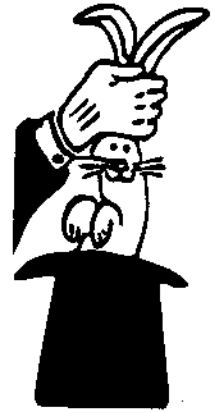
context, that may be foreign to the former? To what extent should the desires of indigenous groups about resources important to them determine how such resources are managed? How much should native interests influence federal decision making? How should one find out what those interests are? How should an indigenous group be expected to demonstrate its interests? To what extent, and how, should it be expected to prove its case? In what sociocultural, legal, and administrative contexts should disputes between indigenous groups and others be worked out? What should an agency or project proponent do to determine whether such disputes may exist? People think they know the answers to such questions, but the answers range all over the map.

In this environment of uncertainty, Congress has made laws, presidents have issued executive orders, agencies have issued regulations, and practitioners have evolved standards, guidelines, and ways of doing business. The most famous of the CRM-related laws is the Native American Graves Protection and Repatriation Act, which is the subject of the first chapter in this section. NAGPRA is widely and to some extent correctly regarded as a law that for better or worse gave tribes control over museums and their collections, as well as over archeologists. I suggest that it has had some other unintended consequences. The second chapter focuses on another well-known point of interaction between indigenous people and cultural resource managers—the identification and management of "traditional cultural properties." The third addresses a specific, always pesky aspect of CRM practice with respect to "TCPs"—that of permissible scale. Finally, the fourth chapter is about consultation between tribes and others (such as federal agencies), some standard CRM practices and assumptions that get in the way of effective consultation, and what might be done about them.

14

What's Really Wrong with NAGPRA



A great deal of vitriol has been spilled over NAGPRA—the Native American Graves Protection and Repatriation Act. Some archeologists and physical anthropologists (but by no means all, as some elements of the popular press would have us believe) hate NAGPRA and, more importantly, everything it stands for. They regard it as government sponsorship of religion, on a par with governmental bans on the teaching of evolution. They argue that the human remains and cultural items to which NAGPRA applies should be preserved and studied to enrich all humankind, rather than given to particular Indian tribes—who may do with them as they please and may not have "legitimate" rights to the things anyhow. Tribes tend to support NAGPRA as a very partial redress of grievances visited upon them by whites, as a token of respect to the ancestors, as a way of putting sacred objects and ancestral remains back where they belong, and as a way of healing old wounds. Increasingly, though, tribes and their members are becoming concerned about the conflicts—including intertribal conflicts—that NAGPRA engenders and about its mind-numbingly legalistic character.

I'm an archeologist, and I don't like NAGPRA much, but not for the reasons that most displeased archeologists cite. I think NAGPRA does damage to the cultural and spiritual integrity, and the sovereignty, of tribes.

NAGPRA was designed to address a very real set of problems—that the ancestors of Indian tribes aren't given the same respect as everybody else's ancestors; that the remains of such ancestors, and their treasured cultural items, have in many cases been taken from tribes without authority to do so; that ancestral remains and cultural items have lain for decades in museums and storerooms, sometimes even been discarded, without the permission or even the knowledge of descendants. In testimony before Congress in the late 1980s, tribal representatives spoke eloquently of the cultural wrongs done them by the majority society—sometimes quite ghastly wrongs. They impressed the members of Congress enough to gain enactment of NAGPRA—a piece of legislation worked out through negotiation among tribes, Native Hawaiian groups, archeologists, physical anthropologists, and museum officials. Or rather, worked out by their lawyers, and therein, I think, lies NAGPRA's real problem. NAGPRA is a classic example of why the design of laws should never be left entirely to lawyers.

NAGPRA is grounded in property law. It declares ancestral remains and "Native American cultural items"—funerary objects, sacred objects, and "objects of cultural patrimony"—to be the property of lineal descendants and culturally affiliated tribes and Native Hawaiian groups. It then directs federal agencies and federally assisted museums to repatriate such remains and items to the tribes and groups that own them. The procedures for repatriation are quite complicated, largely because of the need to determine just who really is a lineal descendant or culturally affiliated group.

The "scientific" objections to NAGPRA spring from the perception that "archeological resources" and the information they contain belong to all humanity. In other words, these objections too are grounded in property law—in who owns what.

But how does the notion of ancestral remains and cultural items as property relate to tribal values and beliefs?

Let's back up a moment and ask ourselves why tribes want repatriation of ancestral remains and cultural items. In point of fact I'm not sure they always do, particularly where ancestral remains are concerned. Typically in my experience, repatriation itself isn't the goal; it's a means to an end. The desired end is to get the remains back into the ground, where they can return to the soil as the ancestors they represent continue their journey to the spirit world. This "back to the earth" philosophy is not universal, and there are lots of variations on the theme. I don't think there's any tribe, however, that wants its ancestors back in order to possess them.

Generally speaking, the same rationale motivates the desire to "get back" funerary items—it's not that the tribes want them for themselves; they want them to accompany the ancestors into—and in many beliefs beyond—the grave. With sacred items and objects of cultural patrimony it's a little different—sacred objects by definition are needed for the conduct of ceremonies, and objects of cultural patrimony—well, the definition of such objects is so strange and circumloquacious that it might mean almost anything. But the central things that NAGPRA is about—ancestral remains and grave goods—are usually not wanted back to possess as property but to return to the ground where their spiritual qualities can be properly respected and the reasons for which they were buried in the first place can be realized. Thus there's at best an uncertain fit between the rationale for repatriation and the tools—identification and return to qualified "owners"—that NAGPRA provides to implement that rationale. I believe that this conflict undercuts and erodes the whole purpose of NAGPRA.

In the mid-1980s I was at the Advisory Council on Historic Preservation, and one of my jobs was to work with the Indian tribes and intertribal groups that were getting more and more involved in Section 106 review. One of the organizations I dealt with a good deal was American Indians Against Desecration (AIAD), a branch of the American Indian Movement (AIM). AIAD essentially consisted of Jan Hammil and a group of advising elders from various tribes. Jan, herself of Comanche extraction, made her living as a judge on the night court in Indianapolis, giving her the daylight hours free to work for AIAD. I have no idea when she slept; she may not have needed to. Jan was one of the most dynamic people I've ever met, and she never shrank from confrontation. Her—and AIAD's—mission was to get the remains of the ancestors back into the ground, and she did everything she could to carry out that mission. One of those things being to jawbone the Advisory Council—i.e., me—about what we should be doing to support reburial. Not repatriation, note; reburial.

One day I was talking with Jan, and offered up the (then) usual "moderate" archeological line:

"If it's somebody's grandmother, of course she should be given back to the descendants for reburial, but if it's somebody ancient . . ."

"Look, dummy," Jan said kindly (or words to that effect), "this has nothing to do with ownership, or exactly who's descended from whom. I don't own my grandmother's bones. Nobody can own another person; the Civil War established that."

"Yeah, but . . ."

"It's about respect," she said. "Respect for ancestors—everybody's ancestors. I respect your ancestors, my ancestors, even (the Interior Departmental Consulting Archeologist's) ancestors, and the way to respect them is by taking care of them, trying to make sure that they can continue their journey to the spirit world."

It was an epiphany for me. It so simplified things. If it's all about respect, not ownership, then we don't need to worry about the complicated business of deciding who's descended from which skeleton in the ground. We don't have to argue about whether a 10,000-year-old dead guy has any living relatives, or whether he represents an ancestor of the group that occupied the land in 1870 or some other group. And we don't necessarily have to put everything back in the ground. We don't see an autopsy as disrespectful, nor the forensic analysis of possible crime victims. In the same way, there might be ways to analyze ancient human remains respectfully; perhaps even keep some of them out of the ground in perpetuity. In any event, if consultation between archeologists, agencies, and tribes focused on how to treat ancestors respectfully, rather than on ownership, we'd at least be consulting about something on which an agreement *might* be reached.

We tried to use this notion of respect as the groundwork for treating human remains and associated artifacts; the Advisory Council even established a policy statement based on such principles[1] to guide consulting parties in Section 106 review. The core of the statement went like this:

- Human remains and grave goods should not be disinterred unless required in advance of some kind of disturbance, such as construction.
- Disinterment when necessary should be done carefully, respectfully, and completely, in accordance with proper archeological methods.
- In general, human remains and grave goods should be reburied, in consultation with the descendants of the dead.
- Prior to reburial, scientific studies should be performed as necessary to address justified research topics.
- Scientific studies and reburial should occur according to a definite, agreed-upon schedule.
- Where scientific study is offensive to the descendants of the dead, and the need for such study does not outweigh the need to respect the concerns of such descendants, reburial should occur without prior study. Conversely, where the scientific research value of human remains and grave goods outweighs any objections that descendants may have to their study, they should not be reburied, but should be retained in perpetuity for study.

OK, so like NAGPRA, the policy statement referred a good deal to "descendants," but it demanded respect for the dead, and generally reburial, whether there were descendants or not. And since we weren't talking about ownership but only participation in consultation, "descendants" could be defined broadly. In guidance issued to the Council's staff about how to interpret the policy statement, "descendants of the dead" was defined as:

> Any group, community, or organization that may be related culturally or by descent to the deceased persons represented by human remains.[2]

Were either the tribes or the archeologists entirely thrilled with the Council's policy? No, but both seemed able to live with it, to try it out. Both, I think, at least saw it as balanced and respectful of both the dead and of the interests of the living. But then along came NAGPRA and threw it all into a cocked hat. Because NAGPRA took us back to the grandmother argument, and ignored respect altogether.

Of course, one thing that made the property-law basis for NAGPRA attractive to the lawyers who negotiated it was that it (theoretically) made possible hard-and-fast, clearly definable determinations. The bones or objects either did or did not actually belong to the agency or museum; they either did or did not belong to this tribe or that. All very desirable to those who insist that life and human relations be reduced to rules. But when one begins to apply the rules—even in the abstract as the drafters of the statute did during its negotiation—things begin to get very complicated. What makes sense in one situation does not in another. The result, in the case of NAGPRA, was a complicated layering of procedures for determining cultural affiliation and right of possession, with burdens of proof shifting back and forth between tribes and museums or agencies as the procedures are implemented.

Consider a couple of real-world examples:

At Chaco Canyon, the National Park Service has the unenviable task of repatriating human remains excavated over the years from the area's ancient pueblo ruins. But to whom should they be repatriated? The NPS has made what seems like a good-faith effort to figure out the answer. It concluded that while the Hopi and other puebloan groups in the area obviously have claims, so do the Navajo. After all, by the most conservative of reckonings the Navajo have been in the area for several centuries, and it would be strange indeed if there hadn't been some mingling of genes and culture. Besides which, there are Navajo clans whose traditions lay out connections with puebloan ancestors in convincing detail.

But turning ancestral puebloan remains over to the Navajo is not something that the Hopi and other contemporary pueblo groups find tolerable, so they've blasted the NPS's conclusion in no uncertain terms. The Navajo, seeing in the pueblo complaint an attack on their historical legitimacy, have fired back. The hapless Park Service is caught in the middle.

Now suppose we simply asked the Navajo and Hopi what they thought should be done with the ancestors—without quibbling about whose ancestors they are? I'm one hundred percent sure that their answers would be the same: the ancestors should go back into the ground. There might well be debate about *how* they should go back into the ground, and maybe about *where*, but such questions would not carry anything like the freight that's carried by questions of ownership. How to treat the dead respectfully, I feel sure, could be established through relatively calm negotiation.

But under NAGPRA, the NPS can't get to the point of negotiating about treatment until it has established who's sufficiently related to the ancestors in question to have a seat at the table. The NPS is blocked in getting to the resoluble issue of disposal by the probably irresoluble issue of "ownership."

Or consider the famous case of Kennewick Man.[3] A skeleton washes out of the bank of the Columbia River and falls into the hands of the property manager of the U.S. Army Corps of Engineers. In compliance with NAGPRA, the Corps sets out to establish ownership—i.e., cultural and genetic relationship—among the tribes of the area. But the bones turn out to be 11,000 years old, and to some physical anthropologists they don't look like those of a Native American ancestor; they look like those of a twenty-third-century starship captain. The physical anthropologists think this is pretty neat, so they want to keep the bones out of the ground. They challenge the tribes, and the Corps, to demonstrate that the dead guy is ancestral to *any* tribe. As this is written, the matter is still in court, unresolved after five years of tumult and shouting.

Now suppose the Corps didn't have to establish ownership, but only to come up with a way to treat Kennewick Man with the respect due a human being regardless of race, relationship, or Starfleet rank. It probably still wouldn't be easy—the tribes would certainly argue for prompt reburial; the physical anthropologists would certainly argue for perpetual storage and study. But at least they'd be arguing about real issues, and issues that might be amenable to resolution through thoughtful compromise. Agreement might well be reached on reburial after some amount of analysis, or on some other approach that, while not perfect from anybody's point of view, was at least acceptable to all. There wouldn't have to be winners and losers. But NAGPRA doesn't allow the Corps to do this. Under NAGPRA, somebody in the Kennewick controversy will win and somebody will lose. And the process of deciding who's the winner and who's the loser has generated great discord among people who should have common interests in protecting ancestral remains.

Could we develop a law based on respect for the dead, rather than on ownership? I think so. Such a law could simply articulate the princi-

ple of respect and lay out the basic range of treatments for the dead and their goods that flow from that principle. It could then direct agencies and museums to negotiate with tribes about how to treat ancestral remains in a manner consistent with such principles, leading to a binding and implemented agreement in each case. As with Section 106, where agreement was not reached, a representative body like the existing NAGPRA Review Committee might review the case and render a final binding decision or perhaps (as in Section 106) a nonbinding recommendation.

With sacred objects and objects of cultural patrimony, something more along the lines of NAGPRA might be necessary. Such objects are wanted by the tribes because they feel they are theirs; they are often wanted in order to put them to use; they are often perceived to have been stolen, and the obvious way to put this to rights is to give them back. Even with such objects, though, it might be useful to see how far one could get substituting respect and compromise for assertions of ownership. In some cases it's quite clear that sacred objects and objects of cultural patrimony were flatly stolen by collectors, anthropologists, or museums, or that they were sold by people who didn't have the right to sell them. But in lots of other cases the rights and wrongs are not so clear. I remember as a grad student being told by an eminent cultural anthropologist about how sometime in the 1950s he had broken into a roundhouse and taken a lot of ceremonial regalia, because he and all his colleagues believed that the tribe that owned the house was extinct. Shocking to us today, but at the time he was undoubtedly doing what he thought was right—saving pieces of the tribe's expressive culture that he believed would soon be lost forever, and that belonged, he honestly thought, to no living person or group. Why fight about whether he was (legally or morally) right or wrong? Why not promote respect and compromise? Maybe in some cases we don't need to establish ownership—or at least what amounts to fee-simple title. Maybe we could recognize joint ownership, split ownership, or negotiate cooperative management.

All this is entirely hypothetical, however; we have NAGPRA to live with now, and like it or not, arguments over ownership cannot be avoided. I only hope that over time, we can find ways to focus on NAGPRA's laudable intent and minimize contention over its specific provisions and its regrettable grounding in Euro-American property law.

Notes

1. ACHP 1988a.
2. ACHP 1988b.
3. Cf. Thomas 2001.

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Thinking about Cultural Resource Management

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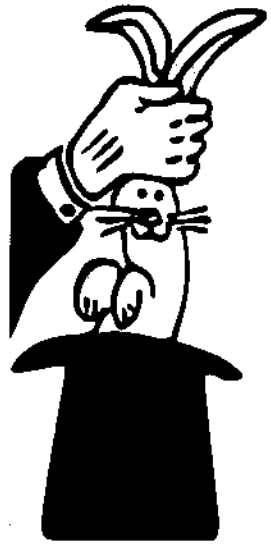
Thomas F. King



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