

The Challenges of Dealing with Human Remains in Cultural Resource Management

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ABSTRACT

Over the past few years, the lead author has had the opportunity to excavate multiple large sites in California, working on behalf of developers to keep their projects in compliance with their permits. She also worked in conjunction with local tribes to resolve burial issues with each excavation. During these excavations, she observed the challenges that the tribes encountered when dealing with fast-paced cultural resource management (CRM) projects where burial retrieval and a shortage of resources were the norm. For many years, archaeologists have viewed CRM as only dealing with the material culture of the past; however, archaeologists also consult and work with living cultures. This article will address the endemic problem in CRM that stems from a lack of planning, preparation, resources, and training and how it affects the burial excavations that archaeologists and tribes encounter in the CRM setting. It will also look for solutions to remedy a long-broken system that continues to ignore existing laws set in place to protect resources, as well as the relationships between the Native American community, agencies, researchers, and land developers.

Keywords: NAGPRA, cultural resource management, bioarchaeology, California, burial act, ethics

En los últimos años, he tenido la oportunidad de excavar en múltiples sitios de gran tamaño en California, trabajando por cuenta de empresas de desarrollo para mantener sus proyectos en conformidad con los permisos otorgados por entes gubernamentales. También he trabajado en conjunto con grupos locales de Nativos Americanos para resolver problemas relacionados con entierros humanos en cada excavación. Durante estas excavaciones, he observado los desafíos a los cuales se enfrentan estas tribus cuando se trata de proyectos acelerados de gestión de recursos culturales (CRM, por sus siglas en inglés), en los cuales la norma es recuperar los escasos recursos óseos presentes. Durante muchos años, los arqueólogos han considerado que los proyectos de CRM solo se ocupan de la cultura material del pasado; sin embargo, los arqueólogos también consultamos y trabajamos con culturas vivas. Este documento aborda un problema endémico en los proyectos de CRM que se deriva de la falta de planificación, preparación, recursos y capacitación. Este problema afecta las excavaciones funerarias a las que los arqueólogos y las tribus se enfrentan en proyectos de CRM. También se buscan soluciones para remediar un sistema roto desde hace tiempo que continúa ignorando las leyes establecidas para proteger los recursos culturales, así como las relaciones entre las comunidades de Nativos Americanos, los entes gubernamentales, los investigadores y las empresas de desarrollo.

Palabras clave: ley sobre protección y repatriación de sepulturas Nativas Americanas (NAGPRA), gestión de recursos culturales, bioarqueología, California, ley de entierros, ética

Archaeologists working in cultural resource management, also known as CRM, are situated in a position between the regulating agency or agencies and the tribe or tribes, both of which are often restricted by the very same circumstances, which include a lack of time and resources to deal with the multitude of projects that come across their desks. As the Native American Graves Protection and Repatriation Act (NAGPRA) approaches its thirtieth year, this problem is growing larger despite legislative and collaborative efforts to improve the law's efficacy. This essay provides an overview of NAGPRA-related challenges, ranging from the controversy surrounding its initial implementation to a lack of penalty when the letter or spirit (intent) of the law is not followed. The main challenge, however, is one that is not often openly discussed: the lack of experience and staff to conduct and supervise burial recoveries. This essay describes the problem

using a case example from California and offers some solutions to a growing concern in CRM archaeology that will help archaeologists negotiate the middle ground and meet the ethical as well as legal challenges of the profession.

NAGPRA AND ITS CHALLENGES

The scientific and Native American communities have identified myriad problems with both the NAGPRA legislation and the way it has been implemented over nearly three decades, including unclear statutes, the need for justification of the law, and the lack of funds to implement it for both museums and tribes (Nash and Colwell-Chanthaphonh 2010). NAGPRA may be the single most important piece of legislation for archaeologists and museums,

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restructuring the relationship with indigenous communities and having diverse and far-reaching goals relating to restitution, human rights, and property and Indian law.

Early assessments of NAGPRA often focused on the unresolved conflict among archaeologists and indigenous communities after the initial passage of the legislation. In an oft-cited article, Rose and colleagues (1996) emphasized NAGPRA's successes, which they described as a steep increase in the percentage of analyzed skeletal remains, from fewer than half of all collections to nearly 100%, and increased employment in bioarchaeology. However, what is not noted is that many of these jobs were temporary and that much of the data derived from the inventories were not formally published (Nash and Colwell-Chanthaphonh 2010:99).

Other NAGPRA publications focus on conflicts resulting from a lack of clarity in the law and a struggle to set precedents in how it would be implemented. The 1996 discovery of 9,000-year-old skeletal remains dubbed "Kennewick Man" or "The Ancient One" is the most well-known controversy. Acrid debate on his ancestry and who had access to the remains was not resolved until 2015, when aDNA (ancient deoxyribonucleic acid) evidence proved sufficient to return the remains to indigenous groups for later reburial (Rasmussen et al. 2015). Prior to the 2015 aDNA evidence (Rasmussen et al. 2015), scientists were granted access to the remains via a court order decision (*Bonnichsen v. United States*, 357 F.3d 962 [9th Cir. Or. 2004]; 2004 U.S. App. LEXIS 1656), and their research spans physical and forensic anthropology, genetics, and geochemistry (Owsley and Jantz 2014).

Nash and Colwell-Chanthaphonh (2010) also describe a significant problem with unaffiliated remains, with more than 27% of up to 200,000 human remains still unaffiliated 20 years after NAGPRA's implementation (also see Brown and Bruchac 2006). In May 2010, new regulations aimed at clarifying repatriation procedures for culturally unaffiliated remains were put into place, contributing to a myriad of federal, state, and local laws regulating Native American archaeological sites and some burial grounds, adding both clarification and additional complexity at the same time. Conversations are also being held about additional legislation that could help make international reparations easier and pertain to Native American cultural patrimony held in private collections (Madeson 2016).

There are articles describing cases where parties have ignored the law, in part because NAGPRA lacks strong penalties for non-compliance by federal agencies (Cryne 2009). In the *Yankton Sioux Tribe v. United States Army Corps of Engineers* case, non-compliance consisted of failing to notify the tribe when human remains and artifacts were discovered, continuing construction, and removing human remains and resulted only in a temporary injunction with no significant penalties for ignoring the legislation (209 F. Supp. 2d 1008, 1020 [D.S.D. 2002], in Cryne 2009). Publications also describe cases where the spirit of the law has been disregarded, such as the case of the Bureau of Land Management's determination that human remains in Spirit Cave were unaffiliated despite their discovery on land adjoining the Fallon Paiute-Shoshone reservation on their ancestral lands (Barker et al. 2000).

Overt disregard for NAGPRA, however, is less common than problems in understanding it, which is compounded by

inexperienced researchers. One case resulted in the repatriation of a non-Apache to the Jicarilla Apache after one historic-period individual in a grave was misidentified. The historical record was complex, and highly specialized osteological training was required to identify patterns of trauma, which resulted in a call for more training for researchers who "accept contract work that includes specialized training" (Watkins 2013:139; see Spude and Scott 2013). In other words, there is a need for additional trained paleopathologists or bioarchaeologists who specialize in the analysis of ancient disease and trauma as manifested in bones.

Brown and Bruchac (2006:206–207) also note how challenging the process of repatriation can be. Museums and tribes may be entering into dialogue for the first time, each with distinct perspectives, with no clear answers on who to consult with or how to read the documentary record and weigh competing claims. For example, remains from a single site that are housed in different museums and institutions may be listed with distinct tribal affiliations (Brown and Bruchac 2006:199). The documentary record itself can also hinder the repatriation process, as sometimes the remains or collection may be accompanied by archaeological documents, ethnographic documents, neither, or both (Brown and Bruchac 2006:193–195).

This scenario is not new, but change has occurred within the CRM community, specifically within the new generation of archaeologists entering the CRM and government agency workforce (Bureau of Labor Statistics, US Department of Labor 2018). This scenario is particularly noticeable on projects under the purview of NAGPRA, which often require both osteological and archaeological expertise. For a variety of reasons, students are entering the CRM workforce before continuing their education and obtaining graduate degrees, such that many begin their jobs with a degree in hand and little practical experience.

Most archaeologists are initially hired as seasonal field archaeologists, perhaps only after a month-long field school, which to be fair does not represent a significant change from the past. However, many new archaeologists currently secure employment in federal or state government agencies and then move on to work for tribes, with limited practical experience. Inexperience is a serious problem because a tribe relies on its archaeologist(s) to have the expertise to deal with all types of situations, especially those involving burials and human remains.

This problem is one of the main NAGPRA-related challenges faced in CRM. The case study presented here is from California and provides an example of situations where tribes are overwhelmed by the number of burials encountered on a given site or in their territory. It illustrates how understaffing and inexperience result in noncompliance with the spirit of NAGPRA and related state laws even when the letter of the law is followed. How can we, as archaeologists working for a land developer, assist the tribe or tribal archaeologist so that information is not lost or destroyed, the tribe's ancestors are not desecrated, and the appropriate laws, ordinances, and regulations are followed? What is offered here is a series of guidelines that allow archaeologists to protect cultural heritage and illustrate the need for better solutions in the case example of a CRM project in California.

PRACTICAL PROBLEMS IN POST-NAGPRA ARCHAEOLOGY

Late in the summer of 2014, human remains were discovered during preconstruction activities on a Central Valley job site in California, and the project was shut down due to the discovery of the remains. Native American human remains found on federal or tribal lands, or remains collected and housed in a facility funded by federal monies, require the project to comply with NAGPRA (P.L. 101–601; 25 U.S.C. 3001 et seq; 43 CFR Part 10). Compliance with NAGPRA is not limited to human remains; it also includes funerary objects, sacred objects, and items of cultural patrimony. The project was not on federal or tribal lands; however, it was following state guidelines in compliance with the California Environmental Quality Act. In California, state burial laws are observed, as well as AB 978, also known as California NAGPRA (Cal NAGPRA). Cal NAGPRA was passed in 2001 as a way for federally unrecognized tribes in California to participate in the NAGPRA process, and the California version adopted the original federal act nearly verbatim (Turner 2016:5).

The state burial laws include Health and Safety Code (HSC) Sections 7050.5 and 7052 and Public Resources Code (PRC) 5097.98. HSC 7050.5 requires that further excavation or disturbance of land, upon discovery of human remains outside of a dedicated cemetery, cease until a county coroner makes a written notification of findings to the Native American Heritage Commission (NAHC). It requires a county coroner to contact the NAHC within 48 hours if the coroner determines that the remains are not subject to his or her authority and if the coroner recognizes the remains to be those of a Native American. HSC 7052 establishes a felony penalty for mutilating, disinterring, or otherwise disturbing human remains, except by relatives. PRC 5097.98 works hand in hand with HSC 7050.5, and if a county coroner notifies the NAHC that human remains are Native American and outside the coroner's jurisdiction per HSC 7050.5, the NAHC must determine and notify a "most likely descendant." The most likely descendant shall complete the inspection of the site within 24 hours of notification and may recommend scientific removal and nondestructive analysis of human remains and items associated with Native American burials (Powless 2017). During this process, it is important to recognize that Native American tribes do not see artifacts and human remains as an archaeologist sees them but instead see them as animate objects and ancestors (Sievert et al. 2017).

The young tribal archaeologist assigned to the project had been working for the tribe for a couple of years at that time, but after several meetings in the office and field, it was clear that there were neither sufficient resources nor the experience to manage the recovery of the burials that were uncovered in the tribe's territory. It was the tribe's policy that only the tribe or the tribal archaeologist could remove the burials. Multiple projects were occurring within the tribe's territory, and nearly all of them were uncovering multiple burials. This put added strain on an already tense situation. Consultation between the tribe, the county, and the landowner representative was ongoing but slow. The combination of an inexperienced tribal archaeologist, multiple burials from multiple projects, and limited tribal resources (people, time, and space to store the remains) put tremendous pressure on all parties

involved, as well as the archaeological resources and human remains.

What began as the retrieval of scattered human remains ended after five months of field investigation of a large habitation site that spanned several prehistoric time periods. The Native American burials recovered included five individuals and a distal hand phalanx from a child (the only bone from this sixth individual). The first burial was the reason the project was halted and was that of an older adult male. The burial had been disturbed by an agricultural plow in an area approximately 61 m × 64 m. The bones of the adult male were in a state of complete fossilization. The tribe requested that the area be shovel-scraped to look for signs of his burial pit and the possibility that other additional burial pits were present (Powless 2017:18). This effort resulted in the collection of 448 fossilized human bone fragments. Although the majority of the remains indicated a probable location, the primary burial pit was not found.

Initially, the shovel-scraped squares were dry-screened and later water-screened when it was apparent that a significant archaeological site was present. With the concurrence of the tribe and county official, a shovel test pit program was initiated to determine site boundaries and then continued with shovel-scrape activity, data recovery of Individual 1's remains, and limited data recovery of subsurface site data (Powless 2017). Three of the five burials were scattered and were collected as the field crew encountered the fragments, logged them in the field, and turned them over to the tribe. The remaining two burials (Individuals 3 and 4), both inhumations, remained exposed in the ground for an additional five months after the conclusion of field investigations until the tribal archaeologist was able to excavate them. Unfortunately, Individuals 3 and 4 were prepared to be removed for reburial and were in exposed pits. They were not removed promptly and were subsequently exposed to the elements, including heavy rains, and were inundated for most of the five-month period before they were removed by the tribal archaeologist.

Limited osteological data from the burials were collected, and some diversity in burial practices was noted. The second individual was that of an adult female who was cremated, with a total of 51 associated bones. The majority of cremated remains were recovered from the southwest portion of the site. The third individual was an adult female in her mid-20s at the time of death. This inhumation was identified at the beginning of construction monitoring and was found in a clay cobble layer at approximately 20 cm in depth. She was buried in a prone position, facedown, with her head oriented to the northeast. The only pathology observed was an unhealed cut mark on one rib. There was no evidence of bone regrowth (evidence of healing) on the cut mark.

The fourth individual was a juvenile approximately 12 years old. This inhumation was also identified at the beginning of construction monitoring and was found in the clay cobble layer at approximately 20 cm in depth. This child was buried in a flexed position and was facing northwest. The fifth individual was an adult burial that had been highly disturbed and spread by construction machinery. Nine of the 88 bones collected were identified as human. Individual 6 was the distal hand phalanx of an infant that was recovered from the 0–10 cm level. A fingertip does not

necessarily constitute a burial, but it does mark the presence of a sixth individual.

All of the artifacts that were collected from the shovel scrapes, site boundary testing, and data recovery were analyzed for the report and then returned to the tribe for their curation. All human remains were reinterred on-site by the tribe after the project was completed. However, the data recovery report was not able to speak to the treatment of inhumation burials or how the tribal archaeologist excavated them, including the severe lack of resources and experienced personnel assigned to the project.

As educators in this discipline in the United States, we see anthropology students graduating with almost no experience doing archaeology who have to learn on their own, experimenting in effect, unsupervised on the most precious resource we have. Our current system also lays the responsibility for lack of funding, training, and personnel on tribes with insufficient resources, although tribes are building capacity to both manage and lobby on behalf of their cultural heritage (Madeson 2016). In the meantime, as professional archaeologists, to assist tribes when we are aware that there is a need, we can

- Provide assistance: Due to time constraints or lack of personnel, a tribe may not have the resources to excavate multiple burials. Ask the tribe if you can assist them with the burial excavation or perform it for them. If the tribe only allows tribal people to work on the burial, offer to find a native bioarchaeologist who could be hired as a subconsultant for them. If applicants or developers are paying the tribe's fee, they may be amicable to hiring a native bioarchaeologist subconsultant.
- Provide supplies: Ask the tribe if they need any supplies to excavate properly, transport, or house the remains before reburial.
- Provide clear and accurate information: Remember that you are in a position to assist all parties. By providing clear and accurate information to a tribal archaeologist or a tribal representative, you are facilitating constructive dialogue to continue with agencies and applicants or developers.
- Provide education: If tribal archaeologists or tribal representatives are doing something wrong, do not be afraid to show them a better way of doing it. Use your knowledge as you would with a peer.
- Provide coordination: As you provide delivery of human remains and associated funerary objects, site visits, or lab visits, remember that you are working on one project with this tribe, but they may be working on multiple projects with different firms. Try to be sensitive to their schedule.

Some of these proposed solutions may require going before the Tribal Council to get permission, especially requests related to burial excavations. Archaeologists are not legally bound to follow this type of guidance, but each archaeologist should assess his or her own ethics in situations such as that described. Attention to understanding the larger context of practice in tribal archaeology programs and abilities to implement burial regulations may help preserve data and the integrity of a site and possibly prevent the unintentional desecration of ancestor graves. As a CRM professional it is not necessary to wait for direction from the tribal archaeologist, who may not be equipped to do what is best for the resources. Extend a helping hand with your knowledge and resources for the sake of science and cultural heritage. In the end,

it will foster a better relationship with the descendants of the people you are studying.

CONCLUSION

There are a variety of steps an archaeologist can take to assist tribes with the recovery, documentation, and care of cultural resources, which is particularly important when human remains are discovered, excavated, curated, and reburied. One outcome of NAGPRA is that the mandate of consultation has influenced public and private sectors to build relationships with tribes (Madeson 2016). The solutions proposed here might add extra time and effort to an already busy schedule and tight CRM timeline in the short term. However, there are both tangible and intangible benefits in the long term that extend beyond following a legal mandate for our ethical obligations, both for our profession and for our colleagues and their ancestors from whom we seek to learn about our present as well as our past. While we see and describe artifacts, human remains, and sites as inanimate, dead places and things, the living descendants see a living, animate, sacredness of place and a different view of past lifeways (Sievert et al. 2017).

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Data Availability Statement

The physical and digital data on which the research is based are available in the Powless (2017) data recovery report, which is on file with the Kings County Community Development Agency, Hanford, California.

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