

# The Future of the Past: Reclassification of 'Culturally Unidentifiable' Human Remains Under NAGPRA

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## Abstract

*The Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 provided specific instructions for the documentation and repatriation of culturally affiliated Native American human remains held by museums and federal agencies. The original legislation, however, left the issue of remains classified as "culturally unidentifiable"-- those that could not be affiliated with federally recognized tribes-- untouched and in legal limbo. Many of these human remains have undergone reclassification since first inventoried, particularly since the passage of new legislation that created new guidelines for the disposition of culturally unidentifiable remains in 2010. As of early 2017, 8,217 human remains in the United States originally inventoried as "culturally unidentifiable" have been classed as culturally affiliated with a federally recognized tribe. These reclassifications call into question the utility and symbolic significance of the term "culturally unidentifiable." The classification criteria of the deceased under NAGPRA are established by the United States government and reworked when federal rules change. Such politics over the inclusiveness of the criteria evidences Native Americans' continuous struggle for recognition in American classification schemes—a struggle originating at European contact and continuing through the centuries including present-day issues surrounding "federal recognition" of native tribes. Establishing "cultural affiliation" criteria for the inclusion or exclusion of human remains works in symbolic, semiotic, and pragmatic domains to continue to mediate, by legal languages and practices, the control over Native American groups both living and deceased.*

## Introduction

The disturbance of Native American graves began as some of the earliest European settlers arrived in North America, with a Pilgrim exploring party removing items from a Native American grave before returning to the Mayflower (Heath 1986). This kind of disturbance was often sanctioned by Anglo-American law in the following centuries, such as the implementation of federal policy in 1868 requiring military personnel to collect Native American body parts for the Army Medical Museum (Bieder 1990), and the 1906 Antiquities Act officially treating Native American human remains as archaeological resources that could be excavated with a proper permit (16 USC §§431-433). Typically unmarked, Native American graves and other unique mortuary practices such as canoe or tree burials were rarely afforded the same legal protection as their European counterparts (Trope and Echo-Hawk 2000). Ancient burial grounds were often classified legally as “abandoned,” or denied a “cemetery” classification altogether, and their occupants disregarded because of their antiquity and lack of known next of kin. Native Americans were also not legally considered “people” until 1879 under federal law (*United States ex rel. Standing Bear v. Crook*, 1879) and not granted citizenship until 1924 (8 USC §1401(b)).

As a result of these legal inequities, the graves of between 100,000 and 2,000,000 Native Americans have been disturbed and their remains put on display or stored by various agencies and museums without regard for descendants’ rights. Grave looting and desecration has affected virtually every Native American group in the United States (Trope and Echo-Hawk 2000). The power differential between those who disturb gravesites and those whose sites are disturbed offers distinctive criteria for inclusion and exclusion in rights of populations living within the Anglo-run United States, from the earliest days of European contact to the present. Disturbed graves raise the possibility of Native claims of desecration and reclamation, particularly if recognized by the state, making for one of the enduring struggles for Native North Americans.

In 1990, the Native American Graves Protection and Repatriation Act (NAGPRA) was enacted by the federal government. This legislation was designed to protect Native American burials and facilitate the repatriation of human remains and funerary objects held by government agencies to affiliated tribes. It had become apparent to legislators by this time that common law, based on judicial precedent, and individual state laws were inadequate to address the nationwide issue of desecration of Native American graves and trafficking in human remains and burial objects. Federal action was needed. NAGPRA was also intended as human rights legislation, in part “designed to address the flagrant violation of the ‘civil rights of America’s first citizens’” (Trope and Echo-Hawk 2000:139).

There are three major components of NAGPRA. The first deals with issues of repatriation of items in existing collections. This component requires federal agencies and museums receiving federal funds to repatriate human remains and associated funerary objects upon request to those determined to be descendants or culturally affiliated tribes (25 USC §3005). Cultural affiliation is determined using information from the following categories: “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion” (25 USC §3005(a)(4)). This affiliation is based on the overall evaluation of the evidence and does not need to be established with scientific certainty. As for culturally unidentifiable remains, the 1990 NAGPRA legislation calls for the Review Committee to compile a list of unidentifiable remains and, in consultation with the tribes, develop a process for the disposition of these remains (25 USC §3006(c)(5)). Additionally, the repatriation component of NAGPRA provides guidelines for the return of unassociated funerary objects, sacred objects, and items of cultural patrimony (25 USC §3005 (a)(2)).

NAGPRA also requires federal agencies and museums to provide inventories of the Native American human remains and funerary objects in their collections (25 USC §3003). They

are required to identify the cultural and/or geographical affiliation of the remains or items based on the information in their possession. The institutions then notify affiliated tribes so they can make claims on the remains and items. The inventories are then published in the Federal Register. Summaries of unassociated funerary objects, sacred objects, and items of cultural patrimony are also required, however object-by-object inventories are not mandatory (25 USC §3004).

The second component of NAGPRA deals with the ownership and control of all Native American human remains and objects found on federal and tribal land in the future (25 USC §3002). Proven lineal descendants are given first priority, followed by the tribe in control of tribal land, then the most culturally affiliated tribe to the remains found on federal land, and, lastly, whichever tribe has the strongest ties to the federal land on which the remains were found. In execution of these rules, the only entities that are designated “tribes” are those designated by the federal government; state or locally designated groups do not have any control over repatriation. Any excavation of cultural items requires the permission of (on tribal land) or notification of and consultation with (on federal land) the appropriate tribes. If cultural items or human remains are discovered inadvertently, all activity must cease and the appropriate tribes must be notified.

The third component of NAGPRA prohibits the trafficking in Native American human remains and cultural items without the full consent of the appropriate tribe or next of kin (25 USC §3002). Violators face fines of over \$100,000 and possible jail time. NAGPRA also created a Review Committee of seven tribal and museum officials that monitors the implementation of the legislation (25 USC §3006).

### Culturally Unidentifiable Human Remains

According to NAGPRA, cultural affiliation is “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier

group" (25 USC §3001 (2)). Culturally unidentifiable human remains are "human remains ... 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)).

The original 1990 NAGPRA legislation required only a good faith effort on the part of federal agencies and museums to use information already within their possession to determine cultural affiliation. No additional research or exhaustive study was required or even encouraged. NAGPRA stated that the cultural affiliation research should not be construed as "an authorization for the initiation of new scientific studies of such remains and funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects" (43 CFR §10.9 (e)(5)(iii)). As mentioned above, there were no guidelines in the original NAGPRA legislation for the disposition of unidentifiable human remains, allowing museums and government institutions to keep them in perpetuity and leaving them in legal limbo.

In March of 2010, the Review Committee drafted and passed the final rule on the "Disposition of Culturally Unidentifiable Human Remains" (43 CFR §10.11). Section 10.11 provides guidelines for federal agencies and museums receiving federal funds for consultation with appropriate tribes, for completion of inventories of the remains in their collections, and for the final disposition of the remains. Consultation must be initiated and repatriation arranged even if no tribe makes a claim, unless a museum or agency can prove it has a right of possession to the human remains. Priority of control of the remains is first granted to the tribe from whose tribal lands the remains were removed, followed by the tribe from whose aboriginal lands the remains were removed, and if the remains are refused by both groups they may be offered to another federally recognized tribe. Special permission can also be granted to transfer the human remains to a non-federally recognized tribe or to directly reinter the remains in special circumstances and when the groups of higher priority do not object.

In 2007, a NAGPRA intern completed a survey of the Culturally Unidentifiable (CUI) Native American Inventories Database and prepared a short report for the NAGPRA Review Committee exploring some of the attributes of the human remains listed in the database (Kline 2007). He focused on the states with the highest numbers of unidentifiable remains and found that the vast majority of these could be associated with a geographic location (minimally to the state level) and archaeological time period. Additionally, 65% had one or more associated funerary objects, and 71% had been scientifically excavated. All of these data suggested that up to 80% of the human remains currently classified as culturally unidentifiable could “reasonably be culturally affiliated” (NAGPRA Review Committee: 17).

In July 2010, the US Government Accountability Office (GAO) published a report revealing that several government agencies were not in compliance with NAGPRA. In particular, the report noted that agencies frequently incorrectly report a lack of cultural affiliation (GAO 2010). The federal courts have found similar results, suggesting that affiliation decisions are often “arbitrary and capricious” (e.g. Bonnichsen v. United States; Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.).

### **Reclassifications and Implications**

The CUI database currently contains 131,417 unaffiliated human remains held by agencies in the United States. According to the NAGPRA database website, 8,217 human remains that were originally inventoried as culturally unidentifiable have since been classified as culturally affiliated (National Park Service 2017). While this only represents nearly 6% of the total number of unidentifiable human remains in the CUI database, the fact that any reclassifications have occurred is promising. This lends credence to the findings of the NAGPRA Review committee and GAO that agencies and museums are likely overusing the “culturally unidentifiable” designation.

There are several additional implications of these reclassifications. First, the term “culturally unidentifiable” is inappropriate if at a later date, or with additional research, many of these remains can be “culturally identified.” They are not, in fact, “unidentifiable,” but merely “unidentified,” as many Native American groups have argued (e.g. Riding In et al. 2004). A change in terminology would be practical and would keep the door open for the periodic reevaluation of affiliation status of the remaining unaffiliated human remains. Reevaluations and reclassifications would be appropriate in order to incorporate new developments and discoveries in the fields of history, anthropology, and archaeology.

Additionally, the reclassifications suggest that the majority of cultural affiliation studies are rarely as detailed or as comprehensive as needed. This is most likely in part a result of NAGPRA legislation only requiring that affiliation determinations be made using the information already in possession of the federal agency or museum (43 CFR §10.9 (a)). The historical treatment of Native American human remains, socially and legally, as specimens, data, archaeological resources, or cultural objects rather than human beings may also impact perceptions of institutional “ownership” of the remains among public agencies implementing NAGPRA to this day (Trope and Echo-Hawk 2000).

Institutional resources also likely play a major role; already thinly spread museum resources would be further strained by the need for investigation into existing warehoused or displayed collections (NAGPRA Review Committee). While federal funding exists to support these efforts, many smaller institutions lack the staff with the time or skills to pursue these grants. Many agencies and museums also rely heavily on archaeology and more “scientific” lines of evidence for affiliation studies, and overlook other types information such as Native American folklore or traditional oral histories (Beisaw 2010; Birkhold 2011; St. Clair 2013). NAGPRA specifically states that museums and agencies must identify cultural affiliation “to the fullest extent possible” (43 CFR §10.9 (a)) and use categories of information, which include both folklore and

oral tradition (25 USC §3005(a)(4)). It does not appear that most affiliation studies comply with these rules.

Finally, the reclassifications have implications for the future of the over 120,000 human remains still listed in the Culturally Unidentifiable (CUI) Native American Inventories Database. As mentioned above, approximately 6% have already been reclassified and the NAGPRA Review Committee suggests that up to 80% of the remaining individuals could potentially be affiliated under the new rules and practices. This would seem to indicate that any reevaluation of the individuals currently listed in the database would yield additional reclasifications. In light of NAGPRA's new rule requiring the repatriation of unidentifiable human remains (43 CFR §10.11), the number of individuals classified as "unidentifiable" should then be expected to decline in the future as further research is conducted in preparation for repatriation.

## Conclusion

NAGPRA has offered long-sought protection to Native American burials and facilitated the repatriation of thousands of human remains, funerary objects, and objects of cultural patrimony; however, the issue of classifying culturally unidentifiable human remains persists. Approximately 6% of the human remains that were originally inventoried as "culturally unidentifiable" have since been culturally affiliated with a federally recognized tribe. This suggests that the class of "unidentifiable" remains is terminologically inappropriate, that the majority of cultural affiliation studies have been inadequate, and that any additional affiliation research would significantly reduce the number of unidentifiable human remains listed in the NAGPRA CUI database in the future. The criteria for cultural affiliation, established by law and embodied in the American bureaucratic system, including museum procedures and practices, not only draws symbolically from historical classifications, but also continues to affect the symbolic meaning of Native American identity in the present. Contact and distinction between Native and Anglo-Americans remains ongoing, and

the politics of this contact and distinction are visible in the concepts and legal languages that govern both the living and the deceased.

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