

**LET'S START WITH THE DEFINITION: A RELATIONSHIP OF SHARED GROUP IDENTITY,
IDENTIFIABLE EARLIER GROUP, AND ISSUES OF JOINT AFFILIATION**

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Most repatriation under the Native American Graves Protection and Repatriation Act (NAGPRA PL 101-601) is made possible by a determination that there obtains a relationship of "cultural affiliation" between a modern Indian tribe or Native Hawaiian organization and a earlier group. The premise of this essay is that to the extent that we want to develop information that will facilitate the determination of the cultural affiliation of Ancestral Pueblo (Anasazi) people of the Four Corners region, we must work within NAGPRA's definition of cultural affiliation:

"Cultural affiliation" means that there 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 (Sec 2(2)).

While the centrality of "cultural affiliation" to the implementation of NAGPRA is unquestionable, considered application of this definition all too often is bypassed. One might ask why this is the case. Clearly, the law itself is not easy to read or understand—indeed Mark Leone once suggested to me that you cannot read NAGPRA, that NAGPRA requires a contextual "reading." Further, with NAGPRA's passage, there developed a general understanding (in both Indian and non-Indian quarters) that NAGPRA is *about* returning Native American human remains and objects to the appropriate tribes. While that is accurate as far as it goes, NAGPRA does limit the classes of objects that are subject to repatriation and its definition of "cultural affiliation" to a large extent determines to what, if any, tribe remains or objects may be repatriated.

The upshot of this is that there is an unfortunately common tendency of both non-Indians and Indians (whether due to conviction or convenience) not to worry a lot about the details and believe that NAGPRA says more or less whatever it is they want it to say. The result is often that "cultural affiliation" is glossed "cultural relationship," surely a vaguer and more general concept. Quite clearly, this is not what the law says and it is not what the law intends.

Apparently, many repatriations have been effected on what I believe to be this essentially extra-legal basis of reading "cultural affiliation" as "cultural relationship." However, because NAGPRA represents a careful compromise between traditional and public interests in the past, "implementation" of NAGPRA in a way that does not really follow the law tends to upset that carefully negotiated

compromise.¹ Also, as the court proceeding in the Kennewick case have already shown, federal agencies and museums can legally be held to implement the law as written.

Thus, in the interests of both appropriate and legal determinations of cultural affiliation, this essay is devoted to a discussion of this definition and its implications. It is written from the perspective of an archaeologist actively involved in the drafting and passage of NAGPRA, including participation in developing the definition of cultural affiliation.

Legislative History

It should be recalled that NAGPRA did not pass until the day of adjournment of the 101st Congress (October 27, 1990). Once the basic compromises had been struck among the Indian, scientific, and museum communities (ca. October 12), the major players for all these constituencies wanted the bill to pass, and because there was so little time left, there was a very real fear that we would all have to start over with the next Congress.²

In this time-limited situation, Congress chose to write NAGPRA to resolve what I would characterize as the "relatively clear-cut" cases, that is situations in which there was a reasonably close relationship between human remains or object and a modern tribe. Congress explicitly *failed* to deal with the issue of culturally unaffiliated remains and to deal with legitimate interests of Indian groups that are not federally recognized. This was not an oversight; it represented a conscious decision to put aside these problems for the simple reason that they were too

¹ Senator McCain's remarks on the day of Senate passage of NAGPRA include: "The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise.... In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues." (*Congressional Record*, Oct 26, 1990, p. S17173)

² Indeed, a 10/12/90 letter endorsing HR5237 was signed by the Society for American Archaeology (SAA), the Native American Rights Fund (NARF), the Association on American Indian Affairs (AAIA), and the National Congress of American Indians (NCAI). While declining to sign the joint letter, on that same date, the American Association of Museums issued a letter supporting passage of HR 5237. Once the bill passed the Congress, on 11/2/90 a letter was sent to President Bush urging him to sign the bill by the signatories of the first letter (AAIA, NARF, NCAI, and SAA) plus the American Anthropological Association, the American Association of Physical Anthropologists, the Archaeological Institute of America, the National Conference of State Historic Preservation Officers, the National Trust for Historic Preservation, Preservation Action, the Society for Historical Archaeology, and the Society of Professional Archaeologists.

difficult to resolve in the time available. This is also understandable in light of the fact that the most compelling examples raised to argue for a law enabling repatriation fell into the category of "relatively clear-cut" cases.

A straightforward reading of NAGPRA's definition of cultural affiliation suggests that it was intended to be restrictive and to codify what I characterized in the last paragraph as the "relatively clear-cut cases." This interpretation is supported by the legislative history which shows that the definition evolved from a much less specific to a more restrictive form. (For more information on the legislative history of NAGPRA see Echo-Hawk and Trope 1992).

On March 23, 1989, Representative Udall introduced HR1646 "The Native American Grave and Burial Protection Act." This bill used the term "cultural affiliation" in paragraphs dealing with trafficking and control over remains excavated after the passage of the Act. For agency and museum collections it required an inventory to determine the "tribal origin" of remains and objects and their return on request to the "tribe of origin". The apparently synonymous use of "tribal origin" and "cultural affiliation" was borrowed from the National Museum of the American Indian Act (NMAIA PL 101-185). Neither term was defined in either HR1646 or NMAIA.

Similarly, the initial version of Senator Inouye's S1980 (the Senate bill that evolved into NAGPRA) introduced on November 6, 1989 had inventories determine the "tribal origin" of remains and objects, but used "culturally affiliated" in the paragraphs discussing disposition. Again, neither term was defined and they appear to be synonymous.

On May 3, 1990, Senator McCain introduced S1021, a bill similar to HR1646. The trafficking language refers to "Indian tribe of which the Native American was a member or from which such grave goods or objects originated." The ownership section (referring to remains and objects excavated after the enactment of the Act) puts these concepts of tribal membership and origin in a hierarchical position prior to "cultural affiliation," indicating a more restrictive meaning for tribal membership or origin. The paragraphs dealing with inventory and disposition of agency and museum collections uses only the tribal member and tribal origin terminology.³

HR5237, the 2nd Session successor to HR1646, was introduced on July 10, 1990. It was HR5237 that evolved, on the House side, into NAGPRA. It defined cultural affiliation for the first time, in a quite expansive way, fundamentally as a "reasonable relationship" between earlier people and modern tribes:

The term "cultural affiliation" means that there is a reasonable relationship, established by a preponderance of the evidence, between a requesting Indian Tribe or Native Hawaiian organization and the

³ The notification paragraph uses "associated with the Indian tribe" to refer to the concepts of tribal membership or origin.

Native Americans from which the human remains or other material covered by this Act are derived, regardless of age or antiquity, which can be evidenced or inferred by geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion. In the absence of clear and convincing evidence to the contrary, there shall be a presumption of a cultural affiliation between an Indian tribe or Native Hawaiian organization and human remains or funerary objects, sacred objects, and objects of inalienable communal property, which were obtained, discovered, excavated, or removed from the tribe's or organization's tribal or aboriginal lands.

Senator Inouye's 9/10/90 amendment to S1980 (in the form of a substitute) introduced a definition that more closely resembles the final definition in NAGPRA.

The term "cultural affiliation" means a relationship between a present-day Indian tribe or Native Hawaiian organization and an identifiable historic or prehistoric Indian tribe or Native Hawaiian group that reasonably establishes a continuity of group identity from the earlier to the present-day group.

The definition that appears in NAGPRA, as enacted (quoted above), was suggested, verbatim, in a September 12, 1990 joint memo to the Senate Select committee on Indian Affairs from the Society for American Archaeology, the Native American Rights Fund, the Association on American Indian Affairs, and the National Congress of American Indians, based on a meeting in NARF's Washington headquarters between SAA representatives and representatives of NARF and AAIA. The primary purpose of this rewording was to eliminate the word "continuity" that had, in other contexts, been interpreted by the courts in an overly restrictive manner. "Traceable" was intended to less restrictively convey that this identity could be reasonably followed through time. This final definition first appears in legislative record on October 15, 1990 in an amendment in the form of a substitute to HR 5237.

confusing

Elements of the Definition of Cultural Affiliation

Present-day Indian Tribe

NAGPRA defines "Present-day Indian tribe" in terms that are generally understood to specify what are usually called "federally recognized tribes." The regulations add: "The Secretary [of the Interior] will distribute a list of Indian tribes for the purposes of carrying out this statute through the Departmental Consulting Archeologist." To date, that list has been the BIA list of federally recognized tribes although the regulations seem to admit the possibility that the Secretary could issue a different list for NAGPRA.

At any rate, this is legally unproblematic, although as indicated above, it essentially defines away what seem, morally, to be legitimate interests of some federally unrecognized Indian groups.

Group Identity

Group identity is a much trickier concept. It is not explicitly defined in the Act. The only guidance provided by the regulations is indirect and has to do with the identification of an "earlier group" as discussed below.

Lacking a definition in the Act, the everyday interpretation of the term applies. In everyday terms I suggest that "group identity" refers to a shared, self-conscious identification of individuals with other members of a group that distinguishes them from others (i.e., non-members). While individuals in all societies have multiple levels of group identity (from kin-group to national citizenship) what Congress must have had in mind was an identity more or less analogous to that of a modern tribe, such as Zuni or Navajo.

While specification of group identity is not now (and probably never was) clear-cut, as I see it Zuni people are, by and large those people that think of themselves as Zuni in contrast to other identities such as Hopi, or Navajo, or Anglo, or Hispanic. Conveniently, members of other groups would tend to identify more or less that same group of people as Zuni, in contrast to themselves.

Thus, group identity is ultimately in peoples' heads, and it is a contrastive concept—it distinguishes ones' own people from other people.

Identifiable Earlier Group

The regulations for NAGPRA (43 CFR 10, *Federal Register* December 4, 1995 (Volume 60 Number 232) pp. 62133-62169) dictate that there must be evidence for the existence of an identifiable earlier group.

Support for this requirement may include, but is not necessarily limited to evidence sufficient to: (i) Establish the identity and cultural characteristics of the earlier group, (ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or (iii) Establish the existence of the earlier group as a biologically distinct population (pp. 62167-62168)

This concept envisions that in the historic or prehistoric past, there existed groups analogous to modern tribes. I don't think anyone doubts that earlier groups with cognized identities existed. There were probably always, and at different levels, us-them distinctions. However, these distinctions may not be either as clear-cut or as inclusive as those associated with modern tribal identities. Furthermore, we know that individuals sometimes shifted their identities, depending on the circumstances (e.g. Moerman 1965). That may have occurred even more in the prehistoric Southwest than it does today.

While the "group identity" concept may work fairly well for modern tribes in the Southwest (and I think it does), I think there is less reason to believe that the situation was so neat in the past. Modern Southwestern tribal identities largely reflect genuine 19th century cultural differences that were fixed by a variety of federal legal actions, including the establishment of reservations. In the past, in the Four Corners area, I am not so sure that there were always good analogs to the modern tribes. Key identities may not have been on the same scales, and the scales of the crucial identities may have changed over time.

On one hand some archaeologists argue that great houses may reflect a pan-Anasazi technology (Fowler and Stein 1992) with some implication that there existed a cultural identity on that scale. Others might extend this into areas traditionally identified as Mogollon. However, even if there were a meaningful pan-Chacoan or pan-Pueblo identity, I don't think any archaeologists would doubt that, throughout prehistory, there existed important, smaller-scale identities, such as a band, clan, village, community, or larger scale alliance.

Still speaking from an anthropological perspective, archaeologists are largely stuck with associating "identifiable earlier groups" with archaeological "cultures" or such as the Pueblo III Mesa Verde Anasazi (as the regulations suggest) that are, at best, very rough analogs to modern tribes. We must recognize that these "cultures" are archaeological constructs that are based on a spatially limited expression of a set of shared material traits (such as the way kivas are built or pottery is decorated at some point in time). While the distributions of those groups of traits are probably not unrelated to self-conscious identities, few would argue that they would identify exactly the same groups of people.

At some times and places, segregating reasonable groups on the basis of material traits is much easier than at others. Archaeologically, these distributions of material traits are essentially what we are stuck with, but the equation of these archaeological cultures with identifiable earlier groups has to be done with considerable circumspection.

One might then ask: Was "Anasazi" (or "Ancestral Pueblo") an identifiable earlier group? My answer would be probably not. It is probably too large and includes too much diversity to reasonably fit NAGPRA's definition. Even if it was a cognized identity, it was probably more similar to a contemporary distinction of Pueblo from non-Pueblo groups and not analogous to the identity of a modern tribe.

Looking at this more broadly, Southwestern Indian conceptions of group identity and the ways in which group identities are contrasted in traditional histories may be extremely informative both in their own right, for making determinations of cultural affiliation, and may be extremely informative to archaeologists trying (for reasons including, but not limited to NAGPRA) to cope with these concepts. Also Indian groups may legitimately wish to contest the way in which archaeologists have divided up the prehistoric landscape, instead of simply claiming or arguing over which modern tribe is associated with what archaeological culture. Finally, it may be that it is possible, using traditional knowledge, to associate remains or

objects with important group identities, such as clans, that existed in the past and that continue as distinct intra-tribal identities today. In this case it seems entirely reasonable that in these cases, affiliation would be with the tribe (or tribes) that maintain those smaller scale identities.

“Relationship of Shared Group Identity” that is “Reasonably Traceable”

The NAGPRA regulations state that establishment of cultural affiliation requires:

Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group. (p. 62168)

This statement really begs two questions. First, what does it take to show that one *group* is descended from another (it is clearly the groups, not individuals involved in the decent)? This question, I will attempt to address below. Second, it is not clear whether the regulations are stating only a legally necessary condition or whether group descent is a legally sufficient condition. Based on the legislative history, I would argue that the regulations are stating a necessary but not a sufficient condition. I think the history shows that had the Congress intended this to be a sufficient condition, it would have drafted the definition quite differently. However, depending upon how group descent is assessed, the second issue may be moot.

To resolve what is meant by shared group identity we need to go back to the wording of the definition that appears in the law: “there is a relationship of shared group identity which can be reasonably traced ... between a present-day Indian tribe ... and an identifiable earlier group.” Clearly, an earlier group must be evidentially established (as discussed above) and that group must have an “identity” which I take ultimately to be what it is that constitutes the “group.” Further a group with that identity must be traceable through time so that prior group identity it is today recognizable as that of a modern tribe.

While cultural change is, of course, inevitable, there must be some strong sense in which the earlier and present-day groups are the “same” group. Ideally what we would like to show is that the earlier group characterized itself as a group with defining characteristics, such as language, religious beliefs, modes of subsistence, and other characteristics and that this group identity continued into the present with essentially the same (i.e. a shared) identity, with language, beliefs, and so forth that developed from the earlier one. In general, we won’t be able to demonstrate that ideal conclusively, and NAGPRA does not require such a demonstration, but a finding that the preponderance of the evidence supports this conclusion.

This concept can be refined by discussing what kinds of relationships it excludes. Following both from the plain language and my earlier argument that the definition was intended to be somewhat restrictive, it seems clear that simple individual descent of members of the group (biological or cultural) is not sufficient to show this relationship of shared group identity. For example, I have a Swiss-German ancestry, but that is not in any realistic sense my cultural identity.

Intermarriage obviously does create social relationships between groups. However, even with large scale inter-marriage, quite distinct group identities often remain intact (whether or not the intermarrying individuals in some way change or broaden their identities). We know historically that with some pueblos were abandoned and their residents moved to other pueblos. In some cases such as the Tewa who moved to Hopi First Mesa and the Pecos people whom moved to Jemez, these group identities have been maintained over a long period of time.⁴ In other cases, groups were absorbed into other Pueblos and their original group identities essentially disappeared. Here again, both historical anthropological inquiry and traditional histories would help us sort out how and when these different outcomes arise.

Thus, even if contemporary Native American residents of the Four Corners may well be descended from the archaic period residents, that in itself would not be sufficient to show shared group identity between modern tribes and archaic remains or objects. Establishment of cultural affiliation would require, instead, identifying a meaningful archaic period group and tracing that *group's* identity through several thousand years to one or more modern tribes. While evidence from traditional history might be brought to bear on that issue, the archaeological evidence would not support a finding of cultural affiliation. It seems likely that there were a large number of archaic groups in the Southwest and archaeologically we do not see that these same identities persisting in any meaningful way into the present.

To reiterate, it seems to me that the root of many of the problems associated with cultural affiliation result from a substitution of "cultural relationship," in this sense of individual descent or general cultural connection, with the much stronger criterion of "shared group identity."

Implications

Degrees of Affiliation

We are faced with a number of problems that not explicitly dealt with by the definition. I'll focus on two. One is the problem of joint affiliation, about which more appears below. The more philosophical problem is that from a scientific

⁴ In such cases, it seems reasonable to conclude that, for legal purposes, a cultural affiliation exists between an earlier group and a modern tribe that maintains more than one *distinct* group identity, insofar as one of those identities is traceable to the earlier group.

standpoint, and I suspect many native perspectives as well, “cultural affiliation” even in the terms used by the Act, is probably better understood as a matter of degree, rather than a yes or no proposition. This derives fundamentally from the way in which human groups develop and change over time. This is also why most scientists would be much more comfortable assessing degrees of affiliation, or deciding that this group is closer than that one, than they are in deciding whether a tribe and an earlier group are or are not affiliated.

Unfortunately, the law makes clear that no such waffling is permissible.⁵ Under the law, earlier groups and tribes are either affiliated or they are not. We’re stuck with that and we must make the best of the what the definition says. That means that must draw some line that separates relationships of shared group identity with other, less strong, relationships. The former count as cultural affiliation; the latter do not.

Joint Affiliation

Joint affiliation, the affiliation of more than one modern tribe with a single identifiable earlier group, represents a very important issue (notably in the Southwest) with a number of dimensions. NAGPRA doesn’t mention it, and thus neither specifically allows nor disallows it. Furthermore, NAGPRA’s regulations don’t provide help much. Let me lay out a continuum on which we might place different kinds of arguments for joint affiliation.

1. Unproblematic Joint Affiliation. Some well-defined cultural groups are artificially divided into more than one modern tribe (as legally constituted). It may be the case (although it is for them to decide) that White Mountain and San Carlos Apache tribes have essentially the same group identity for purposes of NAGPRA determinations of disposition of remains found outside current or past reservation boundaries.⁶

To my knowledge no one would question the propriety of joint affiliation to these very closely related groups that have adjacent reservations and which share language, basic religious beliefs, and many other cultural characteristics. For example, if one had Apachean remains on Tonto National Forest land from the Salt River Canyon area, would it likely be determined that there is a relationship of

⁵ Again, one might wonder why the Congress took this tack. To admit degrees of affiliation, while more realistic, would make achieving a resolution more complex. Although the problem was pointed out, the Congress didn’t want to hear it. A second reason, perhaps, is that the National Museum of the American Indian Act set a precedent of setting up the problem as a binary one; remains or objects have a tribal origin or they do not.

⁶ These tribes became distinct with the separation of the reservations in 1897. The separation of these two tribes with the Camp Verde and Tonto Apache was also arbitrary.

shared group identity between the earlier Apachean group and both San Carlos and White Mountain Apache. Such a decision seems to me completely consistent with NAGPRA.

2. Expansive Joint Affiliation. The Hopi, the Zuni, and four Piman tribes (Ak-Chin Indian Community, the Gila River Indian Community, the Salt River Pima-Maricopa Indian Community, the Tohono O'odham Nation) have claimed affiliation with the prehistoric Salado of the Tonto Basin in central Arizona (USDA Forest Service 1996). How does shared group identity fit in here? No one would argue that the group (cultural) identities of Hopi and Zuni are the same. There are a number of cultural similarities, of course, but the languages are totally different and their perceived identities are also, of course, plainly different. The Piman tribes share many cultural similarities with one another, but are quite different from either Hopi or Zuni in language and many, many other cultural characteristics.

The question then is: Is it plausible to argue that there is *simultaneously* a relationship of shared group identity between the Salado *and* the Hopi *and* the Zuni *and* the Piman tribes? Can we say that the Tonto Basin Salado (which archaeologically constitutes an identifiable earlier group that lived in the Sonoran Desert, lived in above-ground rectangular compounds, built platform mounds, and used red ware pottery) had a cultural identity that remained intact and that can be reasonably traced simultaneously to Hopi, Zuni, *and* Piman identities? Can this argument be made when, at exactly same time the people we call Salado lived in the Tonto Basin, there were substantial populations with very different cultural identities established around Hopi, around Zuni and in the areas south and west of Tonto Basin now occupied by the Pimans and when, in all these cases, the local prehistoric identities (as we see then archaeologically) are far more similar to those of the modern tribes occupying those areas they are to the Salado identity?

My own inclination is to say: No, the Salado cannot simultaneously share a group identity with all those diverse groups. Could the Salado as a cultural identity have disappeared? Clearly that is at least possible, and at the Durango conference at least one advocate of this broad cultural affiliation even agreed that identity probably has disappeared.

This is not to deny that people we would identify as Salado may have ended up at Hopi, at Zuni, or with the central and southern Arizona Pimans. It also does not deny the archaeological evidence that indicates that there *are* shared cultural characteristics between the Salado and all these groups. However, even assuming these biological and cultural *relationships* exist, the criterion of shared group identity is not satisfied.⁷

⁷ Nonetheless, the Forest Service has recognized this joint affiliation (USDA Forest Service 1996; Federal Register, February 18, 1998 (Volume 63, Number 32) pp. 8209-8210).

3. Plausible Joint Affiliation. Between these two poles of straightforward joint affiliation and what I consider to be implausibly over-broad joint cultural affiliation, there is a lot of difficult territory. Many of the issues of affiliation of "Ancestral Pueblo" with modern tribes in the Four Corners area falls within that middle ground. So far as I can tell, there is broad agreement among modern Indians and anthropologists that there are clear and strong cultural relationships between modern and Ancestral Pueblo peoples (there is much more disagreement about the nature of the relationships of Ancestral Pueblos and other tribes, especially the Navajo). However, to go beyond "cultural relationship" to get at "cultural affiliation," we need to carefully examine the evidence to identify earlier groups and trace their identities to the extent possible in order to figure out where to reasonably (and legally) draw the line between relationships that are close enough to satisfy the definition, and those that are not.

While I will not propose an answer, let me pose an example with which I am familiar, that would fall into this middle ground where it may be possible to establish an affiliation, but it is not straightforward to do so. Archaeological evidence and oral traditions both connect the 14th century residents of the upper Little Colorado River valley (in east-central Arizona) with both Hopi and Zuni. People from this area were clearly in contact (as Andrew Duff's ceramic studies have shown) with the residents of the areas where historic and modern Hopi and Zuni populations resided. Further, it is certainly plausible (though I have no direct archaeological evidence) that when permanent habitation of this area ceased in the late 1300s the people moved to Hopi, to Zuni, or both.

The question is: What was their cultural identity in the 1300s? Were they Hopi or Zuni before these individuals, groups, or sub-groups reached the Hopi or Zuni areas? An argument can probably be made that in some senses they were *neither* Hopi nor Zuni and in other senses they were *both* Hopi and Zuni. Further that position may be easier to support than that ones in which these people during the 1300s were either Hopi and not Zuni or Zuni and not Hopi. While a detailed explication of this position might be satisfying intellectually, it does not directly answer NAGPRA's cultural affiliation question. Answering that question will take a much more careful examination and discussion of all of the evidence from traditional history and from archaeology.

Conclusion

NAGPRA insists on a reliance on evidence and on consultation. The understanding of cultural affiliation laid out in this essay should make clear that Native American input will be critical in making these determinations not only because that evidence is legally empowered by NAGPRA, but also because the anthropological evidence will often be too weak, on its own to make a determinations of group identity. We must work together, within the law, to solve the challenges posed by the definition of cultural affiliation. If we do, not only will repatriation be done in a responsible and legal manner, we will all be richer for the learning fostered by the discussions.

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