NAGPRA for the CRM Professional

Webinar **(SLIDE 1)**

Introduction

We’d like to welcome everyone today to the “NAGPRA for the CRM Professional” webinar, an hour and a half presentation with a half-hour question and answer period. The purpose is to provide a resource for training to increase proficiency in complying with the Native American Graves Protection and Repatriation Act (NAGPRA). This webinar is made possible by two successive grants from the National Science Foundation Program, Cultivating Cultures of Ethical STEM (1449465, 1540447). The funds were awarded to Indiana University for the *Learning NAGPRA* Project to study and prepare materials to increase teaching and training about repatriation of Native American remains and cultural objects, and the legislation that governs this process.

**(SLIDE 2)** I would like to introduce our presenters: my name is April Sievert, PhD, RPA, and I direct the Glenn A. Black Laboratory of Archaeology at Indiana University. As an archaeologist with 35 years of experience, my work includes archaeological research, teaching, and repatriating cultural materials from Indiana University. I am the Principal Investigator of the Learning NAGPRA Project.

Our second presenter is Patricia (Trish) Powless, MA, RPA., currently a Principal Investigator/Project Archaeologist for Amec Foster Wheeler. Ms. Powless has 30 years of experience in archaeology performing all phases of archaeological work and analyses. She has worked with human remains and the Native American Graves Protection and Repatriation Act since its enactment in 1990.

Our third presenter, Kerry Sagebiel, PhD, RPA, has been an Adjunct Professor in the Department of Anthropology, Northern Illinois University (NIU) since 2012. In her capacity as an instructor, she has integrated teaching about NAGPRA in her courses, based on her extensive experience in all phases of cultural resource management archaeology. Prior to teaching, Kerry worked for Statistical Research, Inc. in Phoenix, AZ for 15 years, completing numerous projects related to fieldwork and collections management.

Crystal DeCell will be joining us today as technical support. and will be receiving your questions and comments throughout the presentation. She will then share those with the presenters during the Q & A period. We will be notifying the RPA about your registration in this webinar, so that you receive two RPA credits toward Continuing Professional Education (CPE).

The first hour and a half will cover six topics (**SLIDE 3 TOPICS COVERED)**, including: consultation at the planning stage; conveying the importance of NAGPRA compliance to your staff and stakeholders; cultural meanings of objects and places; consultation after discoveries in the field; cultural affiliation under NAGPRA; and strategies for the long-term management of collections subject to NAGPRA. The learning objectives for the “NAGPRA for the CRM Professional” webinar are: (**SLIDE 4 LEARNING OBJECTIVES)**,

* Understand when archaeological fieldwork projects are required to comply with NAGPRA, compared to other laws and regulations, and what NAGPRA compliance entails
* Differentiate between responsibilities in consultation
* Recognize the diversity of cultural meanings of objects and places to various tribal communities
* Evaluate why consultation is needed (and beneficial) at different stages of archaeological fieldwork and post-recovery collections management

(**SLIDE 5 – INTRO TO LEGISLATION)** The Native American Graves Protection and Repatriation Act was enacted by U.S. Congress as Public Law 101-601on Nov. 16, 1990. The provisions of this law are laid out in US Code Title 25 Chapter 32. Regulations for compliance with the law are compiled in the Code of Federal Regulations (CFR) as 43 CFR Part 10. In this webinar, we will refer to the specific federal regulations that the Department of the Interior (43 CFR 10) has enacted to codify the process of protecting and repatriating the remains and cultural items from Native American graves made possible by the Law enacted by Congress.

Subpart B of 43 CFR Part 10 regulates work on federal or tribal lands that may disturb Native American graves and result in the exhumation of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Subpart C handles the repatriation of humans remains and cultural items held by federal agencies and owned or controlled by federally supported institutions and museums. **(SLIDE 6-CHART)** Thus, the legislation has two major directives, one dealing with fieldwork and the other with extant collections in repositories. It is important to distinguish between these provisions, because each comes with its own set of regulations.

Three major laws affect cultural resources: **(SLIDE 7- LAWS AND ARCHAEOLOGY)** The National Historic Preservation Act/ NHPA (Section 106); Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA). The chart compares the provisions of each one and how and when it applies **(SLIDE 8- MATRIX)**

The National Historic Preservation Act, Section 106 applies to federal or federally-assisted undertakings in any State. Undertakings that are considered “federally-assisted” can involve federal permits and/or federal funding. Section 106 can then apply to any type of land, including state, local, and private lands, if federal assistance is involved. The Archeological Resources Protection Act, or ARPA protects cultural resources on federal or tribal land, requiring an archaeological plan be submitted and approved before a permit is issued and archaeological work can proceed. There is no specific provision made for human remains and funerary objects under either of these laws.

NAGPRA applies when field projects encounter or detect human remains, funerary objects, sacred objects, or objects of cultural patrimony under or on the surface of Federal or tribal lands on or after November 16, 1990 [43 CFR 10.2 (g)(4)]. Nevertheless, even if NAGPRA does not apply for private or state lands, professional archaeologists must still be aware of state and local laws relating to archaeological resources and burial grounds or cemeteries that **may** apply. For regions in which you work, tribal regulations are available often from Tribal Historic Preservation Offices (THPOs). State regulations can be accessed through State Historic Preservation Offices (SHPOs). Cities, counties, and other municipalities may also have local policies and regulations relating to archaeological resources and burial grounds or cemeteries.

Now that we’ve looked a bit at NAGPRA, let’s describe what we include here as CRM professionals. CRM archaeology can be defined in several ways. For this webinar, cultural resource management archaeology is done by federal or state agencies or by archaeological contractors who work for clients to carry out the provisions of federal and state regulations designed to identify, record, and mitigate potential adverse effects to archaeological resources. Contract archaeologists are an increasingly important part of the heritage management process in general. The industry also includes CRM archaeologists who work for not-for-profit organizations or public institutions such as universities or museums. The work these archaeologists do often conjures up images of field archaeology crews doing surveys, testing, and data recovery. But contracts may also be extended for laboratory analyses, historic documentation, and repatriation-related work for clients that might include private companies, federal agencies, and federally recognized tribes.

**SLIDE 9**

**1. Consultation at the Planning Stage**

“An ounce of prevention is worth a pound of cure.” A popular idiom but one that applies perfectly in this case.

(**(SLIDE 10- Who is responsible? )** NAGPRA has specific requirements for Federal agencies. Federal laws have established government to government relationships between the federal government, states, and sovereign tribal nations. NAGPRA implies compliance with these provisions. Our discussion of federal agency obligations should equip federal agency officials for working with tribes and enable contract archaeologists to see distinctions between professional responsibilities as archaeologists and legal obligations in working through federal agencies under NAGPRA.

A key part of the process for NAGPRA compliance, is consultation—correspondence, phone calls, emails, and the most critical—face-to-face meetings between officials of federal agencies, federally recognized tribes, and/or facilities having control of collections. Consultation works differently depending on the law in play. For example, consultation under Section 106 differs from consultation and compliance under NAGPRA. Under Section 106 of the National Historic Preservation Act (NHPA), developers are required to consider project impacts to archaeological or historical resources as well as to traditional cultural properties (also known as TCPs). TCPs will likely not be identifiable without talking with the people who know the area, and can identify what places or spaces may have meaning as traditional cultural properties.

What does compliance entail for fieldwork**? (SLIDE 11- QUESTIONS)** If working on federal or tribal land—having a plan for handling human remains and cultural object subject to NAGPRA is required prior to starting work. If there will be intentional excavation, under NAGPRA, objects may be excavated only AFTER consultation or consent from the appropriate Indian tribe or Native Hawaiian Organization (NHO) (10.3 Section 2). The Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be descended from or culturally affiliated with any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated (10.3 Section 4 (c)). As laid out in 10.5 section (e), the result of this planning and consultation at the earliest stage of work should result in a written plan of action. We introduce this here, in brief, and will return to the topic later in the Webinar in more detail. Work on tribal lands in most cases will require working within procedures drawn up by the tribe.

**(SLIDE 12 – WHAT DOES A PLAN NEED)** NAGPRA requires that a written plan of action must document 9 aspects:

(1) The kinds of objects to be considered as cultural items as defined in §10.2 (b);

(2) The specific information used to determine custody pursuant to §10.6;

(3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;

(4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;

(5) The kinds of analysis planned for each kind of object;

(6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural patrimony;

(7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian organization;

(8) The nature of reports to be prepared; and

(9) The planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following §10.6.

To summarize, having a plan for disposition and treatment of burial items means: **(SLIDE 13 HAVING A PLAN )** 1) A clear path toward repatriation/reburial/field planning and documentation, as agreed upon with the tribes in consultation; and 2) Tribal assistance in determining lineal descendants or cultural affiliation.

The best time for this is while you are developing your work plan.

Under what other circumstances should you consider NAGPRA as you are developing your work plan? **(SLIDE 14- CAN NAGPRA kick in)** Say you are not on federal or tribal land—NAGPRA doesn’t apply, right? Correct, NAGPRA doesn’t apply, but let’s back up a second. Consider this: if there is federal funding, i.e. you are working under section 106 of the NHPA, could any human remains or cultural objects removed become subject to NAGPRA? Yes, under certain conditions—if a federal agency or federally funded institution has control of the materials, the museum side of NAGPRA kicks in. For example, say archaeologists who work at the CRM arm of an archaeological facility at a federally funded university receive a grant from the National Historic Preservation Fund Program (National Park Service) to excavate a site on a municipal park. These archaeologists plan to receive control of the recovered materials, to be placed in a campus repository. At this point, the materials become subject to NAGPRA via the museum provisions in 43 CFR 10 Subpart C.

What if there is no federal involvement? States usually have burial laws that prescribe your action should human remains be uncovered on public at the least, and sometimes on private land. Consideration of state laws should also be incorporated into preliminary planning. In Indiana, for example, any recovery of human remains must be reported to the SHPO office within two days, regardless of landowner. State regulations then require, if the remains are determined to be Native American burials dating before 1940, that the SHPO’s office contact tribal officials concerning disposition.

Therefore, it is not usually a good idea to overthink whether or not a project will be or become subject to NAGPRA somewhere in the process. It will be much wiser to develop a sound planning document or procedures that can be referred to not only in cases when NAGPRA clearly applies, but also to cases in which state or other statutes may come into play, or when inadvertent discovery and removal may cause NAGPRA to kick in. Reburials of Native American human remains will invariably require consultation with lineally descendant or affiliated tribes. Treatment of burials will always be linked to underlying values regarding human dignity, respect for the dead, and respect for religion. These values are emotional and respecting ancestral remains should be paramount in any situation in which remains are encountered.

What does planning for human remains and cultural objects entail?

The provision of NAGPRA that makes the process work is consultation—key to any NAGPRA compliance. Set up communication networks that you can go back to over and over again, with contacts that you can call on at a moment’s notice. This time spent up front saves time later. Do this face to face. Personal relationships with tribes are the best.

Whose responsibility is it to initiate consultation? Because of federal mandates for government to government relationships, federal agency personnel must make that contact with tribes. If you work for the federal agency, it is your responsibility to establish relationships with tribes with whom you are likely to consult. If you work as a contractor on a federal project on federal land, you may be drawn into developing a working relationship with the tribe in conjunction with the agency. For example, the USDA Forest Service has been developing these relationships. On the other hand, contract archaeologists who work for clients on federally assisted projects, may have little contact with the agency, and none at all with tribes.

Who at the tribe is the contact? For consultation, this may start initially with the highest tribal official but may also be a designated authority such as tribal historic preservation officer (THPO) or NAGPRA coordinator. This is sometimes, but not always, the same person. This person may have many job responsibilities beyond NAGPRA, so titles vary widely. Changes in tribal personnel can occur, so keep yourself as up to date as possible (for example, knowing about election cycles). It is also important to recognize that tribal staff can be overworked or may have times in which they are more or less prompt in responses (for example, while observing ceremonies). Do not assume a lack of response means a lack of interest. Touch base early and often.

Good results of Upfront Consultation:

You will have a clear idea who to contact and what to do when you find something that requires NAGPRA compliance. Parties must work together and follow the provisions of NAGPRA or state burial laws when managing ancient burial sites. Archaeologists must be flexible to find optimal solutions to situations in which human remains are found, or situations that will require removal of those remains. For archaeologists, discovery of human remains should never be a complete surprise!

Our suggestions for handling discoveries of human remains: **(SLIDE 15- BEST PRACTICE)**

If on federal or tribal land, planning is mandatory.

* + If federal money or licensing is involved, be cognizant of issues concerning custody of remains and plan accordingly.
  + If no federal money or licensing is involved, plan anyway on the basis of relevant state regulations.

**(SLIDE 16- WAYS TO BUILD RELATIONSHIPS)** Set up consultation networks and relationships, recognizing that federal agency personnel are responsible for contact and consultation. Contract archaeologists benefit from being aware of those consultation networks between federal agency personnel and tribes. Many tribes have consultation guides or procedures, and archaeologists should be familiar with these documents.

Consultation works best for tribes and for agencies when it is on-going and decisions are collectively reached. The outcomes of consultation should inform the work of contract archaeologists so the project is consistent. Being pro-active in contacting the overseeing federal agency in the case of any find that may be subject to NAGPRA is required.

**(SLIDE 17- CONVEYING TO STAFF)**

**2. Conveying the Importance of NAGPRA Compliance to Your Staff**

The general public is often familiar with news stories of construction projects going over budget and beyond the time frame, and cultural resource regulations are often blamed. However, if there is an accepted monitoring and discovery plan developed ahead of construction, allowances are built in to buffer those inadvertent discoveries and to allow time for post-discovery tribal consultation. While everyone works within time constraints, planning ahead allows for time allotments that may reduce project delays and expenses overall. Because these projects involve a variety of employees and clients who are stakeholders in the process, archaeologists should be aware of how their approach influences the perceptions of NAGPRA compliance. Archaeologists are advocates for the value of cultural resources and respectful of tribal sovereignty, and these projects run smoother when these priorities are addressed and communicated as part of the working process. Likewise, archaeological contractors should be realistic about possible discoveries and communicate this clearly to clients.

**(SLIDE 18- WHAT YOUR STAFF SHOULD KNOW)** Contract archaeologists must also be able to recognize potential conflicts of interest, and understand the ethical responsibilities they have to their clients. This is part of the reason for the Register of Professional Archaeologists, a body that can respond to ethical and professional issues and lend credibility to archaeological competency.

Contract archaeologists at any skill level should know that all work must comply with Federal law. They should also understand the responsibilities of federal agencies to consult, and why this is necessary. While it may be highly unlikely that contract archaeologists working for clients will ever personally consult with tribes, on some projects, tribal monitors may be present on-site. For this reason, familiarity with local tribes and tribal government is helpful.

Cultural sensitivity training benefits archaeologists as well as other project workers. For example, some contract firms require staff to participate in the Cultural Sensitivity Training from the Department of Interior, as a condition of their hiring. Some tribes have their own programs or may be interested in being involved in such a training. Archaeologists come from a variety of backgrounds, and encouraging staff to recognize how meaningful it is for tribes to have their places and cultural objects respected is beneficial for all parties. The staff benefits from a deeper understanding of why these work processes are important and necessary. Every project involves new consultation, even if the same agencies and tribes are involved. Because of this, one standard operating procedure is unlikely to work in each case and flexibility is key. It is important to understand that each tribal nation has their own culture and history, as they have their own repatriation procedures.

**(SLIDE 19- CULTURAL MEANINGS)**

**3 Cultural Meanings of Objects and Places**

As well-equipped archaeologists, we almost always go into the field with a knowledge of the culture area that we are studying; however, we rarely anticipate the projectile point or pottery type that we categorize is anything but a physical remnant of past behavior or people who are no longer living. We see those artifacts as another set of data to add to our chronologies and/or our perceptions of past lifeways. After all, that quest for knowledge is, for some, the reason why we chose this profession. We spend our careers, as archaeologists, working with the material culture and some never have the opportunity to interact with the living culture that they are studying or the living descendants to be more precise. That is, until they encounter a human burial on federal lands and have to comply with NAGPRA, or if you are on state, municipal, or private land then you would follow the appropriate laws of the local jurisdiction. For instance, anywhere in California that Native American human remains are found other than in a dedicated cemetery (and it doesn’t matter if it is state, municipal or private lands), if the remains are identified by the Coroner (and it has to occur within 48 hours), the Coroner then has 24 hours to notify the Native American Heritage Commission who will immediately notify the most likely descendent.

**(SLIDE 20- CHANGING PERCEPTIONS)** Project archaeologists should be communicating with affected tribes within their project area, and it should not be limited to the tribes currently occupying the area. For our reports, we conduct cultural histories of the project area and we should know the settlement pattern of the area. For instance, the Hopi Tribe claim all of Arizona as ancestral land, so if any projects are conducted within the state of Arizona, the Hopi are to be consulted. We should be examining migration patterns of the people who occupied the project area as well as relocation efforts of the United States Government, and consulting with the descendants early on in the project before we get to the field.

This consultation with the tribe(s) can provide valuable information for the project archaeologist, but is often disregarded because it does not fit the chronology or hypothesis. Leaving out of a source of information is not very scientific at all, is it? Sometimes the information is discarded because it is thought that the knowledge base is too far removed from the past to be credible. Well, unfortunately so is our knowledge and we are basing our knowledge of what we can see through a microscope, calipers, or tested sample. Some tribes also have extensive experience with archaeology in their ancestral territory. While it might be your first encounter with a site of a certain age or culture, it is likely the tribes have had extensive experience, perhaps in other states or areas. And don’t forget many tribes have their own archaeologists who have not only the academic training but also the tribal knowledge. Native American descendants have their oral histories that tell what these objects are, and these give a far greater cultural meaning to the object or place that you are studying. We see and describe artifacts, human remains, and sites as inanimate, dead, places but knowledge provided by the living culture can give us a living, animate, sacredness of place and a different view of past lifeways. This interaction with tribal members early on in your project development will prepare you in the event you encounter one of their ancestors or cultural objects during your fieldwork.

Most archaeologists have a degree in anthropology, but once you begin your career in cultural resource management the business of archaeology seems to force the anthropology out of your discipline. There are timelines to keep, budgets to considers, and clients to please. All of these things need to be balanced with sound archaeological practice, which leaves little or no room for the unpredictable that one would not be expecting from an artifact or a site. In the years following the passage of NAGPRA, there has been little movement in the way of early consultation with tribes prior to excavation. Tribes are normally contacted when burials are encountered, after the fact. However, early consultation with tribal representatives or tribal archaeologists can provide much needed information regarding special artifacts, burial practices, and sacred places. Generally, the CRM archaeologist will send out a scoping letter to tribes, in contrast to the federal project archaeologist who will send out a consultation letter to tribes. In that scoping letter, a CRM archaeologist can ask for “guidance” or if the tribe has any issues or concerns with the proposed project, but the problem with this method of data gathering is that we are often not specific enough in our request for information. This quote sums it up well: “neither do you understand us, nor do we understand you. And we do not know what it is that you want” (Zurita 1941:110 in Duran et al. 1998:67). Sending out such a generic letter request for information often results in a generic response of “yes there is an interest in your project area” or “no interests here” or no reply at all.

A more productive scoping endeavor would be to send a letter introducing the project, including areas of potential effect (APE), and the work plan. The letter should ask for a meeting to explain the proposed project, including what you hope to learn from the fieldwork. This will give you the opportunity to open a dialogue with the tribe or tribal representative of what you may expect to find in their territory.

Keep in mind that professional anthropology in the United States really had its start in the late 19th century when the Bureau of American Ethnology “was given the responsibility to conduct anthropological researches among the North American Indians” (Bureau of Ethnology, lst Ann. Rep., xi) (Dittemore 1996). Under this premise many anthropological projects were conducted and a wealth of data was recorded and published in the past 100 years, and yet no formal explanation was given to the subjects of these studies as to why it was so important to gather this data. The individual researchers may have explained their quest to specific informants, but may not have bothered to explain the research or who they were to the communities as a whole. This has left many, but not all, of the communities with a negative impression of the anthropological discipline as a bunch of Euromericans who have lost their traditional culture and are looking to native peoples’ traditional ways to define who they are and where they came from.

So, when you meet with the tribe or tribal representative it is important to choose you words wisely and how you present them. For instance, if your research design involves reconstructing land use systems and trade relations in Imperial Valley, California, you will want to research the relationships between tribes in the valley. It may be possible to schedule a meeting with multiple tribes; however, not all tribes are willing to meet together to discuss sensitive cultural knowledge. So, it’s important to be familiar with the dynamics of the tribes histories and sociopolitical relationships and also recognize that they are each their own sovereign nation.

To recap, changing our perception of the cultural meaning of objects and places begins with early interaction with the living culture. Put on your anthropology hat and do due diligence in the spirit of the law, which will help facilitate relationships for your project in the long run:

* Understand and acknowledge that Native Americans see artifacts, human remains, and places as animate, ancestors, and sacred places;
* Understand and acknowledge that Native Americans are the living descendants of the creators of the cultural resources we are studying. These cultures have never died because culture is ever-evolving, in contrast to static stereotypes or romanticized depictions.
* This suggested method for tribal scoping will likely mean setting aside some of the budget so you should plan it out in your proposal;
* Do your cultural history research well before fieldwork;
* Send out tribal letters asking for meetings; not just for information;
* Ask the right (or specific) questions and choose your words wisely.

**(SLIDE 21- CONSULTATION IN THE FIELD)**

**4 Consultation after Discoveries in the Field**

Once discoveries are encountered on federal or tribal land, the federal agency archaeologist must, by law (43 CFR 10), initiate consultation (§10.5) with the Indian tribe or Native Hawaiian organization (NHO) whether it is a planned excavation (§10.3) or an inadvertent discovery (§10.4). This is why it is so important to understand the cultural history of your project area as we discussed in Section 3 of this webinar, and to establish a dialogue with the tribes/NHOs prior to fieldwork.

When human remains, funerary objects, sacred objects, or items of cultural patrimony are encountered on federal or tribal land, the project archaeologist must immediately notify the federal land-managing official or tribal representative official by telephone, and follow up the telephone call with written confirmation to that official. If the discovery was connected to an on-going project or activity, then all work in the immediate area of the discovery must cease and the on-site archaeologist must make a reasonable effort to protect the human remains and any cultural items associated with it.

If you are conducting a planned excavation in an area where there is a high probability for encountering burials, you most likely already have a signed agreement document between consulting parties in the event human remains are encountered. If you do not, you should have one prior to beginning excavations. If you are dealing with an inadvertent discovery, then there is more to the NAGPRA process than if you have an agreement document in place. If there is no agreement document, the federal agency must reach out as soon as ancestral human remains or potential cultural objects are encountered.

When you, as a project or federal agency archaeologist, engage in consultation with the tribe/NHO, keep in mind that what archaeologists describe as bones and specimens are, in fact, people and ancestors to the living culture that you will be consulting. The majority of archaeologists have degrees in anthropology; however, once we get out of academia and begin working in government agencies and cultural resource management we sometimes lose the mindset that allows us to see aspects of material culture from an emic perspective. We become wrapped up in our research design, budgets, laws, ordinances, regulations, and guidelines. We forget to take into consideration the effect our words and actions have upon the living descendants of the people and cultural items that we excavate. In our mind, the impact is the excavation; however, in reality that is only part of the impact because we are also impacting the living culture, the descendants.

The professional archaeologist’s responsibility under NAGPRA in the field when dealing with inadvertent discoveries is to document the discovery, and its context. What doesn’t happen often enough is that tribal representatives do not get the opportunity to identify artifacts in the field or during analysis in the lab. They are often not afforded the opportunity to identify sacred objects or items of cultural patrimony. They are often presented with items that were associated with a burial context and described as a funerary object; however, tribal representatives should have the opportunity to view the entire artifact assemblage of the site or be invited to the field. For instance, if a burial is inadvertently discovered within an agricultural field context, any artifacts from disturbed contexts should be examined by the tribal representatives for potential funerary objects, sacred objects, or items of cultural patrimony. These displaced artifacts have poor context, and we archaeologists cannot associate them to the inadvertently discovered burial. Only the tribal representatives can tell us if any of these objects have funerary, sacred, or cultural patrimony meanings because we, as archaeologists, do not have that knowledge.

This information is also something that archaeologists should be gathering from tribal representatives as early as possible during the cataloguing and accessioning of the artifacts. If there are any special or sensitive artifacts that will be repatriated back to the tribes/NHOs for reburial with or without human remains, tribal representatives may not want permanent writing or chemicals on the artifacts but each tribe/NHO may be have different thoughts on this process. So, it’s important to identify these artifacts and work with the tribe/NHO to determine how they will be treated during the cataloguing and accessioning process, prior to their transfer to the tribe/NHO. I remember back in the mid-1990s I was invited along to the repatriation and reburial of a sacred object. When they took the object out of the box to rebury it, it had the Museum accession number on it with a base of white paint. That’s the nature of our profession and our history of accessioning artifacts. However, NAGPRA has been enacted for over 25 years and we should know by now that funerary objects, sacred objects, and items of cultural patrimony are going to go to the tribe/NHO where they belong and we shouldn’t be writing on them with paint and permanent ink. Again, if we identify these artifacts, with the help of tribal representatives early on, then we avoid any unnecessary markings on funerary objects, sacred objects, and items of cultural patrimony.

Another key point to remember is that we don’t need to hold on to the human remains, funerary objects, sacred objects, and items of cultural patrimony for a decade or two before repatriating them back to the tribes/NHOs. Once all of your laboratory work and documentation (including photos and drawings), is complete, human remains and associated items must be repatriated back to the tribe/NHO. We all know that it takes about a year to write a decent data recovery report, depending on your staff size, but the tribe/NHO shouldn’t have to wait while we write our reports. If we have the collection analyzed, everything documented, photographed, and drawn, then there is no reason why the tribe/NHO should have to wait to have their ancestors and associated items returned to them. Remember this is just one project with the tribe that you are working with, but they are working with probably 25 projects at a time. Compound the heartache they feel every time their ancestors are disturbed, collected, kept until we are good and ready to give them back. Follow the spirit of the law and do your best to repatriate their ancestors in a timely manner, thereby reducing some of your impact to the living descendants. The best scenario has few, if any remains acquired by the federal agency.

**(SLIDE 22- CULTURAL AFFILIATION)**

**5 Cultural Affiliation under NAGPRA**

Again, we need to recall the two directives of NAGPRA, fieldwork and repositories. Although it is the exclusive legal obligation of federally-funded museums and Federal agencies to make cultural affiliation determinations, it is best practice for CRM archaeology professionals working on federal projects to prepare for inadvertent NAGPRA discoveries by completing some preliminary research about which present-day Indian tribes or Native Hawaiian organizations (NHOs) may be culturally affiliated with any discoveries in the project area before fieldwork is initiated. It is also wise to at least make contact with tribes and NHOs before the project begins–and, ideally, to sign a Plan of Action (POA) with them–in order to lay the groundwork for a timely resolution if an inadvertent discovery is made. Although it takes some time upfront, preparatory cultural affiliation research, consultation, and the development of a Plan of Action can save time, money, and hassle in the event of an inadvertent NAGPRA discovery by giving the CRM archaeology professional the information needed to resolve the issue quickly and amicably, through repatriation with possible reburial.

Cultural affiliation is only one way that ownership and, therefore, claims to repatriation can be made. Priority of ownership and repatriation is given in the following order (25 USC 3002): **(SLIDE 23- PRIORITIES)**

(1) Lineal descendants or individuals who can trace their ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or NHO or by the common law system of descendance to a known Native American individual (43 CFR 10.14 (b)).

(2) if lineal descendants cannot be determined, priority is given to the Indian tribe or NHO on whose tribal land the objects or remains were discovered

(3) to the Indian tribe or NHO with the closest cultural affiliation

(4) if cultural affiliation cannot be reasonably ascertained and the remains or objects were discovered on Federal land that is recognized as the aboriginal homeland of a particular tribe or NHO priority is given to that tribe

(5) unless the preponderance of the evidence indicates that a different tribe or NHO has a stronger cultural affiliation with the remains or objects.

**(SLIDE 24- CULTURAL AFFILIATION)** As defined in the statute “‘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 NHO and an identifiable earlier group” (25 U.S.C. 3001 (2)). It should be kept in mind that cultural affiliation is usually based on more than simple lineal descent: “Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion” (43 C.F.R. 10.2 (e)). **(SLIDE 25- TO REMEMBER)** In some cases, the federal agency or the SHPO may have compiled information on cultural affiliation for different regions of a state. In that case, preliminary contact and consultation with likely affiliated tribes and NHOs can easily be initiated before a project begins, as stated previously, ideally during the scoping phase. If that information is not available through the agency or SHPO, then the CRM archaeological contractor will need to do some research on its own. Because cultural affiliation is determined by a preponderance of the evidence (meaning a case is more likely than not to be true) and claimants do not have to establish cultural affiliation with scientific certainty (43 CFR 10.14 (f)), it is best to research multiple lines of evidence—historical, sociocultural, archaeological, and scientific.

**(SLIDE 26- 43 CFR 10.14)** Requirements for cultural affiliation that must be met are: (1) the existence of an identifiable present-day Indian tribe or NHO with standing under NAGPRA (2) evidence of the existence of an identifiable earlier group and (3) evidence of the existence of a shared group identity, which can be reasonably traced as descending from prehistoric or historic times to the present-day Indian tribe or NHO (43 CFR 10.14 (c)). **(SLIDE 27- 43 CFR 10.14)** Support for the existence of an identifiable earlier group includes—but is not necessarily limited to—evidence that: establishes the identity and cultural characteristics of the earlier group, documents distinct patterns of material culture manufacture and distribution methods for the earlier group, or establishes the existence of the earlier group as a biologically distinct population (43 CFR 10.14(c)). As mentioned previously, the regulations state that the evidence that must be used to establish cultural affiliation between an Indian tribe or NHO include: geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, expert opinion or other relevant information (43 CF 10.14 (e)).

**(SLIDE 28- NATIONAL NAGPRA)** Findings of cultural affiliation are based upon an evaluation of the totality of the circumstances and evidence and a finding of cultural affiliation can be made even if there are some gaps in the record. Gaps are, in fact, to be expected as lifeways of past groups may have been disrupted through dislocation, migration, and forced relocation. The historical record will likely also have considerable gaps because adequate records were never made, or records were destroyed. Finally, the archaeological record may contain gaps due to natural and cultural disturbances or formation processes.

Again, it is highly recommended that cultural affiliation efforts are initiated at the beginning of any field project (ideally during the scoping phase)—even if NAGPRA-related remains are not expected—in order to have information that can be used to more-quickly resolve the cultural affiliation of any inadvertent finds. Not all regions have clearly affiliated tribes and organizations, but that does not excuse the CRM archaeologist from making their best effort to identify those groups who have potential affiliation and aboriginal homelands in the project area.

Not all ancestral human remains or cultural objects can be culturally affiliated. In those circumstances, the 2010 NAGPRA regulations require you to consult with tribes and NHOs whose aboriginal homelands include the area of potential effect (APE). This may include a large number of tribes and NHOs, and National NAGPRA has a variety of online resources that can help you begin identifying them. For example, the Indian Land Cessions (1784-1894) maps include information on which counties and tribes were included in each treaty and are organized by state. As you reach out to tribes to start consultation, you should ask for their guidance on which other tribes have aboriginal homelands in the project area and should be consulted. Some tribes may not be represented on any treaty or cession maps for reasons having to do with displacement and migration. Any federally recognized tribe that wants to be involved should be included.

Cultural affiliation research can take time, particularly if there have been no or few studies done for the project area previously. The broad range of information that can be used to establish cultural affiliation means that time may need to be allocated to visit libraries, archives, museums, SHPO and THPO offices, historical societies, and the tribes and NHOs themselves. The final results will likely indicate that different groups have varying degrees of affiliation with the project area, for instance, it may be clear that a tribe’s ancestors lived in the area for hundreds of years or it may be an area they only migrated through or used for specific purposes. Regardless of the extent of affiliation, it should be documented and taken into consideration when making a cultural affiliation report and determination.

**(SLIDE 29- STRATEGIES…)**

**6. Strategies for the Care and Management of NAGPRA Collections from the Field to Repatriation**

**(SLIDE 30- SOURCES FOR GUIDELINES)** There are a number of guidelines under NAGPRA, the Curation of Federally Owned and Administered Archaeological Collections (36 CFR 79) regulations, and the Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation that address the proper curation (storage and care), management, and preservation of federally owned and administered collections. Although the federal agencies have the ultimate responsibility to care for their collections, contractors are expected to follow these laws and guidelines when working on federal or tribal land; or on federally funded or permitted projects.

As mentioned previously, under NAGPRA, federal agencies—and contractors working for them—are required to stop work on a project for 30 days in the event of an inadvertent discovery so that proper notifications can be made to the affiliated tribes and NHOs (43 CFR 10.4 (c)). How can this be done properly, or, avoided altogether? The answer is through a Plan of Action or POA. In fact, NAGPRA requires the development of a POA before a project begins whenever NAGPRA remains are likely to be encountered and, particularly, when a project is on federal land, tribal land, or within the external boundaries of a reservation. With a POA in hand, the contractor may continue to work without disruption as long as they follow the agreed upon guidelines set out in the POA. Because a 30-day—or repeated 30-day—work stoppage can be costly, it is worth the time and effort to develop a POA even if the possibility of encountering NAGPRA-related remains and objects is low. It should be kept in mind that any other agreements entered into for the project, such as a Memorandum of Agreement (MOA) under Section 106, should be coordinated so that there are no contradictions between the documents. For a good example of a NAGPRA POA see Thomas King (2004/2014).

The CRM archaeology professional may or may not play a role in the POA process as it will be a government-to-government agreement, however, the contractor may be asked to facilitate the process. The contractor will need to plan for plenty of lead time for research, outreach, and consultation during the development of the POA because the contractor may need to do extensive research and may need to contact many tribes, and each will need to be consulted with individually. It should be kept in mind that not all tribes will have the resources or time to respond quickly to a request for consultation. In fact, 43 CFR 10.5 (g) states “The Federal agency official must be cognizant that Indian tribe officials may need to confer with traditional religious leaders prior to making recommendations.” Again, no response does not mean that there is no interest and polite persistence is often key. It should also be remembered that each tribe will likely also have its own individual concerns, issues, and preferences that will need to be taken into consideration. The more time you can give them, the more successful the consultation and POA will likely be.

**(SLIDE 31- WHAT DOES POA HAVE)**

As discussed earlier, the guidelines for a POA (43 CFR 10.5 (e)) state that the POA will include:

1. A description of the kinds of objects to be considered as cultural items
2. The information that will be used to determine custody of NAGPRA remains and objects
3. The planned treatment, care, and handling of NAGPRA remains and items
4. How NAGPRA remains and objects will be recorded in the field and laboratory
5. The kinds of analyses (if any) that will be carried out on the remains and objects
6. The steps to be followed when contacting the affiliated tribes and NHOs
7. The kinds of traditional treatment (if any) that will be afforded to the NAGPRA remains and objects by the affiliated tribes and NHOs
8. The nature of reports to be prepared
9. The final disposition of the NAGPRA remains and items

It is worth going over the parts of the POA, particularly those that pertain to cultural affiliation and the disposition of NAGPRA remains, in more detail. These will be discussed in a different order than listed in the regulations so that they reflect the chronological order of tasks usually followed during a project.

**(SLIDE32- PLAN OF ACTION MUST HAVE)**

1. A description of the kinds of objects to be considered as cultural items.

This should be completed in consultation with potentially affiliated tribes and NHOs. The contract archaeologist may be asked by the federal agency to conduct research into what kinds of NAGPRA remains and objects have been discovered in and around the project area by previous projects as well as research of the types of burial goods, sacred objects, and objects of cultural patrimony used by tribes and NHOs affiliated with the project area. This kind of knowledge and information can be very sensitive and; therefore, consultation will need to be done and research may need to be conducted in partnership with members of the affiliated groups. It is possible that the affiliated groups will be reluctant to divulge sacred, secret, and ritual information. In that case, the POA may need to make allowances for the identification of NAGPRA items and remains after they are discovered and, if that is the case, a protocol will need to be set up for those identifications. One way to resolve the issue of the identification of NAGPRA objects is to have a tribal or NHO monitor with the required knowledge on the work site and/or in the laboratory to help analyze remains and artifacts as they are uncovered and potentially removed.

6. The steps to be followed when contacting the affiliated tribes and NHOs

The POA should indicate who, when, and how contact with affiliated tribes and NHOs will be made in the case of an inadvertent NAGPRA discovery. Specific contact information for each group should be listed in the POA.

1. The information that will be used to determine custody of NAGPRA remains and objects, in other words, to whom they will be repatriated.

This is where cultural affiliation studies are useful and where consultation is vital. In a case where more than one group is affiliated with the project area, agreement will need to be made about which types of remains and objects will be repatriated to which group. The POA may be very specific with detailed descriptions of which kinds of remains and objects will be repatriated to each group, or it may only enumerate broad categories based on date or age of the remains and objects, specific geographical location, specific burial type, specific artifact classes, etc., or it may be stated that agreement will be reached after further consultation once—or if—any remains or objects are discovered. If the latter is the case, the agreement should specify the protocols, including the parties involved and a timeline for when further agreements will be made.

**(SLIDE 33- POA MUST INCLUDE --3)**

1. How NAGPRA remains and objects will be recorded in the field and laboratory

It is particularly important to address in the POA whether tribal members will want NAGPRA items removed from archaeological context (particularly human remains) or left in place and reburied, and, if they are removed, who will remove them—a tribal member or the archaeologist. There should be agreement on the type of receptacles that will be used to hold excavated NAGPRA remains and items, whether (and in what quantity) surrounding soil or matrix will be collected, and whether and what kinds of examinations, analyses, and tests can be made in the field. Agreement should be made on whether any samples can be taken, what kinds, and in what manner. There should also be discussion and agreement about what recording methods may be used, including notes, maps, drawings, videos, photography, scans, etc.

**(SLIDE 34- KINDS OF TRADIAITONAL TREATMENT)**

7. The kinds of traditional treatment (if any) that will be afforded to the NAGPRA remains and objects by the affiliated tribes and NHOs

The POA should also include decisions about how tribal and NHO members will be able to access and engage with NAGPRA objects and remains in the field. Some tribes and NHOs may want to conduct ceremonies in the field when burials or sacred objects are encountered, usually before they are removed from the ground or reburied. Time, space, quiet, and privacy may be needed in order to conduct these ceremonies and this may require the removal of archaeological equipment and personnel from the area as well as cessation of any construction activities while the ceremony takes place. Safe passage to and from the location of the discoveries may also need to be provided for participating tribal or NHO members. (EX. Arizona)

**(SLIDE 35- TRADITIONAL TREATMENT)**

In the laboratory or repository, tribal and NHO members may need regular access to remains, sacred objects, and objects of cultural patrimony for ceremonies or the feeding or smudging of items. As these activities may affect other objects in the collections, special areas for ceremonies and other activities may need to be set aside. Finally, if human remains and cultural items are to be repatriated, the time, place, and means of transfer should be agreed to in the POA and, as stated in the regulations, “the responsible Federal agency…must…transfer custody of the objects…following appropriate procedures, which must respect traditional customs and practices of the affiliated Indian tribes” or NHOs (43 CFR 10.6 (c)).

**(SLIDE 36- POA MUST ADDRESS-PHOTO)**

3. The planned treatment, care, and handling of NAGPRA remains and items.

5. The kinds of analyses (if any) that will be carried out on the remains and objects

Agreement should be made as to whether NAGPRA remains will be cleaned and analyzed in the laboratory or whether they will be immediately repatriated to the tribe. Any cleaning methods and analyses, particularly destructive analyses, should be agreed upon in the POA. If laboratory analyses will be made, time lines will likely need to be set for their completion. The law states that any NAGPRA items tested should be repatriated to the tribe or NHO no later than 90 after the completion of any scientific study (25 USC 3005 (b)). If any residue or remnants will be left after analysis, the disposition of that residue or any remnants should be agreed upon. Once in the laboratory or repository, most NAGPRA items will need special packaging, labeling, and housing that causes little or no damage to the item. Catalog or reference numbers will likely need to be affixed in a manner that does not alter the object, for instance, by tying the label on with string or simply labeling the container in which the item will be held. Other important issues that will need to be agreed upon in the POA include the use of preservatives, pesticides, adhesives, and other substances in the field, laboratory, and curation facility. These may not only harm the object, but they can be harmful to anyone who uses or engages with the object in the future. The regulations state “The museum official or Federal agency official must inform the recipients of repatriations of any presently known treatment of the” remains or objects “with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to person handling the objects” (43 CFR 10.10 (e)).

1. The final disposition of the NAGPRA remains and items

**(SLIDE 37- POA MUST ALSO INCLUDE..PHOTO)** Because Native American groups often believe that there can be spiritual, cultural, and health consequences caused by the mistreatment of NAGPRA objects or remains, proper care and handling are vital. Once in the laboratory or curation facility, objects may need to be allowed to breathe, to be fed, to face a particular direction, or handling may be restricted to certain people (for example, those of a particular gender or age, or who have the proper religious training and knowledge). Particularly powerful objects may need to be isolated or kept separate from other objects. Repairs to objects may also need to be carried out by religious practitioners who have sacred knowledge and who can enact the necessary rituals (Neller 2004).

Most NAGPRA remains and items will not remain in the custody of the laboratory or curation facility as the purpose of the law is to expeditiously repatriate these remains and objects to the lineal descendants—who have priority—or, if there are no lineal descendants making a claim, to a culturally affiliated group or groups. Unclaimed remains and objects may be transferred to any tribe or NHO who is willing to accept transfer. Or, if no group is willing to accept transfer, the Federal agency may place two public notices at least a week apart soliciting claims. If no claimants come forward after 30 days of the second public notice, then the Federal agency may reinter the remains in accordance with interment laws (43 CFR 10.7(c)).

**(SLIDE 38- POA MUST ADDRESS)**

8. The nature of reports to be prepared

Finally, the POA should not only address what kind of information will be in any field reports and how those will be disseminated, but other documentation should be agreed upon as well. These include any documentation made in the field, the laboratory, or repository. Although NAGPRA only requires that remains and objects be repatriated, it is worth discussing the disposition of related documents, particularly photographs, videos, drawings, and similar images. These related documents may also need to be repatriated to the affiliated group, or they may want copies of all documentation. The regulations state that officials, at the request of the tribe or NHO, may take steps to ensure that information of a particularly sensitive nature not be made available to the general public (43 CFR 10.10 (4)(f)(2)). These issues should also be agreed upon and included in the POA.

By involving tribes, NHOs, and curation facilities before a project begins, by having a true dialog with them, and by agreeing to a POA, issues about how NAGPRA objects and remains will be treated from the field into perpetuity can be resolved to everyone’s mutual benefit. In the end, it saves time and money, but, more importantly, it allows all involved parties a voice in the process and insures a peaceful resolution.

**(SLIDE 39- CONCLUSION)**

**Conclusion**

Over the course of this discussion, we have demonstrated that NAGPRA consultation occurs as part of the government to government relationship that sovereign tribal nations have with federal agencies. For NAGPRA, undertakings on federal and tribal land benefit from initiating consultation at the planning stage of projects. CRM archaeologists benefit from sending scoping letters and building relationships with tribes as they plan their projects, which allows for the writing of work plans and MOAs that clarify the processes for all parties when ancestral human remains or cultural objects are encountered. There are 568 federally-recognized tribes and numerous NHOs, so every project and every consultation process will be different. Archaeologists are only one of many stakeholders in cultural resource management, and it is important to remember that Native Americans see artifacts, human remains, and places as animate, ancestors, and sacred places.

Consulting early and often benefits not just the tribes but you and your project. It clarifies responsibilities and processes, and through the course of the project it can save time, money, and frustration. NAGPRA was created to address on-going problems that Native Americans and archaeologists were encountering, and following the letter and the spirit of the law can prevent new ones. NAGPRA compliance continues to evolve, and we encourage you to look at some of our suggested resources for on-going information in your professional practice. We will also be offering a self-paced web-based training which will be available in early 2018.

[Go to Q&A period]