

Margaret M. Bruchac

University of Connecticut at Avery Point

Anthropology News, March 2010

In-focus commentary

Constructing Indigenous Associations for NAGPRA Compliance

Imagine a world where one's right to property (including possession of one's own body parts) is predicated upon having politically powerful relatives. Those who lack such kin are routinely disinterred and scientifically dismembered after death. When their relatives seek to recover their bodies, they encounter bureaucratic reconstructions of their identities. Who would tolerate such injustices? Now, imagine this scenario within the context of the NAGPRA legislation. NAGPRA procedures were intended to remove Indigenous ancestral remains from museum control and facilitate their repatriation. Yet, thousands of deceased individuals remain separated from their relatives, held captive, in part, by modern notions of association.

The Scope of the Unidentifiable

To date, the National NAGPRA website reports that American museums and other institutions subject to NAGPRA have identified and repatriated more than 31,900 sets of human remains. Nearly four times as many "culturally unidentifiable" remains—more than 124,300 individuals, along with 916,400 of their funerary objects—are still housed in museums. More than 669,500 associated funerary objects, 118,200 unassociated funerary objects, and 4,500 sacred and/or patrimonial items identified as belonging to federally-recognized tribes have been returned (http://www.nps.gov/history/nagpra/FAQ/INDEX.HTM#How_many). Why are there so many unidentifiabiles?

During the first decades of NAGPRA, many archaeologists and physical anthropologists argued vociferously that all unidentifiable objects and ancient remains should be retained for study. The Bonnichsen decision [357 F.3d 962 (9th Cir. 2004)], which set temporal boundaries on the classification of "Native American" remains, appeared to bolster this opinion, but in 2005, the Working Group on Culturally Unidentified Human Remains successfully argued that NAGPRA's working definition of "Native American" was intended to encompass *all* of the Indigenous peoples of America, regardless of their level of association with a present-day federally-recognized tribe. The definition of "tribe" however, remains flawed by virtue of its association with federal policy.

Constructing Indigenous Claimants

The problem here is that NAGPRA uses *federal* constructions, rather than common-sense or historical constructions, to discern indigeneity, tribal identity, and association. An “Indian Tribe” is recognized as such *only* if they are “eligible for the special programs and services provided by the United States to Indians because of their status [25 USC 3001 (7)] (in other words, federally-recognized).” “Cultural Affiliation” as “a relationship of shared group identity” is applicable *only* to remains traceable to a “present day Indian tribe” [25 USC 3001 (2)]. Remains that cannot be traced to a federal tribe must be classed as “Culturally Unidentifiable” [43 CFR 10.9 (d)(2)]. Although some collections truly have little to no provenance, many so-called unidentifiabes are, in fact, associated with historical tribal nations that hold the disadvantaged status of being non-federally-recognized.

In effect, NAGPRA positions “Indian” identity as a protected status that dates, not from the Indigenous world pre-dating European conquest, but from the era of modern tribal recognition. The top rank of potential NAGPRA claimants, therefore, consists of 564 Indigenous tribes/bands/nations within the contiguous United States and Alaska recognized by the Bureau of Indian Affairs (<<http://www.bia.gov/>>), and Hawaiian nations. The lower rank of potential claimants consists of approximately 300 non-federally-recognized tribes, including at least 226 that have applied for recognition; an unknown number have divorced themselves from the federal process of establishing sovereignty. These differences in federal status do not accurately reflect the unique (in some cases, ethnocidal) historical circumstances of each tribal nation’s federal relations over time. Their present lack of federal status means, bluntly, that their ability to claim their own ancestors depends entirely upon the generosity (and honesty) of museums and federally-recognized tribes.

Museums are expected to weigh tribal status amid a preponderance of evidence to establish likely claimants, but procedural hurdles make repatriation to the non-federally-recognized difficult. For example, museums and federal tribes need only reach agreement among themselves to draft a “Notice of Intent to Repatriate.” Museums that intend to repatriate to non-recognized tribes must apply to the NAGPRA Review Committee for special permission, must meet very high standards of evidence, and must be prepared to negotiate with any federal tribes that might seek to make a competing claim.

The recent promulgation of regulations concerning the unidentifiable has not eased this process, nor has it fixed loopholes in the legislation. NAGPRA dictates that museums must

maintain possession of unidentifiabes until a federally-acceptable form of identity can be determined. Many unidentifiabes were found in the known historical territories of non-federally-recognized tribes, but NAGPRA does little to encourage consulting with these tribes, and some recognized tribes have begun extending their influence into these territories. As a direct result, some (unnamed) museums have re-classified “unidentifiabes” as “identifiabes” in order to speed repatriation. Others have concealed documentation or avoided consultation to prevent repatriating collections that are too old (or too interesting). Native nations have little recourse, apart from complaints to National NAGPRA staff and the NAGPRA Review Committee (which serves only in an advisory capacity). NAGPRA, furthermore, empowers museums to behave like federal agents; if there are any unresolved disputes over identification and association, museum officials are the final arbiters.

Locating and Associating Objects

NAGPRA constructions similarly govern the classification of Indigenous funerary possessions, which are determined to be “associated” based on the circumstances of their excavation and curation (regardless of Indigenous patterns of deposition), and “affiliated” based on the political status of their tribal nation (regardless of Indigenous constructions of sovereignty). The dead are considered to be associated with funerary objects *only* if both are present in a museum’s collections, and only if they have been identified and curated as though they were associated. Orphaned funerary objects must be identified as “unassociated” [25 USC 3001 (3)(A)].

One might presume that excavators and curators took pains to keep burial assemblages intact, but collecting practices during the early days of American anthropology were far from organized. It was routine for different archaeologists to collect different objects, even different body parts, from the same site. The practice of sifting skeletal remains from soil resulted in a re-ordering of burial context, and the loss of related soil, red ochre, cremains, etc. In some cases, disarticulated skeletal elements from the same body, having come to rest in different collections, have been identified as belonging to different tribes. Curators, when confronted with poorly-documented collections, may simply class these as non-funerary and unidentifiable. Such gaps could potentially be addressed by demanding more historical research, better tracking of collections, and more inclusive consulting, but it is doubtful that curators would embrace yet more work.

In addition, there has been no reckoning of the many Indigenous remains and objects held captive by private collectors, art dealers, and foundations. These groups do not receive any federal funding and are not, therefore, required to comply with NAGPRA; their collections number in the millions, in both quantity and monetary value on the open market.

Reconsidering NAGPRA's Role in Restorative Justice

I doubt that the founders of NAGPRA fully foresaw the chaos in collections or the dangers of retroactively legislating indigeneity. So, I offer a few questions for reflection, twenty years after. Is a federal agency the most appropriate venue for restoring Indigenous relations to the dead? Does the NAGPRA law depend too heavily on property law rather than human rights legislation (especially given the control it affords to museums)? Should museums, as the descendants and beneficiaries of those who created these collections, be compelled not only to repatriate, but to institute measures to avoid further harm, both to Native gravesites and Native peoples? Why do we allow the federal government to define not only who is Indian in the present, but who was Indian in the past (in a world that pre-dated federal recognition)? Could a higher authority, perhaps the United Nations, assist Indigenous peoples in reclaiming their dead? In the long run (if they could, of course, set aside their differences in federal status), might Native nations be the best arbiters of Indigenous identity and association?

Biographical Statement:

Dr. Margaret M. Bruchac is Assistant Professor of Anthropology and Native American Studies Coordinator at the University of Connecticut at Avery Point. Since 2003, she has served as the Five College NAGPRA Research Liaison for Amherst College, Smith College, and the University of Massachusetts Amherst. Bruchac is co-author, with Michael F. Brown, of "NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences," in John H. Merryman's *Imperialism, Art, and Restitution* (Cambridge University Press 2006). She is also co-editor, with Siobhan Hart and H. Martin Wobst, of the forthcoming *Indigenous Archaeologies: A Reader in Decolonization* (Left Coast Press 2010).