



# Indigenous Archaeology

## American Indian Values and Scientific Practice

Joe Watkins



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## Repatriation Legislation

As discussed in the previous chapter, Congress passed two important pieces of legislation that spell out the rights of tribes to claim human remains and items important to the various tribes. Since the National Museum of the American Indian Act (NMAIA) was the first of the repatriation acts, it will be discussed first, but since the Native American Graves Protection and Repatriation Act (NAGPRA) has had perhaps the most widespread impact on museums and anthropologists, it will be discussed in greater detail.

### THE NMAIA AND ITS AMENDMENT

When the 101st U.S. Congress passed the NMAIA (Public Law 101-185) in 1989 establishing the new National Museum of the American Indian, it also required the Smithsonian to inventory, document, and, if requested, repatriate culturally affiliated human remains and funerary objects to federally recognized native groups. In 1996 the NMAIA was amended to add new categories of objects subject to repatriation and to establish deadlines for the distribution of object summaries and inventories of the Smithsonian's collections to the tribes. Definitions of the object categories subject to repatriation generally follow the language of the NAGPRA, which was passed by Congress in 1990.

Object summaries (item by item listings of unassociated funerary objects, sacred objects, and objects of cultural patrimony) were mailed to federally recognized tribes by the end of February 1997. Final inventories of all human remains and associated funerary objects still held by the National Museum of Natural History (NMNH) were mailed on June 1, 1998. Repatriation provisions contained in the NMAIA bring the Smithsonian repatriation legislation into close conformance with deadlines and categories of objects subject to repatriation under NAGPRA.

The NMNH Repatriation Office was established to implement the statutory requirements of the NMAIA and to produce reports that summarize all the available information on the cultural origins of the collections in question. Recommendations for repatriation are made on the basis of this assembled information. Additionally, the Repatriation Office has produced object summaries that identify all ethnological objects in the museum's ethnographic collections associated with particular cultural groups and provide information about how the items were originally acquired. These summaries have been distributed to all federally recognized tribes.

Categories of materials that are eligible for return under the NMAIA include (1) human remains of individuals whose identity is known; (2) culturally affiliated human remains; (3) associated and unassociated funerary objects; (4) sacred objects; and (5) objects of cultural patrimony. In addition, under long-standing museum policy, tribes may request the return of objects transferred to or acquired by the NMNH illegally or under circumstances that render the museum's claim to them invalid.

Culturally affiliated human remains are defined in the legislation as human remains that share a relationship with a present-day Indian tribe that can be demonstrated based on a preponderance of available evidence. Associated and unassociated funerary objects are items that, as part of the death rites of a culture, are believed to have been intentionally placed with an individual of known affiliation at the time of death or later. The only distinction between whether a funerary object is considered unassociated or associated is whether or not the museum has the human remains with which it was originally interred. Sacred objects are specific ceremonial objects that are needed by traditional Native American religious

leaders in order to continue practicing their traditional Native American religions by present-day adherents.

Objects of cultural patrimony are more difficult to define and vary among tribes. In general, they are cultural objects that were originally owned by the entire tribe rather than a single individual, and that have an ongoing historical, traditional, or cultural importance to the group. Because the objects were tribally owned rather than individually owned, they cannot have been alienated, appropriated, or conveyed by any individual, at the time they were acquired.

Repatriation of Native American human remains and certain cultural objects may be made by lineal descendants of named individuals, federally recognized Native American tribes, federally recognized Native Alaskan villages, and Native Hawaiian organizations named in the act. Requests from state-recognized Native American tribes are reviewed by the museum on a case-by-case basis.

The NMAIA also required the Smithsonian to establish a special committee to monitor and review the process of inventory, identification, and repatriation. This external review committee consists of seven individuals, four of which must be Native Americans. The review committee may, upon the request of any affected party, review any findings relating to the origin or the return of human remains and cultural objects. They also assist the secretary of the Smithsonian in resolving disputes between groups or between a group and the institution with regard to the disposition of collections that may arise.

## THE NAGPRA

Public Law 101-601, the NAGPRA, affirms the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to custody of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Signed into law by President George Bush in November 1990, NAGPRA places the responsibility for compliance upon federal agencies and museums that receive federal funds. It required all federal departments, agencies, or instrumentalities of the United States (except for the Smithsonian Institution) to complete summaries and inventories of Native American materials in their control

(including those held by nongovernmental repositories) and to ensure compliance regarding inadvertent discoveries and intentional excavations of human remains conducted as part of activities on federal or tribal lands.

A large number of terms and concepts as defined in NAGPRA were used in the 1996 amendment to the NMAIA. The presentation of those definitions again in discussion of NAGPRA seems redundant, but some are included to ensure the terms are understood in relation to the separate laws.

Museums as defined in NAGPRA are more than just places that house artifacts and collections. The definition included any institution or state or local government agency (including any institution of higher learning) that has possession of, or control over, items covered under the act and that receives federal funds. The two important terms, "possession," meaning the physical custody of objects with sufficient legal interest to lawfully treat them as part of the museum's collection, and "control," having a legal interest in objects sufficient to lawfully permit the museum to treat the objects as part of its collection, whether or not the objects are in the physical custody of the museum, were also defined. Generally, a museum that has loaned objects to any entity (individual, museum, or federal agency) is considered to retain control of those objects, although the objects may not be in the physical custody of the museum. Objects in the museum's collection that have been received on loan from another individual, museum, or federal agency are considered to be in the control of the loaning museum.

The act also provided an expanded definition of the phrase "receives Federal funds." As defined in the act, a museum that receives funds from a federal agency through any grant, loan, contract (other than a procurement contract), or arrangement by which a federal agency makes or made available funds to a museum is included. If a larger entity of which the museum is a part receives federal funds (i.e., a university museum where the university receives federal funds), then the museum must comply with NAGPRA regulations. The NAGPRA also applies to certified local governments and tribal museums if they receive federal funds through any grant, loan, or contract. The act does not apply to private individuals and museums that do not receive federal funds or are not part of a larger entity that does receive federal funds.

Under the statute, lineal descendants, Indian tribes, and Native Hawaiian organizations (hereafter, "Indian tribes and Native Hawaiian organizations" will be referred to as "tribal groups" solely for ease of discussion) may claim Native American items covered under the act. While "lineal descendant" is not defined in the statute, the statute makes it clear that lineal descendants have priority over tribal groups in making claims. Regulations require an individual to trace ancestry directly and without interruption by means of a traditional kinship system or by the American colonial law system of descendancy to the Native American individual whose remains, funerary objects, or sacred objects are being claimed. Reference to traditional kinship systems is designed to accommodate various systems that Indian tribes might use to reckon kinship. "Indian tribe" is defined to mean any tribe, band, nation, or other organized Indian group or community of Indians, including any Native Alaskan village, as defined in or established by the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. This definition was drawn explicitly from the American Indian Self Determination and Education Act (25 U.S.C. 450b). Only federally recognized Indian groups have standing to make a direct claim under the act.

The statute defines "Native Hawaiian organization" as any organization that serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has expertise in Native Hawaiian affairs. The statute specifically identifies the Office of Hawaiian Affairs and Hui Malama I Na Kupuna 'O Hawai'i Nei as being Native Hawaiian organizations.

The NAGPRA affects four types of Native American cultural items held in museums: human remains, funerary objects, sacred objects, and objects of cultural patrimony. Note that the term "Native American" (meaning "of, or relating to, a tribe, people, or culture indigenous to the United States including Alaska and Hawaii") is used only to refer to items covered under the act, and is never used in the statute or regulations in reference to any living individual or group of individuals.

"Human remains" (the physical remains of a person) has been interpreted broadly to include bones, teeth, hair, ashes, or mummified or otherwise preserved soft tissues, but does not include remains or portions of remains freely given or naturally shed by the individual (such as hair made into ropes or nets). The act makes no distinction between fully articulated burials and isolated bones and teeth, but it does consider human remains incorporated into funerary objects, sacred objects, or objects of cultural patrimony as part of that object.

"Funerary items" are items that are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. They must be defined by the preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular tribal group, or as being related to specific individuals or families or to known human remains. "Burial Site" means any natural or prepared physical location (whether below, on, or above the surface of the earth) into which individual human remains were deposited as part of the death rite or ceremony of a culture. Rock cairns or pyres are also considered to be burial sites. Items that inadvertently come into contact with human remains are not considered funerary objects, but objects that are intentionally placed near, but not necessarily with, the human remains at the time of death or later are considered to be funerary objects. The act distinguishes between associated funerary objects and unassociated funerary objects based solely upon whether or not the human remains with which the objects are associated are in the possession or control of the museum or federal agency.

"Sacred objects" are defined as specific ceremonial objects needed by traditional tribal religious leaders for the practice of traditional tribal religions by present-day adherents. "Traditional religious leaders" are further defined by the statute. While many items might be imbued with sacredness in the eyes of an individual, NAGPRA regulations are specifically limited to objects that were devoted to a traditional tribal religious ceremony or ritual and that have religious significance or function in the continued observance or renewal of such ceremony.

"Objects of cultural patrimony" are defined as items having ongoing historical, traditional, or cultural importance central to the

tribal group itself, rather than property owned by an individual tribal member. They are considered to be items of such central importance to a tribal group that they could not have been given away or sold by any individual tribal member, even though an individual tribal member or family usually might maintain day-to-day care of it. An additional requirement is that they also must have been considered inalienable by the Indian tribe at the time the object was separated from the group. Objects of cultural patrimony include items such as the Zuni war gods and the Confederacy wampum belts of the Onondaga.

The statute lays out a mechanism for federal land managers, museums, and agency officials to consult with lineal descendants and tribal groups and reach a determination regarding the proper disposition of objects covered under the act that might be excavated or discovered on federal or tribal lands. The processes for dealing with excavations or discoveries on federal or tribal lands are different than those for dealing with the disposition of objects within museum or federal agency collections.

Provisions relating to intentional excavations and inadvertent discoveries on federal and tribal lands (but not to private or state lands) went into effect on November 16, 1990. These provisions were designed to help in the proper disposition of items covered under the act that might be intentionally excavated or inadvertently discovered on federal or tribal lands.

"Intentional excavations" are the planned archaeological removal of items covered under the act that are found under or on the surface of federal or tribal lands, and, under these provisions, federal officials are required to take steps to determine whether a planned activity may result in the excavation of items covered under the act. Any items covered under the act that might be recovered must be excavated in accordance with the requirements of the Archaeological Resources Protection Act (ARPA) and its implementing regulations, and only after consultation with the appropriate tribal group. Intentional excavation of items covered under the act on tribal lands can only proceed with the consent of the appropriate tribal group. The procedures require written proof that consultation has occurred before the responsible agency official may issue required permits.

An "inadvertent discovery"—an unanticipated encounter or detection of items covered under the act found under or on the

surface of federal or tribal lands—requires immediate telephone notification, with written confirmation, to the responsible federal agency official. Inadvertent discoveries on tribal lands must be reported immediately to the responsible Indian tribal official. If the inadvertent discovery occurs in connection with an ongoing activity, the activity must stop in the area of the inadvertent discovery and a reasonable effort made to protect the items covered under the act. Notification and consultation with the appropriate tribal group about the disposition of the items covered under the act must be done as soon as possible (but no later than three working days after receipt of the written confirmation of notification) by the responsible agency official. The activity may resume thirty days after certification by the notified federal agency of receipt of the written confirmation of notification. The activity may also resume at any time after a written, binding agreement is executed between the federal agency and the affiliated tribal group(s) that adopt a recovery plan for the excavation or removal of the items covered under the act.

Once the group that appears to be entitled to custody of the materials is determined, the federal agency official must publish a general notice of the proposed disposition in a newspaper of general circulation in the area where the materials were excavated or discovered and, if applicable, in a newspaper of general circulation in the area in which the affiliated tribal group's members now reside. Transfer of the materials cannot take place until at least thirty days after the publication of the notice in order to allow time for any additional claimants to come forward.

The statute also requires museums and federal agencies to inform tribal groups of items covered under the act that are within their collections through either summaries or inventories.

"Summaries" are defined as written descriptions of collections that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony and are to have been completed by November 16, 1993. They were basically a simple notification to each tribal group of the nature of the collections held by the museum or federal agency relating to that group. The summary was intended as a initial step to bring tribal groups, tribal representatives, and traditional religious leaders into consultation with a museum or federal agency in order to help in the identification of

specific unassociated funerary objects, sacred objects, or objects of cultural patrimony.

"Inventories" are much more detailed descriptions of materials within a museum's collections. These item-by-item descriptions of human remains and associated funerary objects must be completed in consultation with tribal groups and represent a decision by the museum or federal official about the cultural affiliation of particular human remains or associated funerary objects. Inventories are to have been completed by November 16, 1995, but some museums have been granted time extensions by the Interior Department based on their "good faith effort" to have completed the requisite inventories.

Inventories of "culturally unidentifiable human remains"—human remains for which no lineal descendant or culturally affiliated tribal group can be determined—are provided by the departmental consulting archaeologist to the NAGPRA Review Committee, a group of seven private citizens charged with making recommendations concerning any questions regarding the implementation of NAGPRA regulations and the disposition of these remains.

The system outlined by the statute provides a framework for resolving issues surrounding the disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony excavated or discovered on federal or tribal lands or held in federal or museum collections. The regulations, while wordy and somewhat filled with "bureaucrat-ese," provide a first step in institutionalizing consultation with tribal groups about human remains and objects of continuing cultural importance.

### THE LEGAL IMPLICATIONS OF REPATRIATION

American Indian groups hailed the passage of NAGPRA as an opportunity to right centuries-old wrongs perpetrated against American Indian graves. In a symposium sponsored by the *Arizona State Law Journal*, many authors discussed the "new" law as it impacted various institutions that dealt with Native American human remains and cultural material.

While archaeology was not the only culprit to have used American Indian human remains as study objects—"Human remains

were obtained by soldiers, government agents, pothunters, private citizens, museum collecting crews, and scientists in the name of profit, entertainment, science, or development" (Trope and Echo-Hawk 1992: 40)—it was perhaps the most visible.

As James Riding In wrote:

Individuals who violate the sanctity of the grave outside of the law are viewed as criminals, Satan worshippers, or imbalanced. When caught, tried, and convicted, the guilty are usually incarcerated, fined, or placed in mental institutions. Yet public opinion and legal loopholes have until recently enabled white society to loot and pillage with impunity American Indian cemeteries. Archaeology, a branch of anthropology that still attempts to sanctify this tradition of exploiting dead Indians, arose as an honorable profession from this sacrilege. (1992: 12)

But NAGPRA was neither written to impede scientific progress nor to provide American Indian groups special status under the federal legal system. In discussing the legislative history of the law, Jack F. Trope and Walter Echo-Hawk note, "NAGPRA is, first and foremost, human rights legislation . . . designed to address the flagrant violation of the 'civil rights of America's first citizens'" (1992: 59).

Additionally, Maricopa County Superior Court judge Sherry Hutt sees NAGPRA as a law that will "strengthen federal prosecutors' ability to protect Native American graves and cultural treasures by hampering the profit incentive" (1992: 135), the same thing federal and local archaeologists had attempted to do regularly through education and legislation.

### THE SCIENTIFIC RESPONSE TO NAGPRA

A more complete discussion of the scientific response to the repatriation legislation is provided in chapter 2, but, needless to say, it ranged from complete support to total opposition. While no archaeological organization supported the initial repatriation legislation, nationwide organizations became deeply involved in the lobbying efforts to ensure that the final version of the NAGPRA was indeed a compromise between American Indian wishes and those of the archaeological communities of the United States.

Larry Zimmerman (1997) provides a good summary of the repatriation issues as they have impacted the discipline of archaeology. His article discusses the four stages that archaeology went through in dealing with repatriation: denial, dialogue, analysis, and compromise.

In the denial phase, argues Zimmerman, the discipline challenged Indian claims, rationalizing, as he writes, that "academic freedom has precedence and that the remains are the heritage of all cultures" (1997: 93). This stance, that the goals of science as a worldwide, humanist pursuit are somehow more important than the wishes of individual cultures, is still heard as an excuse for the unfettered practice of archaeological excavations in societies throughout the world (see Gough 1996; Meighan 1992; Mulvaney 1991).

During the dialogue phase, Zimmerman notes that, while not all archaeologists agreed that problems existed, the discipline began a series of dialogues to gain an understanding of the Indian perceptions of the problems. It is interesting to note that archaeologists continue to court dialogues.

Zimmerman's third phase, analysis, came about as "some anthropologists became curious about why the controversy arose and why it continued. The issue itself became a matter of intellectual investigation" (1997: 101). Anthropologists began to study the processes that evolved along with the changing relationships between anthropologists and indigenous populations.

Zimmerman's last phase, compromise, provides a brief listing of some "historical" (if the late 1960s might be considered historic) compromises made between American Indians and archaeologists. It also provides a glimpse of the reasoning behind American Indian attempts at getting national repatriation laws passed rather than state or local laws (1997: 105).

NAGPRA falls heavily on those individuals who analyze and interpret the human remains subject to repatriation as well as on those who initially encounter those remains. In articles such as "Human Skeletal Remains: Preservation or Reburial?" (Ubelaker and Grant 1989: 249–87), "Why Anthropologists Study Human Remains" (Landau and Steele 1996: 209–28), and "NAGPRA Is Forever: Osteology and the Repatriation of Skeletons" (Rose, Green, and Green 1996: 81–103), biological anthropologists and osteologists outline the types of information that result from the study of human remains. Although these might be construed to be nothing

more than a justification for the continued study of human remains, they nonetheless offer an attempt to educate not only American Indians but also other anthropologists about the uses of osteology in the gathering of information concerning life styles of human beings.

### AMBIGUITIES AND INADEQUACIES OF NAGPRA

The passage of NAGPRA gave American Indians some of the tools necessary to implement the changes they had protested for in the 1970s. Many authors (Hutt 1992; Hutt, Jones, and McAllister 1992; Tsosie 1997; Welsh 1992), believe that NAGPRA is human rights legislation aimed at providing equal treatment to all human remains under the law, without consideration of "race" or cultural background. The law, they believe, was meant to remedy the unequal treatment of American Indian remains by previous generations of American military, bureaucrats, and scientists. But with the law's passage, tribal groups quickly realized it was not the panacea they hoped it would be, and Indians quickly spoke out on the inadequacies and ambiguities of NAGPRA.

American Indians complained that scientists were using the inventories and summaries required of museums in Section 5, subsection (a) of NAGPRA for additional scientific data collection under the guise of complying with NAGPRA. While the law does not authorize the initiation of new scientific studies, it does not preclude it when the museum deems it necessary for determining the cultural affiliation of a set of human remains (Section 5[b][2]), or when the materials are "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States" (Section 7[b]).

In the 1995 oversight hearing on the implementation of NAGPRA, Kunani Nihipali, a leader of Hui Malama I Na Kapuna 'O Hawai'i Nei, a Native Hawaiian organization, called for a clarification of the role of scientific study, asking that "where existing documentation establishes geographic location and cultural affiliation by clear, reasonable belief, or the preponderance standard of evidence, scientific studies of any kind on ancestral skeletal material remains [be] prohibited" (Superintendent of Documents 1996: 158).

Other tribes were concerned about the apparent authorization of study prior to repatriation of materials allowed in Section 7 of NAGPRA. At the same oversight hearing, Jesse Taken Alive, chairman of the Standing Rock Sioux Tribe, noted:

It was only when Native people . . . rose to stop the racist practice of the robbery and study of our graves was the "loss" to science loudly and arrogantly lamented. Amid great gnashing of teeth, *the rush was on* to study, document, analyze, and further desecrate our relatives before the precious "scientific and cultural materials" could be "destroyed" through reburial.

*In our view, the science and museum industries have only themselves to blame that they did not correctly catalog and store our dead relatives while they had them, and should not now be allowed to gather one more iota of data from our relatives under the cloak of NAGPRA.* (Superintendent of Documents 1996: 231, emphasis in original)

Scientists might argue that since the deadlines for inventorying and summarizing museum collections have past such arguments are moot, but the scientific study of American Indian human remains is still a valid concern.

Additionally, many American Indian groups cannot understand why the graves protection portion of NAGPRA was not applied to all lands within the United States, rather than just to federal or tribal lands, since the entire continent was at one time Indian land. The National Congress of American Indians, the oldest and largest national organization representing American Indians called for "amendatory language to the NAGPRA to extend protection of funerary remains and objects on all lands within the exterior boundaries of the United States wherever they may be situated" (NCAI Resolution No. NV-93-170). NAGPRA Review Committee chairwoman Tessie Naranjo of Santa Clara Pueblo noted that the NAGPRA Review Committee itself experienced frustration over this issue (Superintendent of Documents 1996: 149).

In a review of the legislative history of NAGPRA, Trope and Echo-Hawk noted that thirty-four states had enacted burial protection laws that "typically prohibit intentional disturbance of unmarked graves, provide guidelines to protect the graves, and mandate disposition of human remains from the graves in a way that guarantees reburial after a period of study" (1992: 52). They also

noted the constitutionality of the laws had been upheld, citing as examples cases in California, Minnesota, and Oregon (53).

Why is such extension of NAGPRA important? According to Melinda Zeder's survey of American archaeologists, approximately 49 percent of archaeologists worked either within the government (23 percent), the private sector (18 percent), or within a museum setting (8 percent) (1997: 47). Although these figures might vary from the true proportions of archaeologists employed in these areas, Zeder feels they are a good fit to the actual makeup of American archaeology (48).

If one assumes that private sector and museum archaeologists are as closely tied to federal regulations as their government counterparts, only about one-half of American archaeologists are bound by the NAGPRA or the NMAIA. Academic archaeologists, those more often participating in "pure research," are less confined by federal regulations and made up 35 percent of the survey population. When these archaeologists conduct research on federal or tribal lands, their research is covered under NAGPRA, as are the artifacts that they collect. However, if their research is conducted on private land, they are less restrained. While the artifacts might eventually come under control of NAGPRA (if the museums where the artifacts are curated receive federal funds), their initial excavations may not be as stringently controlled.

The ascription of property rights to archaeological resources is, as Ruthann Knudson notes, "a complicated legal, as well as social, issue" (1991: 4). While human remains may be protected under various state laws, federal intervention on private land is sometimes seen as a violation of the "takings clause" of the U.S. Constitution if the landowner is somehow denied access or free use of his or her property without adequate compensation.

Another point of concern to American Indians is in relation to American Indian human remains and funerary objects whose cultural affiliation has not been established.

At the 1995 oversight hearing on the implementation of NAGPRA, Cecil Antone, lieutenant governor of the Gila River Indian Community at Sacaton, Arizona, noted that "Even though they are not identified [as to culture], they are human beings. They were human beings" (Superintendent of Documents 1996: 37). Jesse Taken Alive of the Standing Rock Sioux Tribe said the tribe believes

"those remains dating back 500 years or more are American Indians. . . . Give them back to the people and let us decide how that should be done, because, after all, as American Indians, as indigenous people, those are our ancestors" (Superintendent of Documents 1996: 42).

Even the NAGPRA Review Committee felt this issue was a point of frustration. Dan Monroe, a member of the committee in 1996, noted in testimony at the oversight hearing that "*the controversy is hottest in respect to disposition of ancient Native American remains . . . [that] can seldom be affiliated with a specific tribe. . . . Native Americans almost unanimously argue that they are culturally and otherwise affiliated with these remains and that their religious and cultural beliefs dictate that the remains be returned and reburied*" (Superintendent of Documents 1996: 125, emphasis in original).

In 1998, the NAGPRA Review Committee issued a set of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains. These principles presented guidelines for the ultimate disposition of these types of remains. While no specific remedies are defined for every case, they do offer suggestions for disposition in cases where the human remains are associated with a nonfederally recognized tribe, suggest regional consultations where such approaches would prove beneficial, and for situations where the human remains represent a population for which there are no present-day cultural survivors.

American Indian views on the issue of repatriating human remains and other items to nonfederally recognized tribes are divided, but for differing reasons. Many tribes feel that nonfederally recognized American Indian tribes are no less Indian than their federally recognized counterparts, while others are afraid that to allow standing under NAGPRA would allow such groups to bypass the normally tedious process of federal recognition.

Again, Tessie Naranjo, former chair of the NAGPRA Review Committee, noted at the 1995 oversight hearing that Congress needed to find a way to "permit Native American groups not presently recognized by . . . the BIA to repatriate their human remains, funerary objects, sacred objects, or objects of cultural patrimony" (Superintendent of Documents 1996: 22). Additionally, testimony provided by the Keepers of the Treasures-Alaska also called for such congressional action. In the words of an Alaska elder: "it

didn't matter . . . when the human remains of nonfederally recognized Indian tribes were taken . . . it irks me that living human beings are technically not in existence merely because the U.S. Government does not recognize them'" (Superintendent of Documents 1996: 72). Additionally, Duane Champagne, director of the American Indian Studies Center at the University of California at Los Angeles provided a five-page letter noting the problems with such a policy in California alone (Superintendent of Documents 1996: 99-103).

While all tribes agree that human remains of unrecognized American Indian groups have been and always will be American Indian, many are concerned about extending rights to all groups under NAGPRA. In a statement prepared for the March 1997 NAGPRA Review Committee meeting in Oklahoma, seven tribes from southwestern Oklahoma—the Apache Tribe of Oklahoma, the Caddo Tribe, the Comanche Tribe, the Delaware Tribe of Western Oklahoma, the Fort Sill Apache Tribe, the Kiowa Tribe, and the Wichita and Affiliated Tribes—felt repatriation should occur only to federally recognized groups. While they felt that human remains, regardless of affiliation, should not be left in museums, they expressed a concern that to repatriate human remains to nonfederally recognized tribes could potentially assign rights and authority to groups that have come into existence without a legitimate claim of continuity. The working group feels that culturally unidentifiable human remains should be repatriated to the federally recognized tribes on whose aboriginal lands the remains were found, with the review committee making decisions in cases of multiple tribes claiming the same ancestral lands.

As a final example of the inadequacies of NAGPRA, under 3(c) and (d), the excavation of American Indian human remains and objects must follow the Archaeological Resources Protection Act of 1979. But what happens if a tribal group does not want the items excavated? If the tribe has the permitting authority for the land where the remains are located, the tribe may refuse to issue an antiquities permit and thereby prevent excavation, but, absent the tribe's permitting authority, the law requires only that consultation occur, not that tribal permission be granted. Additionally, if the tribes will have the right of ownership and control as called for under 3(c)(3), it creates a situation where the artifacts magically

become tribal property only *after* the scientist is finished removing and/or studying them, but not before.

And the situation gets dicey in the case of an inadvertent discovery situation on federal land if there are no known or easily discovered lineal descendants. If the material cannot be reasonably identified to tribe, then the material becomes the "property" of the tribe that has the closest cultural affiliation with the material and that states a claim for it. Of course, this might require scientific study of the material to determine which group might have the "closest" affiliation, something many tribes do not want.

And if the material cannot be identified as to cultural affiliation? If the materials are found on federal land that is recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as the aboriginal land of some Indian tribe, then the material goes to the tribe that is recognized as the aboriginal occupant of the land, or to another tribe if it can demonstrate a stronger cultural affiliation than the aboriginal occupant of the land on which the materials were found.

Ultimately, it can happen that no tribe may be judged to be an aboriginal occupant of the land or that no tribe will be viewed as being culturally affiliated with the materials, something that can definitely create difficulty in getting the remains repatriated in an efficient manner.

## SUMMARY

The passage of the NMAIA and the NAGPRA forced the discipline of archaeology to react more strongly than necessary. While the importance of human remains in the study of past diets, lifeways, and cultures has been recognized by various authors, archaeology nonetheless failed to make clear the objectives of wishing to retain control over human remains and cultural objects encountered within excavations.

The impact of the laws' requirements was immediately felt by those museums that were required to prepare inventories of the human remains and associated grave goods, sacred items, and items of cultural patrimony within their collections. The inventories were then forwarded to American Indian groups that were of-

ten forced to wade through computer generated listings in an effort to discover those items for which they had an interest. The sudden influx of such lists strained programs, many of which were already underfunded, and forced some tribal programs to either curtail aspects of their cultural resource programs or to try to come to grips with the mountain of data with which they did not know what to do.

Archaeologists and organizations were quick to recognize the problems involved in consultation and repatriation of material recovered or donated before the current legislative controls. However, legal analyses of NAGPRA pointed out that archaeologists were not entitled to "own" the materials that the tribes were requesting, and that the control of such objects covered under the law was vested in the tribes or in members of the tribes.

While museum officials and curators might have been concerned with the loss of items within their collections, archaeologists appeared to be more concerned with the freedom to pursue "science" and the academic quest for answers to questions about which most American Indians might not care. Additionally, as is the case in the Kennewick situation, anthropologists soon entered into the legal arena in a fight to retain the right to attempt to answer questions that influence the worldwide knowledge base.

But not all American Indians are against the practice of archaeology, and some tribes have developed programs that utilize archaeology on the reservations and other lands under their control. The following chapters provide some case studies that illustrate the variation in tribal involvement with the discipline of archaeology within their areas of influence.

## 5



## Sampling the Attitudes of Archaeologists

The breakdown of virulent racism in the twentieth century has enabled Indians to challenge with a remarkable degree of success the practices of archaeologists and other grave looters. (Riding In 1992: 12)

Representatives of indigenous populations often perceive archaeologists as people who dig up the cultural and human remains of minority populations out of an inherently racist attitude of the sort suggested by James Riding In. While archaeology might have grown from a colonial racism of the sort decried by Riding In, archaeologists have less freedom today concerning the types of actions in which they might engage than they did thirty years ago.

Having been involved in the federal compliance system in one aspect or another during the past twenty years, I cannot recall meeting that many insensitive, neocolonialist archaeologists who gave no consideration of the wishes of the descendants of a site's original inhabitants. I have met some, I hate to admit, but there are fewer of those now than before.

Thus, since American Indians and even some archaeologists cast a blanket of cultural insensitivity over all archaeologists, I became curious about the extent that certain variables might influence an archaeologist's decisions to conduct excavations.