closing 29 July 2009 deadline to get on the agenda for the fall NAGPRA Review Committee meeting. One last minute problem emerged when, several weeks before the deadline, one tribe asked if the human remains from east-central Utah could be buried closer to where they were excavated. Fortunately, a reburial site was located and all consulting tribes agreed. We made the agenda deadline.

On 30 October 2009, in Sarasota, Florida, museum staff presented the disposition agreement to the NAGPRA Review Committee, which unanimously consented to the proposed disposition and forwarded it to the Secretary of the Interior for his consideration. Five months later, the museum received the Secretary of the Interior's letter, granting his permission to proceed with the disposition. The museum then drafted a Notice of Inventory Completion and submitted it to the National Park Service. After publication in the *Federal Register*, a 30-day waiting period began in which other tribes could object to the disposition agreement (none did). The remains will be returned as soon as possible.

The Rocky Mountain East consultation followed a more circuitous route. On 30 April 2009, the intertribal video-conference was held for 20 tribal officials representing 12 tribes in Oklahoma City and Denver.[9] The consultation focused on the remains of 21 individuals and 75 associated funerary objects from Colorado, Wyoming, South Dakota, and the 'Great Plains.' Unlike the Rocky Mountain West meeting, this one was more tense, as it initially focused on offensive language used in museum policy statements. The exchange also focused on a subset of remains that museum officials at one point, for unknown reasons, had identified as 'Cheyenne/Arapaho,' although this designation could not be determined through a preponderance of the evidence. Additionally, the meeting stalled when it became clear that, while the consensus was that everyone wanted the remains reburied, no single tribe was willing to step forward to take the lead because it might be perceived as 'taking' others' relatives – and yet, because the spiritual responsibility of reburial is so great, no tribe was willing to ask another to undertake this task. Fortunately, by the end of the day, it was agreed that the Ute Mountain Ute would take the lead, if no other tribe came forward with a claim. However, before proceeding along this path, the tribes present asked that the museum first go back and consult further with the Cheyenne and Arapaho tribes.

Unfortunately, since none of the Cheyenne or Arapaho tribes were able to attend the inter-tribal summit, museum staff set out to consult with the Arapahoe Tribe of the Wind River Reservation, Wyoming; the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; and the Cheyenne and Arapaho

Tribes, Oklahoma. While the two northern tribes would concur with any plan that allowed for the remains' expeditious reburial, the Cheyenne and Arapaho Tribes, Oklahoma, wanted to see the remains in person. Tribal representatives finally visited Denver on 5–6 November 2009. This consultation was positive, and the representatives returned home to talk further with additional elders. A month later, the Cheyenne and Arapaho Tribes, Oklahoma, informed museum staff that they would like to be the lead tribe on the disposition agreement, with the goal of reburying the remains near the Sand Creek Massacre site. A disposition agreement was drafted, and letters of support from the consulting tribes were sought and received. However, literally on the day museum staff planned to submit the disposition agreement to the National NAGPRA program to get on the agenda for the summer 2010 NAGPRA Review Committee meeting, the Department of the Interior released the draft of the final rule for 43 CFR 10.11. The work done had to be reconsidered (see section 'Applying the new rule').

Building on the experiences from the 2008 NAGPRA grant, a second grant was awarded in 2009 to consult with 35 tribes on eight remains from Texas, Arkansas, Missouri, and Illinois. However, unlike the previous region, after the physical anthropology report and documentary search were completed, the museum suspected that several individuals that previous museum administrators had labeled as culturally unidentifiable, could, in fact, be affiliated. After consulting directly with the Osage and Quapaw tribes, three individuals from Arkansas and Missouri were formally affiliated with these tribes (Hutt 2010; Tarler 2010).

The remains from Texas posed a more complex problem, as they are represented by sections of human hair which, under NAGPRA are considered human remains only if the hair is not naturally shed or freely given (43 CFR 10.2(d)(1)). Additionally, the dates associated with the hair represent a vast time span – 1000 BC to AD 1700 – which makes possible affiliations also difficult to ascertain. After independent consultations with multiple tribes, several stepped forward to work together on a claim for these sections of hair as culturally unidentifiable human remains. Similarly, the three remains from Illinois could not be affiliated, but a consortium of tribes met in Denver and agreed that the Ho-Chunk Nation of Wisconsin and the Sac & Fox NAGPRA Confederacy would take the lead on the disposition agreement. However, like the Rocky Mountain East remains, just as we were finalizing the agreement for both the Texas and Illinois remains, the new rule was finalized.

The advent of 43 CFR 10.11

On 15 March 2010, the *Federal Register* published the Department of the Interior final rule for 43 CFR 10.11, which would be in force after a 60-day comment period (Strickland 2010). The appearance of this publication abruptly recast and redirected efforts at the DMNS, and, on the larger national stage, set off a heated public debate about the new rule's merits and its shortcomings.

NAGPRA established that a museum, in consultation with tribes, must develop an inventory of human remains and decide which remains are culturally affiliated, or not, with a federally recognized tribe. The culturally affiliated remains have the established process for their return to tribes. For the culturally unaffiliated remains, the new rule most basically requires museums to go back to consider their original inventories and determine if the unaffiliated remains were removed from tribal or

aboriginal lands. 'Tribal lands' are defined within the regulations as those areas within the exterior boundaries of any Indian reservation (including allotments held in trust), recognized dependent Indian communities, and lands administered by the Hawaiian Homes Commission Act of 1920 and the Hawaiian Statehood Admission Act. The determination of 'aboriginal lands' may be determined by consulting the final judgment of the Indian Claims Commission or the US Court of Claims, treaties, Acts of Congress, or Executive Orders.

With the new rule, if the human remains are unaffiliated *and* the remains are from a completely unknown location or a location that is not tribal land or aboriginal land, then the museum must continue to hold the remains until another rule appears for these remains (43 CFR 10.15(b)). However, a museum may still propose a disposition agreement for remains in this category, to be considered for approval by the US Secretary of the Interior.

Under the new rule, museums are required to proactively begin consultation with tribes if the museum seeks to transfer control of remains. Otherwise, the museum is only required to begin consulting within 90 days of receiving a request with tribes from whose tribal and aboriginal lands the remains and funerary objects were removed. Consultation requirements are outlined in the new rule, which oblige museums and tribes to exchange basic information. Through the consultation process, the museum should seek to develop a mutually acceptable disposition for the remains and associated funerary objects. If, during this process, the remains are determined to be affiliated then the parties simply return to the steps outlined in the regulations that dictate treatment of affiliated remains (43 CFR 10.9). Based on the consultation efforts, the museum then publishes a Notice of Inventory Completion, which summarizes the findings and, after a 30-day period, disposition may proceed if no other claims are presented.

The new rule stipulates a 'priority order' for those human remains that the museum cannot prove it has the right of possession: first, the tribe(s) from whose *tribal lands* the remains were removed from, and, second, the tribe(s) from whose *aboriginal lands* the remains were removed from. Only then, if none of the tribes with ties to the tribal or aboriginal lands agrees to accept control of the remains, may a museum offer to transfer control to another federally recognized tribe, or seek the US Secretary of the Interior's authorization to transfer the remains to a non-federally recognized Indian group, or to reinter the remains according to State or other law. Significantly, unlike 43 CFR 10.9, the new rule does not require the transfer of associated funerary objects along with unaffiliated remains (Strickland 2010, 12398). However, the rule states that the US Secretary of the Interior recommends transferring control of funerary items, if federal or state law does not preclude it.

In sum, the regulations now require museums to compile a geographically based inventory of unaffiliated remains in consultation with tribes; consult with tribes within 90 days of a claim; publish Notices of Inventory Completion for unaffiliated remains for which it lacks evidence of right of possession, and offer to transfer control for those remains that come from tribal or aboriginal lands. A museum has the option – but is not required – to seek a disposition agreement that would return remains to other federally or non-federally recognized Indian groups, or to simply rebury them according to non-federal law. The return of associated funerary objects is similarly left to the discretion of each museum. The new rule took legal effect on 14 May 2010.

Debating the new rule

A 60-day comment period that began following the release of the final rule provided several months of bellicose debate and media attention. Most notably, the release of the rule drew out the old battle lines of pre-NAGPRA days (Quick 1985). Museums and scientific organizations – ranging from the National Museum of the American Indian to the American Association of Physical Anthropologists (AAPA) – in near unison argued against the new rule's legality and practical effects. In turn, Native American tribes and Indigenous intellectuals argued that the new rule is reasonable but, if anything, still did not go far enough in addressing the problems that the collections of human remains present.

While it is impossible to summarize every critique of the new rule, three of the most central arguments deserve attention. Many of the arguments leveled against the new rule were grounded in legal issues. Perhaps the best example of these arguments comes from the Field Museum in Chicago, USA, whose public comments focused mostly on legal concerns, rather than ethical, practical, political, or economic concerns.[10] Seemingly written by lawyers, the Field Museum comments state four sophisticated and technical legal issues: (1) the Secretary of the Interior lacks authority to promulgate regulations on unaffiliated human remains; (2) the final rule abrogates NAGPRA's 'liability shield' that protects museums that transfer remains in good faith; (3) the final rule departs from NAGPRA's intent and terms, and (4) the rule's definition of 'aboriginal lands' imposes a burden on museums to identify possible claimants. Of these legal points, it is perhaps the first that is voiced most commonly by institutions and organizations (see Lovis et al. 2004, 180; McLaughlin 2004). The Society for American Archaeology (SAA), in particular, has argued the longest and most vociferously, 'that Congressional action, not regulatory action, is the appropriate means by which the disposition process for culturally unidentifiable human remains should be addressed.'[11]

A second common argument is that NAGPRA was intended to be a 'balance' between the rights of tribes and the rights of the museum community. As Vincas P. Steponaitis, a past SAA president (1997–1999) and NAGPRA Review Committee member (2004–2009), stated in an editorial letter, 'Those who see problems with the new [NAGPRA] regulations are not driven by "panic" or a blind "resistance to repatriation," but rather by a clear understanding of what Congress intended when it passed the law, which was a balance between religious and scholarly interests.'[12] In the public comment period, the AAPA most forcefully advocated this position, even going so far as to state that 'the implementation of NAGPRA as a balanced act lie at the heart of AAPA concerns.'[13] The AAPA's official position is that NAGPRA came into law because it 'served to balance the needs and rights of Native American/ Native Hawaiian groups ... and the rights and obligations of the museum/scientific community on behalf of all Americans to protect and preserve the archaeological heritage of this country.'

The AAPA then suggested that evidence for NAGPRA's underlying balance is that the NAGPRA Review Committee consists equally of scientific/museum and tribal representatives. Additionally, members of the US Congress and government officials have explicitly stated that NAGPRA was intended as a balance between opposing interests. The AAPA letter quotes Senator John McCain, as saying when the law was passed, 'I believe this bill represents a true compromise. ... In the end,

each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues.' Further still, it might be added that even some Native American legal scholars have written that NAGPRA reflects a compromise (Riding In 2000, 111; Trope and Echo-Hawk 2000, 141).

A third argument was an unwavering appeal to consider the benefits of scientific inquiry, the obligations of anthropologists to preserve and study human remains for the public good, and the principles of academic freedom. Nearly a dozen anonymous letters by scientists made appeals of this sort, emphasizing that the study of human remains is vital to understanding past peoples and that the return of these remains threatens to suspend scientific progress. This argument seems to be animated by the belief that scientists are most ideally positioned to articulate what is fair for both living Native Americans and the study of Native American history.

For example, the AAPA letter argues that the new rule is 'an expedient and unlawful "solution" to the complex problem of repatriation under NAGPRA … [which] actually attempts to legislate for the wholesale reburial of indigenous history' and then concludes by suggesting that 'NAGPRA may well go down in history as the Dawes Act of the twenty-first century, a law with purported good intent but devastating consequences in the long run for indigenous Americans.' The Dawes Act was a disastrous policy, which sought to help Indians assimilate into mainstream America, but resulted in the loss of 100 million acres of Indian lands and decades of legal battles and social turmoil.[14] Similarly, a letter signed by 12 anthropology professors at the University of Tennessee concludes that the new rule is 'an injustice to Native people.'[15]

Native American tribes, organizations, and individuals systematically countered and contradicted these arguments. For example, the Native American Rights Fund states that there are multiple sections within the statute that direct the Secretary of the Interior to work with the NAGPRA Review Committee to implement the law, including specifically addressing human remains.[16] The Department of the Interior also unambiguously holds that NAGPRA authorizes the Secretary of the Interior to promulgate implementing regulations (Strickland 2010, 12379). Other legal arguments are similarly debatable; for example, unlike the Field Museum and other organizations, the DMNS's lawyer concluded that a museum returning remains in good faith under the new rule would not be placed in legal jeopardy.[17]

The concept of NAGPRA as a law that balances disparate interests is also debatable. Some, particularly those advocating for a renewed commitment to the 'universal' museum (e.g., Cuno 2009), are right to emphasize that museums serve broad social functions. As such, museums must work to balance the multiple and often conflicting interests of a pluralist democratic society. However, in legal terms, NAGPRA is not about balancing museums' social obligations to myriad publics, but redressing a historical imbalance of rights. As anyone reading the law will find, 'nowhere in NAGPRA is anything said about achieving balance' (Fine-Dare 2002, 161).

The drafters of the new rule unambiguously state that NAGPRA 'was enacted for the benefit of Indians' (Strickland 2010, 12384). According to the House Committee Report on NAGPRA, the law's purpose is not to achieve balance, but 'to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian, and Native Hawaiian lands,' and NAGPRA's section 12 specifically recognizes the unique

legal relationship between Indian tribes and the US Government.[18] Unlike the other major federal heritage laws – the Antiquities Act of 1906, Historic Sites Act of 1935, National Historic Preservation Act of 1966, and the Archaeological Resources Protection Act of 1979 – which were placed in the United States Code Title 16 (Conservation), NAGPRA was intentionally placed in the United States Code Title 25 (Indians).

This fact has significant legal repercussions (Hutt and Riddle 2007, 236), given that Indian legislation is 'to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'[19] Also, in contradistinction to Senator McCain's comments, are statements made by other key Congressmen. Senator Daniel Inouye, Senator Ben Nighthorse Campbell, and Representative Morris Udall, among others, each emphasized that the legislation was fundamentally about redressing historical racism, morality and the American conscience, and fundamental human rights (McKeown and Hutt 2003, 211–2).

Moreover, even if NAGPRA was intended to balance Native and scientific interests, it is unclear how the status quo or the retention of human remains in museums could reasonably be construed as a 'balanced' resolution. Among the rule's critics, it goes unstated in what sense taking 20 years to affiliate only 27% of remains in collections is a balanced approach, or how allowing researchers to define how and why remains are useful to society is evenhanded. Indeed, some museums have seemingly misused the culturally unaffiliated category – a result of faulty legal interpretations, not directing enough resources toward affiliation research, and circumventing full consultation (Beisaw 2010, 253; Isaac 2002, 163, 166; Riding In et al. 2004, 181). Furthermore, there is nothing in the new rule that precludes 'balanced' disposition agreements in which scientific studies are pursued. The regulations now define 'disposition' to mean the 'transfer of control,' but not necessarily transfer of possession or even reburial. It is wholly conceivable that after the transfer of control to a tribe, that the tribe would permit research (see Buikstra 2006, 406–12). The main difference now is that for certain categories of cultural items scientists must now be accountable to Native communities, rather than simply pursuing research on their own terms.

Despite the opportunity for collaborative research that the new rule could inspire, it is likely that in the face of perceived irreconcilable differences between Indians and scientists, many culturally unidentifiable human remains will be returned and reburied without study. In this sense, the new rule does represent a loss of potential scientific data. But, this loss must be considered alongside the knowledge that the privilege of science is not a license of absolute freedom. The human interest in science is limited – as it should be – by other human interests such as justice, religious freedom, promises made in treaties, respect for cultural differences, and basic human rights. Contrary to the AAPA's claim, the lesson of the Dawes Act is less about the devastation wrought on Native communities by those with good intentions, than it is about sanctioning those with good intentions to decide what is best for Native Americans. The crux of the new rule – congruent with NAGPRA itself – is that it empowers Native peoples to decide and manage their own interests (McLaughlin 2004, 198; Trope and Echo-Hawk 2000, 133).

Although Native American tribes and organizations from across the USA generally supported the new rule, they were dissatisfied with several specific measures. The loudest protests related to the decision not to compel museums to

return associated funerary objects. The most systematic analysis of this decision came from law professor Rebecca Tsosie, who argued that this part of the rule violates established law, and if judicially challenged would be considered 'arbitrary and capricious.'[20] Another source of frustration, as articulated by the National Association of Tribal Historic Preservation Officers (NATHPO), is that the new rule does not include timelines for when Notices of Inventory Completion must be published or when remains must be transferred.[21] NATHPO recommended 180 days for this process, while the NAGPRA Review Committee unanimously recommended 365 days.[22]

In spite of the angry debate over the new rule, 43 CFR 10.11 took effect and it now determines the future of Native American culturally unidentifiable remains in museums. It is possible that a legal challenge may yet undo the new rule, more than 15 years in the making.[23] It is possible, too, that the Secretary of the Interior or the US Congress might alter the regulations. But until such events come to pass, the new rule is the law of the land.

Applying the new rule

The appearance of the new rule is largely a positive change for institutions such as the DMNS, and those museums that had already become dedicated to addressing unaffiliated remains. The new rule provides a clear way to navigate through the consultation process and a streamlined mechanism for transferring control. No longer will most museums need to undertake the odyssey of presenting a disposition agreement before the NAGPRA Review Committee and then await permission from the Secretary of the Interior. However, based on the public comments, it would seem that for most other museums the new rule poses a burden, if not an existential threat.

Since the Secretary of the Interior approved the Rocky Mountain West disposition agreement before the new rule, the DMNS staff is proceeding with this agreement under the previous administrative standards. The Rocky Mountain East disposition agreement, however, was retooled to fit the new rule. Impressively, adhering to the new rule presented only minor changes from how we were already proceeding. The only change of substance was that the museum included several more tribes, based on the rule's definition of 'aboriginal lands.' Similarly, the draft disposition agreement for the remains from Illinois and Texas were also adapted to fit the new rule and, again, with no substantial change.

Given that the new rule did not require us to alter our approach or our pre-rule disposition agreements, we are fairly confident that the new rule successfully codified how museums and tribes, which were actively addressing the disposition of unaffiliated remains, have already been working on these issues. The new rule most fundamentally requires museums to talk with tribes, share information, and work toward a mutually agreeable settlement. For those museums already committed to comply with NAGPRA, and who have developed strong and positive relationships with tribes, the new rule will likely simply provide administrative guidance for institutional habits already in place. For those museums less committed to NAGPRA, the new rule will likely provide a prompt to seriously consider how to more effectively work with descendant communities. For tribes, the new rule should provide a clear legal process to get museums to actively consult on the return of remains they consider to be ancestral.

In 2010, the DMNS received its third NAGPRA grant, to consult with 23 federally recognized tribes on six human remains from Pennsylvania and Florida. For the first time, museum staff will be initiating consultations from the beginning exclusively along the lines of the new rule. At this point – after two grants, more than two years of consulting with scores of tribes, and working on these questions both before and after the new rule – we do not anticipate any surprises. But, as we have learned, unforeseen complications inevitably defy plans.

Conclusion

The efforts at the DMNS since 2008 have been an education about the consultation process and the unique problems and issues surrounding culturally unaffiliated human remains. In conclusion, we present three important lessons that were learned.

First, fully addressing these remains through consultation will be labor-intensive. Considering that 20 years of NAGPRA has resulted in the affiliation of just 27% of the remains in collections, it is clear that the work of NAGPRA has only started. Moreover, unlike affiliated remains, which often entail working with a handful of tribes, culturally unaffiliated remains require consulting with scores of tribes concurrently. This is a lot of work. As demonstrated in our projects, some of the time and costs associated with consultation can be mitigated with technology, but this solution itself requires an investment of resources.

Second, through additional consultation and revisiting museum documentation, remains that were once designated as unaffiliated may, in fact, be affiliated with federally recognized tribes or, per the new rule, if the museum is willing to work with non-federally recognized Indian groups. At the DMNS, a list of unaffiliated remains had been completed some years ago. But, when we began this work, the decisions and logic of our predecessors were often ambiguous. If we had not intentionally set out to revisit this issue, it would have been easy enough to simply leave these remains listed as unaffiliated. Consultation has played an important role here, too, as tribes have provided new information that informs the affiliation process. The culturally unaffiliated designation should thus not be considered permanent and fixed, but provisional and open to revision.

Third, it is our experience that Native Americans uniformly desire humans remains to be repatriated. However, they do not want these repatriations to occur at the cost of tribal sovereignty or contrary to their deeply held cultural beliefs (see also Riding In et al. 2004, 172). Out of the scores of federally recognized tribes we have consulted with to date, not a single tribe has objected to repatriation and the reburial of remains. But tribes consistently insist that the museum acknowledges the rights of tribes in this process. Additionally, much conversation is concerned with where and how the remains will be reburied. Tribal representatives, in other words, are concerned about the process as well as the result of repatriation.

Over the last 20 years, NAGPRA has shown that the museum field's worst fears of what repatriation would do to the discipline were misplaced (e.g., Turner 1986). NAGPRA has not resulted in empty museums. In fact, most museums have only returned a small fraction of their total collections. Some museums have yet to return a single sacred object or object of cultural patrimony, even though they have rigorously adhered to the law, a situation made possible because the law neither requires tribes to make claims for cultural items nor requires museums to accept

every claim.[24] NAGPRA has not ended science either – it has only ended the premise that scientists working with unique kinds of cultural items are accountable only to themselves.

It is easy to compare a case like Kennewick Man and the On-Your-Knees-Cave remains (Thomas 2000, 273–5). Kennewick Man involved an eight year legal battle in which the bones were mishandled and locked away for years, leaving a broken trail of bitter resentment. The On-Your-Knees-Cave remains – which were also found in 1996 and were even a thousand years older than the Kennewick Man – were based on collaborative study and resulted in extensive scientific research, including local Native Alaskans offering their DNA for comparative study and a respectful reburial in the end. Native Americans are not against science – only forms of science that are callous to their human rights and cultural values (see Marks 2010). Rather than ending museum anthropology, NAGPRA is widely acknowledged to have sparked the kinds of meaningful dialogs and collaborations that have come to define twenty-first-century museum work (Preucel et al. 2006).

Our experiences – earned both before and after the new rule – suggest that 43 CFR 10.11 basically codifies what museums already committed to addressing unaffiliated remains have been doing for some years. And so, in practical terms, the new rule is feasible. What remains to be seen is how museums elect to implement the new rule and whether they actively resist the law, grudgingly accept it, or embrace the rule as an opportunity to usher in a new collaborative period of accountability and shared authority. The future thus depends on key institutional choices museum professionals will make: how many resources will be invested in implementing the law, whether a genuine commitment is made to an open and equitable consultation process, and if museum professionals and anthropologists will rethink the discipline's long-held ideological commitments. The real question now is whether museum professionals fully come to terms with the ethical dilemmas that underscore their legal obligations – if they will eagerly turn to the new task at hand.

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Notes

1. Under NAGPRA, the phrase *culturally unidentifiable* 'refers 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 organization has been identified through the inventory process' (43 CFR 10.2(e)(2)). Of note, 'culturally unidentifiable' and 'culturally unaffiliated' are generally used interchangeably in NAGPRA discussions.
2. Under NAGPRA, a *museum* is defined as 'any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds' (43 CFR 10.2(a)(3)). NAGPRA also applies to US federal agencies, but for the sake of simplicity, in this paper we mean 'museum' to encompass all institutions and organizations subject to NAGPRA. Also for simplicity, throughout the

paper we reference 'tribes' to include Indian tribes, Alaska Native villages and corporations, and Native Hawaiian Organizations (43 CFR 10.2(b)(2)-(3)).

3. The most up-to-date numbers can be found at: http://www.nps.gov/history/nagpra/ONLINEDB/INDEX.HTM
4. On the legal definition of *cultural affiliation*, see 25 U.S.C. 3001(2)(2), 25 U.S.C. 3005(a)(4), 43 CFR 10.2(e)(1), and 43 CFR 10.14.
5. In the USA, federal recognition is a special legal status that gives Indian communities the rights of sovereign governments as 'domestic dependent nations.' With federal recognition, Indian nations have a unique 'trust' status with the US Government, and interaction under NAGPRA must proceed through 'government-to-government' consultation.
6. Under the new rule, the return of unaffiliated human remains and associated funerary objects is not legally repatriation but 'disposition,' defined under 43 CFR 10.2(g)(5). However, in the colloquial sense, the return of these cultural items is considered repatriation (McKeown 2008, 427).
7. In addition to the authors, the DMNS staff that facilitated this work includes: Stephen E. Nash, Isabel Tovar, Matt Brownell, Sonny Evans, Dave Baysinger, Garrett Law, Sean Weinert, Tommy Kilpatrick, Steven R. Holen, Heather Thorwald, and Lynda Knowles. At the DMNS, all NAGPRA claims are decided by the museum's Curatorial Review Committee, made up of all curator-level staff.
8. Given that this policy was formed prior to the new regulations, it is notable that this approach was congruent with the NAGPRA Review Committee's 1999 draft principles, which stated, 'Human remains for which there is little or no information … should be speedily repatriated since they have little educational, historical or scientific value' (N.a. 1999, 33503).
9. Billings was also included, but a snow storm prevented officials from attending there.
10. Letter from John W. McCarter Jr., 13 May 2010, posted on http://www.regulations.gov
11. Comments by the Society for American Archaeology, 11 May 2010, posted on http://www.regulations.gov
12. 'New Regulations Do Wrong by Native Remains,' Vincas P. Steponaitis, 14 May 2010, http://blogs.denverpost.com/eletters/2010/05/14/new-regulations-do-wrong-by-native-remains/
13. Letter from Dennis O'Rourke, Patricia M. Lambert, Clark S. Larsen, and Fred H. Smith, 10 May 2010, posted on http://www.regulations.gov
14. The Dawes Act of 1887 was US federal legislation that divided tribally held lands into privately owned lands, and opened the 'surplus' lands to non-Indian settlers and corporations. Today, it is widely reviled as a law founded on paternalist and colonialist assumptions.
15. Letter from the University of Tennessee Department of Anthropology, 5 May 2010, posted on http://www.regulations.gov. Of note, this was actually another form letter submitted by others, including professors at the University of Montana, Washington University, and Mississippi State University, among others.
16. Letter from Natalie A. Landreth (on behalf of the Comanche Nation, Mississippi Band of Choctaw Indians, Pawnee Nation, and Pyramid Lake Paiute Tribe), 13 May 2010, posted on http://www.regulations.gov
17. Denver Museum of Nature & Science Statement on Final Rule, posted on http://www.regulations.gov
18. Memo from John D. Leshy to the Secretary of the Interior: http://www.nps.gov/archeology/kennewick/encl_4.htm
19. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000).
20. Letter from Rebecca Tsosie (on behalf of the Inter-Tribal Sacred Land Trust, Inc., and the Morning Star Institute), 11 May 2010, posted on http://www.regulations.gov
21. Letter from Reno Franklin, 12 May 2010, posted on http://www.regulations.gov
22. NAGPRA Review Committee Comments on 43 CFR 10.11, 14 May 2010, posted on http://www.regulations.gov
23. 'Scientists Ponder NAGPRA Lawsuit,' Rob Capriccioso, *Indian Country Today*, 9 April 2010. (See also Kintigh 2008, 6)
24. Bridget Ambler (personal communication, 5 May 2010).

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