

The Duty Under NAGPRA to Inform Repatriation Recipients of Potentially Hazardous Substances

A Best-Practice Guide

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Introduction

David Hostler's arrival at Harvard University's Peabody Museum of Archaeology and Ethnology in 1997 marked the culmination of a long struggle.¹ For almost a century, his tribe's sacred regalia—religious items believed to embody the spirit of the creator²—had lain locked away in the museum.³ Now a federal law, the Native American Graves Protection and Repatriation Act (NAGPRA), required museums and federal agencies to return Native American human remains and cultural items under their control to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations.⁴ A curator for the Hupa Valley Indian Tribe, Hostler had come to collect seventeen artifacts on behalf of his reservation. "As we started going through the collections," he said of the Peabody staff, "I was forewarned to wear gloves and a breathing apparatus.... They said, 'We don't know what's on this stuff, but to be safe, you should wear gloves.' I didn't get no clear understanding of the problem until I got back, but that's when I first learned about the poison."⁵

As Hostler soon discovered, the items were saturated with mercury, naphthalene, and DDT,⁶ chemicals applied by museum curators to ward off pests and forestall decay.⁷ The practice was a common one, dating back to the 18th century⁸ and continuing well into the 1970s and '80s,⁹ when the chemicals' harmful effects on human health first became apparent.¹⁰ But until NAGPRA's enactment in 1990, no one foresaw that native people would once again control these cultural items and, importantly, that they would use them for their intended purposes.¹¹

Under NAGPRA,

the museum official or Federal agency official must inform the recipients of repatriations of any presently

known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.¹²

A museum that has failed to comply with this requirement is liable for civil penalties.¹³

To date, none of the counts alleged under 43 C.F.R. § 10.12(b)(1)(viii), for failure to inform, have yet been investigated, let alone substantiated. Nonetheless, publications have documented the dissatisfaction¹⁴ of tribal members who waited years for sacred objects to be repatriated, only to find that the items were toxic and unusable for the purposes for which they were made.¹⁵ Native American activists have been vocal about museums' moral obligation to the tribes, with some arguing that the institutions should take responsibility for the objects' testing and decontamination.¹⁶ Conservators have convened symposia to highlight the problem and discuss potential solutions,¹⁷ and articles on the topic have appeared in medical and environmental journals.¹⁸ Several museums have been sued for exposing their own employees to pesticides, in violation of OSHA standards.¹⁹ As one of NAGPRA's savings provisions, at 43 C.F.R. § 10.15(d)(4), states that nothing in the regulations can be construed to "limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations," Native Americans might, similarly, seek redress through tort litigation for injuries caused by exposure to contaminated cultural items.

No legal analysis of a museum or federal agency's duty to inform repatriation recipients of any presently known treatment of repatriated items with hazardous substances, under NAGPRA or any other law, has yet been done. This paper attempts to fill that void by providing guidance to museums and federal agencies on this duty. The paper first describes NAGPRA and the process it provides for repatriating certain cultural items from museums and federal agencies to lineal descendants, Indian tribes, and Native Hawaiian organizations, and the unintended consequences of this transfer of control. Next described are the historic treatment of cultural items with toxic materials and the risk this poses to recipients of repatriated items. The paper then lays out the duty to inform and the potential legal action that might be initiated against a museum or federal agency for breach of that duty. It next examines how "presently known treatment" might be proved. Finally, it suggests a best practice for satisfying the duty to inform recipients of repatriations of any presently known treatment of cultural items with potentially hazardous substances.

Background: Repatriation under NAGPRA

NAGPRA is a federal law that requires federal agencies and museums receiving federal funds as of November 16, 1990, to return Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, under their control, to lineal descendants, culturally affiliated Indian tribes, and Native Hawaiian organizations, as appropriate.²⁰

The repatriation process begins with museums and federal agencies completing, as required, either descriptive summaries of cultural items or itemized inventories of Native American human remains and funerary items over which they have control. In consultation with tribal government or Native Hawaiian organization officials, traditional religious leaders, and lineal descendants, a determination is first made as to whether an item fits a NAGPRA category and, if so, determining to which party or parties with standing to request the repatriation the item is culturally affiliated. Museums and federal agencies must prepare item-by-item inventories of all human remains and associated funerary objects under their control, also in consultation with tribes, and, if cultural affiliation is determined, notify the appropriate tribe or tribes through a Notice of Inventory Completion. For unassociated funerary objects, sacred objects, and objects of cultural patrimony, museums and agencies must provide summaries (rather than object-by-object inventories) describing "the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable." Finally, the museum or agency must "expeditiously" repatriate these human remains, funerary objects, and objects of cultural patrimony to a culturally affiliated tribe or a lineal descendant upon request following publication of a Notice of Intent to Repatriate Cultural Items, or upon a claim for cultural items and publication of a Notice of Intent to Repatriate. As a result of this process, objects that, for decades, might have lain untouched in display cases

and storage facilities are once again being put to the uses for which they were made, or subject to handling in the process of reburial.

Historic Treatment of Cultural Items with Toxic Materials

While repatriation returns control of cultural items to lineal descendants and Native people, the result also poses risks. For many years, curatorial procedures included applying pesticides to individual artifacts, as well as to the areas where artifacts were stored, in order to protect museum collections from biodeterioration. Standard treatments in the late 19th and early 20th centuries included arsenic, boric acid, and mercuric chloride. Later, when museums began using closed cabinets to store their collections, volatile fumes—including naphthalene, tar camphor, paradichlorobenzene, carbon disulfide, cydrocyanic acid, and fluorosilicate compounds—became popular. In the 1950s, pesticides that had been developed for agricultural use—sprays, dusts, fogs, and resin strips containing chlorinated hydrocarbons and organic phosphates—found their way into curatorial usage, as did crack-and-crevice pesticides containing carbamates and boric acid. Even in the latter part of the 20th century, pressurized fumigation chambers employing ethylene oxide, methyl bromide, and sulfuryl fluoride were considered a safe and effective means of eradicating pests.²¹

Eventually, with tighter restrictions on the manufacture and sale of pesticides at the end of the 20th century and growing awareness of the effects of pesticides on human health and the environment, museums began to limit their use of these chemicals. Today, integrated pest management programs, which establish guidelines for pest prevention and removal, include nonchemical insect-killing methods such as freezing, high heat, and oxygen deprivation.²² While these programs bode well for future museum acquisitions, many of the older items now being reintegrated into tribal communities have already been contaminated with toxins.

Were repatriated items merely stored in tribal museums in the same manner and for the same uses as in the repatriating institutions, the risk of injury to recipients caused by exposure to toxins likely would be equivalent to the risk assumed by collections staffs at federal agencies and museums. Instead, sacred objects and objects of cultural patrimony often are worn against the skin during religious ceremonies,²³ placed in food storage structures to ensure a bountiful harvest,²⁴ or ritually destroyed via burial or burning,²⁵ while human remains and funerary objects are reburied, thus allowing chemical residues to seep into the earth.²⁶ Each of these activities creates an opportunity for potentially hazardous substances to enter the body through absorption,²⁷ inhalation,²⁸ or consumption.²⁹

Duty to Inform and Potential Legal Consequences for Breach of That Duty

In some situations, transferring toxic items to another might carry a risk of legal liability for the transferor. Through regulation, NAGPRA explicitly imposes a duty on museums and federal agencies to “inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.”³⁰ Failure to comply with this requirement can subject a museum to a NAGPRA civil penalty or a federal agency to injunctive or other relief under the Administrative Procedure Act. In addition, breach of this duty might subject a museum or federal agency to tort liability under, respectively, the common law and the Federal Tort Claims Act.

Failure to Comply with the Requirement of NAGPRA at 43 C.F.R. § 10.10(e)

In NAGPRA, Congress tasked the Secretary of the Interior with promulgating regulations for the imposition of civil penalties against museums that have failed to comply with the requirements of the law.³¹ The civil penalty regulations are codified at 43 C.F.R. § 10.12. The Secretary of the Interior is responsible for assessing civil penalties and has delegated this authority to the Assistant Secretary for Fish and Wildlife and Parks.³² Anyone may bring an allegation of museum failure to comply but must do so in writing.

There are eight ways in which a museum might fail to comply with the requirements of NAGPRA.³³ “Whether a museum has failed to comply is determined under a strict liability standard.”³⁴ In other words, intent is not an element of the violation. Violations are civil in nature, with recourse for violations assessed as penalty amounts paid to the government.

A museum has failed to comply with the requirements of NAGPRA if it breaches the duty to inform set forth at 43 C.F.R. § 10.10(e).³⁵ According to the plain meaning of the words in 43 C.F.R. § 10.10(e), the duty extends only to “recipients of repatriations” and not, for example, to all the individuals who consulted with the museum during the NAGPRA process and, in the course of NAGPRA consultation, came into contact with an item. Also, the duty is restricted to NAGPRA items actually repatriated. The breach of duty need not cause an actual injury in order for a violation to exist under NAGPRA. If a museum breaches the duty to inform and does cause an injury in fact, the Assistant Secretary may assess the museum a penalty amount based on economic and noneconomic damages suffered by the aggrieved party, in addition to the base penalty amount of \$5,000 or .25% of the museum’s budget, whichever amount is less.

Unlike museums, federal agencies are not subject to the civil penalty provisions of NAGPRA, but they nevertheless are subject to the law’s requirements, including the duty to inform in 43 C.F.R. § 10.10(e). Consequently, a federal agency that breaches that duty could be subject to an action under the Administrative Procedure Act (APA).³⁶ Under the APA, “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute” is entitled to judicial review of that action.³⁷ The APA allows the aggrieved party to bring an action for injunctive relief (not money damages) in federal court and to name the U.S. as a defendant, provided that one or more federal officers are identified as being responsible for compliance with any injunctive decree issued.

A court hearing a claim under the APA can either compel an agency to act when action has been “unlawfully withheld or unreasonably delayed,” or set aside an agency action found to be arbitrary, capricious, or otherwise unlawful.³⁸ In the case of an individual who has been harmed by an agency’s failure to warn that an artifact had been treated with pesticides prior to repatriation, neither compelling the agency to warn nor halting repatriation would be effective, since repatriation has already occurred and the harm has been done. However, the employee responsible for returning the artifact without a proper warning still faces disciplinary action. If the Office of Special Counsel determines that the employee has “violated the provisions of any law, rule, or regulation” within the Special Counsel’s purview, it may prepare a written complaint against the employee and present it to the Merit Systems Protection Board, which may in turn suspend or reprimand the employee, impose a fine of up to \$1,000, demotion, or debarment from federal employment for a period of up to five years.³⁹

Private Tort Actions for Injury Caused by a Breach of the Duty to Inform

While museums face NAGPRA civil penalties and federal agencies face disciplinary action if they fail to comply with the duty to inform in 43 C.F.R. § 10.10(e), they both face being sued in private tort actions if their breach of that duty causes an injury.

NAGPRA states that “any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.”⁴⁰ At the same time, the law has a savings provision stating that “nothing in this Act shall be construed to ... deny or otherwise affect access to any court or limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations.”⁴¹ Thus, should a museum or federal agency fail to repatriate in good faith, NAGPRA would not preclude an injured party from suing the museum or agency. A museum that repatriates a NAGPRA item and fails to inform the recipient of any presently known treatment of the cultural item with a substance that is potentially hazardous to either people or the object itself is not repatriating the item in compliance with NAGPRA. A noncompliant repatriation might reasonably be deemed bad faith

repatriation. Thus, NAGPRA would not preclude a plaintiff who had been injured as the proximate result of the museum or agency's breach of the duty to inform from bringing an action in tort against the museum or federal agency.

Federal agencies may only be sued under the Federal Tort Claims Act (FTCA), which waives the government's sovereign immunity. The FTCA serves as "the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment."⁴² When a federal employee is sued pursuant to the FTCA, the government stands in as the defendant. The head of the agency is authorized to settle claims in any amount, although compensation over \$25,000 must be approved by the Attorney General. Claims of less than \$2,500 must be paid out of the agency's appropriations. Museums and museum employees, having no sovereign immunity to waive, may be sued at common law.

If a museum or federal agency fails to inform a tribe that a repatriated mask is known to have been treated with arsenic and an individual becomes sick after wearing the mask, the tribe or individual could sue the United States under the FTCA for the federal agency official's negligence or bring a private tort action for negligence against the museum or museum employee. To establish a case for negligence, a plaintiff must show that (1) the defendant museum or agency owed the plaintiff a duty (such as the statutory duty to warn of known pesticide treatment), (2) the museum or agency breached its duty, (3) injury occurred to the plaintiff or plaintiff's property, and (4) a direct causal relationship existed between the injury and the defendant's breach. Plaintiffs in negligence actions for improper application of pesticides can recover for damage to the artifact and personal bodily injury—including pain and suffering, medical expenses, future disability or subsequent disease, aggravation of a previously existing condition, or impairment of earning capacity—as well as punitive damages; that is, additional amounts where there is egregious behavior on the part of the defendant.⁴³

Determining "Presently Known Treatment"

In any of the three actions outlined above—NAGPRA civil penalty, APA action, or private tort suit—an aggrieved party must show that the museum or federal agency failed to inform the recipient about the repatriated artifact's "presently known treatment" with a potentially hazardous substance. As the term "presently known treatment" is a constituent element of the duty to inform—and the breach of that duty—it is important to determine the facts that might satisfy this element.

At first glance, 43 C.F.R. § 10.10(e) seems fairly straightforward. Indeed, the proposal that museums and federal agencies be required to inform recipients about a repatriated artifact's known treatment with potentially hazardous substances merits only one sentence in the statute's legislative history,⁴⁴ indicating its seemingly uncontroversial nature. Nevertheless, museums and federal agencies cannot always account for the history or the treatment of an object, even during the period when the item was in their control. Thus, determining what museums and agencies "know" about their collections is necessarily a task to be performed on a case-by-case, totality-of-the-circumstances basis.

If asked about how an object has been preserved, a museum official would probably turn to conservation records first.⁴⁵ In theory, each object in a collection would have its own documentation detailing if, when, and how it was treated with preservatives.⁴⁶ In practice, however, these records are often incomplete or missing.⁴⁷ While museum records can help identify potential toxins,⁴⁸ they are not always accurate or comprehensive,⁴⁹ and often they cover only certain time periods.⁵⁰ Even if a museum has documented an object's treatment in painstaking detail, there is no guarantee that the archaeologist or collector who acquired the piece did not treat it prior to its acquisition by the museum.⁵¹

When written records are lacking, some museums interview prior employees about chemicals used on collection items during their tenure at the museum.⁵² However, given that many items were acquired several generations ago,⁵³ the person who might originally have treated the item is not always available for comment. Historical practices are relevant here.

An artifact's physical appearance can provide clues to its treatment, as when arsenic crystals are clearly visible on the objects surface.⁵⁴ However, most pesticides and preservatives are not visible to the naked eye and, as a result, a battle of the experts could ensue concerning whether the pristine condition of a cultural item that otherwise should have deteriorated due to age or infestation shows, more likely than not, that the item has been preserved.⁵⁵

Chemical analysis is the only surefire method of determining what preservatives have been applied to an artifact.⁵⁶ Testing each object for the presence or absence of a myriad of potentially hazardous substances, though, would be a guessing game, since a lab must first have some sense of what chemicals to look for before it can choose the appropriate method of analysis.⁵⁷ Testing equipment is available, but each can detect some, not all, toxins.

A museum might not have *actual* knowledge that a particular object in its collection was treated with a potentially hazardous substance. Nonetheless, knowledge that hazardous chemicals were routinely used throughout most of the 20th century to preserve collections is widespread in the curatorial community.⁵⁸ So, if museum or federal agency professionals, to whom specialized knowledge is imputed, know that, at some time in the past, the industry standard was to treat certain materials or categories of materials with potentially hazardous substances, and if the repatriated cultural items contain those materials, then that knowledge might satisfy the meaning of "presently known treatment," which, in turn, would trigger the duty to inform imposed by 43 C.F.R. § 10.10(e). On the other hand, if "presently known treatment" applies only to a museum or federal agency's *actual* knowledge that potentially hazardous substances were applied to a particular repatriated item, then the museum's duty, at least under NAGPRA, is more circumscribed. Thus, the meaning of the term "presently known treatment" is key to understanding the duty to inform.

Legal analysis suggests that a court would interpret the phrase "presently known treatment" to encompass both actual *and* constructive knowledge of an artifact's treatment, thus imposing on museums and federal agencies a broad duty to inform. When the language of a statute is ambiguous, common-law principles provide courts with a valuable guide in interpreting the statute's meaning. In fact, "where there is a limitation by statute which is capable of more than one construction, the statute must be given that construction which is consistent with common law."⁵⁹ Therefore, a court interpreting a museum's duty to warn under NAGPRA would look to prior common law actions in which defendants had supplied third parties with dangerous items without warning them of the danger in advance.

According to the Second Restatement of Torts:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) *knows or has reason to know* that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.⁶⁰

Under this doctrine, the duty to inform recipients of a repatriated cultural item's treatment with a potentially hazardous substance is imposed when the supplier knew—or even when he or she merely "had reason to know"—that the object was dangerous for its intended use and when the recipients would not have realized its dangerous condition. A party "has reason to know" something when he "has information from which a person of reasonable intelligence, or of the superior intelligence of the actor, would infer that the fact in question exists, or would govern his or her conduct upon the assumption that it does exist."⁶¹

Like the "supplier"⁶² referenced above, museums and federal agencies know that chemically treated, repatriated cultural items are dangerous for the use for which they are supplied. Collection staffs themselves take precautions when handling items that have been treated⁶³ and, therefore, would realize that, even if a

toxic object never left a tribal museum or repository, it would pose a risk to tribal curators unaware of its toxic properties. The risk increases for items not consigned to display cases, such as sacred objects; that is, “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”⁶⁴ Because museums and federal agencies know that such objects will be handled or worn during religious ceremonies, they know that any toxic residues on the objects would make them “dangerous for their intended use.”

Collection staffs, to whom specialized knowledge is imputed, also know that the recipients will not suspect the potentially hazardous condition of the cultural items being repatriated to them, as (1) laymen are unlikely to be familiar with conservation procedures, (2) presentations aimed at alerting recipients of repatriations to the hazards of exposure to potentially toxic substances are a recent phenomenon,⁶⁵ and (3) even when informed that an object is coated with potentially hazardous substances, the recipients are often unaware of the health risks these substances pose.⁶⁶

As long as a plaintiff can prove that museum or federal agency personnel “knew or had reason to know” that cultural items had been treated with potentially hazardous substances prior to repatriation, the museum or agency can be held liable in tort for an injury proximately caused by the failure to inform the recipient(s).

There are several ways a plaintiff might prove a museum or federal agency’s knowledge that a repatriated cultural item had been treated with a potentially hazardous substance. First, they could show that the repatriating museum or federal agency had applied the injurious substance. Second, they could offer facts contained in the museum or agency’s records to show that, more likely than not, a collection professional would know that the injurious cultural item had been treated with a potentially hazardous substance. Third, demonstrative evidence for the physical presence of a potentially hazardous substance on the repatriated cultural item—including the presence of arsenic crystals or other residues,⁶⁷ a distinctive smell,⁶⁸ evidence of prior infestation and repair,⁶⁹ or signs that an organic object was unusually well-preserved for its age⁷⁰—might be proffered to prove that the museum or federal agency knew or should have known that the item had been treated. Fourth, evidence showing that the museum or federal agency knew or should have known both that, at some point in time, the repatriated cultural item formed part of a collection and that one or more of the other items in that collection had been treated with a potentially hazardous substance might be dispositive of knowledge that the injurious cultural item itself had been treated.⁷¹ Similarly, evidence showing both that the museum or federal agency acquired other, individual items from the transferor of the repatriated, injurious cultural item, and knew or should have known that one or more of those other acquired items had been treated with a potentially hazardous substance, might satisfy the “presently known treatment” element of the case. Even if, in fact, the injurious cultural item was known not to have been treated with a potentially hazardous substance, perhaps evidence showing that the museum or federal agency knew or should have known that the injurious cultural item came into physical contact with another item that *had* been treated with a potentially hazardous substance might be sufficient to establish the duty to inform and the “presently known treatment” element of the tort.

Finally, the widespread use of pesticides and other poisonous chemicals on items in collections as recently as the 1980s, and the massive attention that such poisonous preservatives have received in recent industry literature, raises the question in a legal sphere of whether there is a preliminary pre-sumption that can easily be made that repatriated cultural items collected prior to the 1980s were treated with potentially hazardous substances. If the answer is yes, then the duty to inform would attach to almost all cultural items repatriated from collections. Such presumption would have an obvious chilling effect on claims and the return of repatriated sacred objects or objects of cultural patrimony to the uses for which they were created, as an unknown health risk to the potential user likely could outweigh the benefits of use.

Although the NAGPRA statute does not explicitly require museums and federal agencies to inform recipients of repatriations about treatments of which they “knew or had reason to know,” courts might nevertheless choose to hold them to the same constructive knowledge standard they have applied to suppliers of dangerous chattel, especially when doing so promotes the law’s purpose.⁷² NAG-PRA’s legislative history indicates

that, in addition to providing a practical framework for repatriating human remains and certain cultural items, the statute was enacted “to reverse several hundred years of abuses of a people, their lands and their very roots,”⁷³ and “was meant to redress past wrongs against tribes, and to level the playing field, so it’s no longer tilted in the favor of scientists.”⁷⁴

According to one canon of construction, “statutes benefiting Native Americans should be construed liberally in their favor.”⁷⁵ NAGPRA benefits Native Americans by effecting the repatriation and disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony. Because liberally construing the duty of a museum or federal agency to inform the recipient of repatriation that a cultural item has been treated with a potentially hazardous substance would provide greater protection for the recipients, a court might very well interpret “presently known treatment” to include both the actual and constructive knowledge of treatment.

Another legal canon holds that public health and safety statutes should be liberally construed in favor of the public.⁷⁶ The requirement of 43 C.F.R. § 10.10(e) serves as a public health safeguard, since it minimizes the chance that repatriation recipients will suffer illness or death as a result of handling toxic cultural items. As a broader construction of “known” advances this interest, a court might hold a museum or federal agency liable for failure to inform if it had reason to know of an artifact’s treatment with a potentially hazardous substance.

The duty to inform aside, a museum or federal agency cannot be held liable for failure to test artifacts in order to determine *how* they were treated.⁷⁷ The Second Restatement of Torts makes a clear distinction between manufacturers and retailers who supply chattel for business purposes and other types of suppliers: the former are required to test for defects, while the latter are merely required to disclose what they have reason to know based on existing evidence.⁷⁸ Because museums and federal agencies gain no financial benefit from repatriation, they are under no duty to routinely test their entire collections for the presence of potentially hazardous substances. The language of 43 C.F.R. § 10.10(e) supports this argument: by restricting the duty to “presently” known treatment, the regulation obviates a museum’s duty to acquire additional knowledge through testing, unless and until repatriation becomes a factor.

Best Practice Model

This paper has focused mainly on the legal duty to inform a recipient of repatriation of the treatment of cultural items with potentially hazardous substances and the possible consequences for the breach of that duty, but it was written against a backdrop of human health and safety. For this reason, a museum or federal agency that reasonably can test cultural items absent and prior to repatriation should do so. Thus, for example, in Washington State, The Burke Museum, which pioneered a testing program for lead, arsenic, and mercury on tribal cultural objects using portable x-ray fluorescence spectrometers,⁷⁹ has affirmatively responded to every request to test Native American collections located in the Pacific Northwest.⁸⁰ Others have followed suit,⁸¹ including the National Museum of Natural History, which uses x-ray fluorescence to test all of its ethnological items made of wood, feathers, hair, and hide for heavy metals.⁸²

Those museums that cannot afford the XFR spectrometers \$40,000–50,000 price tag should follow the advice of Nancy Odegaard and Alyce Sadongei of the Arizona State Museum and determine an artifact’s treatment history by conducting “a thorough review of many museum documents, archives, conservation correspondence and reports, and letters to earlier staff members that may be on file.”⁸³ In addition, repatriation officials should look beyond written records and ask themselves whether other types of evidence provide constructive knowledge that a cultural item was treated with a potentially hazardous substance. Odegaard and Sadongei suggest the following checklist:

1. Is there evidence of prior infestation?
2. Are residual pesticides indicated?
3. Is there evidence of museum repairs, restorations, and alterations?

4. Are there any written records that would suggest the use of pesticides?
5. Based on past storage locations, what pesticides might typically have been used on or near this object?⁸⁴

It is advisable for museums and federal agencies to research and answer these questions before they are involved in litigation or a court tells them that they breached their duty to inform. Only after examining all the available evidence can a museum or federal agency satisfy the duty to inform the recipients of a repatriated cultural items presently known treatment with potentially hazardous substances.

Museums might take a cue from the National Museum of Natural History and supplement the information about *specific* pesticides they provide to repatriation recipients with a more general caution: because there is no way to know with absolute certainty exactly how each artifact was treated, all artifacts should be presumed to be hazardous and handled and stored with care,⁸⁵ and recipients should speak to a health professional about the risks of pesticide exposure.⁸⁶

Hopefully, as conservators, tribal representatives, and cultural organizations continue to work together to determine how cultural items were treated, these items may one day be decontaminated and reintegrated into the daily lives of their recipients. In the meantime, compliance with NAGPRA's duty to inform should be construed liberally, in order to minimize the risk of physical harm to recipients during the repatriation process.

Notes

1. See Claudine Zap, *Trail of Toxins*, EAST BAY EXPRESS, May 11, 2001 (describing the bureaucratic hurdles Hostler had to overcome to convince the Peabody to repatriate Hupa artifacts in their collection, including enlisting an academic to submit a 600-page anthropological analysis of the artifacts); see also *Native American Artifacts Pose Pesticide Exposure Risk*, Science Daily, Mar. 20, 2003 (stating that Hostler negotiated with the museum for three years before repatriation of seventeen artifacts was granted).
2. See Matt Palmquist, *Poisoned Gods: As Museums Return Stolen Religious Artifacts, Native Americans Are Learning That Their Most Sacred Objects May Kill Them*, SF Weekly, Sept. 4, 2002 (describing the Hupa belief that "the spirit of the creator is . . . embodied in the regalia"); see also David Hostler, Shawn Kane & Lee Davis, *The Hoopa Tribal Museum's Experience with Chemical Contamination of Repatriated Materials*, in 16 Soc'y for the Pres. of Natural History Collections, Collection Forum 54, 54 (Summer 2001) hereinafter Collection Forum (claiming that "the artifacts are living spirits who cry to come to the ceremonies back home and dance with 'their people'"); cf. Richard Fausset, *Indians Face Dilemma of Toxic Relics*, Los Angeles Times, Sept. 1, 2002 (conveying the Elem Indians' belief that the headdresses and ceremonial outfits lying on shelves in California state park storage facilities are "tortured souls."); cf. Lynda V Mapes, *Museum First in Country to Offer Safety Check for Tribal Artifacts*, Seattle Times, Oct. 6, 2005 (stating that the Tlingit elder responsible for returning a repatriated tunic to his tribe will address the item as "him" rather than "it" "because of the living spirits the clan believes the treasure carries).
3. *Id.* (noting that the objects had remained at the Peabody Museum since being taken from the Hoopa in 1904).
4. 25 U.S.C. § 3001 et. seq.
5. See Palmquist, *supra* note 2, at 2.
6. See Zap, *supra* note 1 (citing the results of lab tests conducted by Niccolo Caldararo, a conservator and professor at San Francisco State University, which later became the source of a conference on pesticide contamination of repatriated objects).
7. See generally Marilen Pool et al., *Identifying the Pesticides: Pesticide Names, Classification, and History of Use*, in *Old Poisons New Problems: A Museum Resource for Managing Contaminated Cultural Materials* 5, 5 (AltaMira, 2005) hereinafter *Old Poisons, New Problems* (listing the various insects that pose biodeterioration hazards to

museum collections and the 87 different pesticides that museums have applied over the years to “discourage insect activity” and “restrain insect maturation”).

8. See Zap, *supra* note 1 (stating that the practice dates to as early as 1785, when Charles Wilson Peale, upon opening a natural history museum in Philadelphia, became the first American to use arsenic as a preservative).
9. See Nancy Odegaard et al., *Assessing Contamination: Analytical Testing of Cultural Materials for Pesticides*, in *Old Poisons, New Problems* 54–55 (stating that museums stopped using arsenic and DDT in 1972 and mercury in 1976, when they were banned by the federal government, and that use of carbamate and thiocarbamate pesticides petered out in the 1980s).
10. See P Jane Sirois, *Analysis of Objects for Arsenic and Mercury: Non-Destructive Analysis and Sample Analysis*, in *Collection Forum* 65, 67 (citing Muir, Lovell, and Peaces 1981 analysis of objects at the Bristol Museum as “one of the first published studies investigating potential health hazards in natural history collections”).
11. See Fausset, *supra* note 2 (stating that “some tribes are confronting unforeseen health and religious issues because of the substances used by generations of collectors who never imagined that the Indians would get the items back”).
12. 43 C.F.R. § 10.10(e).
13. 43 C.F.R. § 10.12(b)(viii).
14. See Zap, *supra* note 1 (stating that repatriation of contaminated objects has “fueled anger and mistrust,” with one woman likening the practice to white settlers giving smallpox-contaminated blankets to their Indian neighbors).
15. See Fausset, *supra* note 2 (stating that the Onondaga Nation of New York received fifty-seven medicine masks that were contaminated with arsenic in 1998, and that Hopi kachina dolls repatriated in 1999 were covered in pesticides, one so toxic that the Arizona Poison Control Center advised the tribe to not even keep it on the reservation); see also Mapes, *supra* note 2 (reporting that the Hearst Museum warned the Tlingit tribe that a tunic repatriated in 2005 might contain DDT).
16. See Fausset, *supra* note 2, at 2 (stating that Leigh Kuwanwisiwma, cultural preservation coordinator for the Hopi tribe, wants museums to pay for the removal of toxic chemicals); see also Palmquist, *supra* note 2, at 4 (quoting Larry Myers, executive secretary of the California Native American Heritage Commission, as saying, “The tribes feel that the state or the institutions should be paying for chemical testing, and that’s perfectly reasonable and logical.... They took the damn stuff. And now that they’ve given it back, it’s in this condition”); see also Zap, *supra* note 1, at 7 (“Monona Rossol frets that tribes are giving up their rights by too hastily accepting items back from museums. She says tribes should demand at least two tests, one screening for pesticides and one for heavy metals”).
17. See, e.g., Symposium, *Mitigation of Pesticides on Museum Collections*, hosted by the Smithsonian Institution, April 23, 2007.
18. See, e.g., Peter T. Palmer et al., *Analysis of Pesticide Residues on Museum Objects Repatriated to the Hupa Tribe of California*, 37(6) *Envtl. Sci. & Tech.* 1083–1088 (2003)(reporting the results of tests for arsenic, mercury, and organic pesticides conducted on seventeen objects repatriated to the Hupa tribe, which “indicate that Hupa tribal members should not wear these objects in religious ceremonies, proper precautions should be followed when dealing with potentially contaminated objects, and that more serious consideration should be given to this issue at a national level”); see also S.A. Seifert et al., *Arsenic Contamination of Museum Artifacts Repatriated to a Native American Tribe*, 283(20) *J. of the Am. Med. Ass’n* 2658–2659 (2000)(evaluating three ceremonial objects made of leather, grasses, cornhusks, feathers, horsehair, yarn, and paint that had been repatriated under NAGPRA, and finding that, although none showed visible signs of contamination, two tested positive for arsenic and one for naphthalene).
19. Monona Rossol, *Open Discussion 1*, in *Collection Forum* 23, 23.
20. 25 U.S.C. § 3001 et seq.
21. See Pool, *supra* note 7, at 11–12.
22. *Id.* at 13.

23. See Palmquist, *supra* note 2 (describing the White Deerskin Dance and the Jump Dance, two of the Hupa's "most sacred rituals of world renewal," in which "shamanistic figures drape themselves in sacred regalia," including deer hide or cat kilts, dentalia-shell necklaces, wolf-fur headbands, and woodpecker-scalp headdresses); see also *id.* (noting that sacred dances usually take place inside an enclosed structure and that, "when someone is dancing with the item, they're shaking their head, moving around vigorously" and "you're shaking arsenic off your headdress, its floating around, and it could contaminate the entire roundhouse").
24. See Jennifer Knight, *Law Requires UNLV to Give Artifacts Back to Tribe*, Las Vegas Sun, Jan. 13, 2003 (describing the Hopi belief that kachina masks "represent the power to bring rain, plentiful crops, or prosperity to the village"); see also Fausset, *supra* note 2 (stating that pesticides were discovered on repatriated kachina dolls only after the dolls had been placed in structures used to store grain and vegetables).
25. See Mapes, *supra* note 2, at 1 (stating that sacred objects are sometimes "burned in sacred ceremonies, or re-buried, potentially posing a health risk in some instances if residues are released into the air, groundwater, or transmitted to people").
26. See *id.*
27. See Leslie Boyer et al., *Understanding the Hazards: Toxicity and Safety*, in *Old Poisons, New Problems* 73–77 (stating that cumulative exposure to ingested arsenic can lead to neuropathy, anemia, and cancer of the lung, liver, kidney, or bladder; prolonged exposure to mercury can produce tremors, gastrointestinal effects, kidney damage, and hallucinations; and exposure to organophosphates, which "tend to cross the skin barrier easily," can produce heart rhythm disturbance, coma, seizures, and death).
28. See Palmquist, *supra* note 2, at 2 (noting that, when Native Americans ritually burn contaminated objects, "they risk scarring their lungs by inhaling the pollutants"); see also Boyer, *supra* note 27, at 76 (noting that inhalation of mercury fumes when objects are heated or burned can result in death or central nervous system damage).
29. See Palmquist, *supra* note 2, at 2 (noting that, when Native Americans "put down," or ritually bury, an item that has reached the end of its life-span, "they risk contaminating the soil and poisoning their groundwater").
30. 43 C.F.R. § 10.10(e).
31. 25 U.S.C. § 3007.
32. 43 C.F.R. § 10.12(a).
33. 43 C.F.R. § 10.12(b)(1)(i)–(viii).
34. NAGPRA Regulations—Civil Penalties (preamble), 68 Fed. Reg. 16,354 (2003) (to be codified at 43 C.F.R. pt. 10).
35. 43 C.F.R. § 10.12(b)(1)(viii).
36. See the 1947 Attorney General's Manual on the APA, available at <http://www.law.fsu.edu/ibr-ary-admin-19->
37. 5 U.S.C. § 702.
38. 5 U.S.C. § 706.
39. 5 U.S.C. § 1215(a)(3).
40. 25 U.S.C. § 3005(7)(f).
41. 25 U.S.C. § 3009.
42. 28 U.S.C. § 2671.
43. Anne M. Payne, *Cause of Action for Damage from Pesticides*, 39 *Causes of Action* 2d 579 (2009).

44. Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62, 134 (Dec. 4, 1995)(to be codified at 43 C.F.R. pt. 10).
45. See Nancy Odegaard et al., *Addressing the Problem: The Team Approach*, in *Old Poisons, New Problems*, 33, 33 (“The first step was to compile and review the documentation already known to exist from the museum’s internal records regarding pesticide use,” including catalog cards, specimen treatment cards, loan records, and purchase orders for pesticides).
46. See Nathan Stolow, *Procedures and Conservation Standards for Museum Collections in Transit and on Exhibition* 22 (UNESCO 1981) (“The condition report is one of the most important documents in the museum. It records historical and acquisition data, describes the technical and compositional nature of the work, and is the time record of its conservation state”).
47. See *id.* (“The writing of condition reports is a very imperfect art. In some instances the record is too brief, in others overly detailed”); see also Mapes, *supra* note 2 (quoting Jim Nason, director of the NAGPRA program at Seattle’s Burke Museum, as saying, “very few museums even know how the objects in their collections have been treated because they lack records”); see also Fausset, *supra* note 2 (stating that, because museum records are incomplete, “suspicion is all they have to go on” when determining whether pesticides or other poisons have been applied to cultural items).
48. See Zap, *supra* note 1 (stating that it was museum records that first tipped off tribes that pesticide contamination was an issue).
49. See Nancy Odegaard et al., *The Issue of Pesticides on Native American Cultural Objects: A Report on Conservation and Education Activities at University of Arizona*, in *Collection Forum* 12, 16 (reporting that, during a chemical analysis of Hopi kachina “friends,” two tested positive for arsenic even though only one was identified as such in museum documentation).
50. See, e.g., Zap, *supra* note 1, at 6 (noting that records at the Phoebe Apperson Hearst Museum of Anthropology at UC Berkeley date back only to the 1960s).
51. See Lee Davis et al., *Recommended Actions Regarding the Pesticide Contamination of Museum Materials* (2000), <http://bs.s.s-fsu.edu/c-als-tud-ies-/ar-tte-st/-rec-.htm> (noting that “pesticides were ... known to have been applied by field collectors, dealers, etc. before they arrived at the museum”).
52. See Catharine Hawks, *Historical Survey of the Sources of Contamination of Ethnographic Materials in Museum Collections*, in *Collection Forum* 2, 7 (stating that “interviewing former staff is a growing practice as museums recognize the potential impact of past contamination on all types of collection use, from loans for exhibition and research, to public programs, and object repatriation”).
53. See, e.g., Knight, *supra* note 24 (stating that many items were acquired during the Dust Bowl era, when starving Hopi Indians traded handcrafted regalia for food).
54. See Palmquist, *supra* note 2 (“People would open up books of botanical specimens collected in the 17th century, and they’d find arsenic crystals on the pages.”); see also Odegaard, *supra* note 45, at 37 (featuring a photograph of a headdress on which white powder—arsenic—is clearly visible amongst the feathers).
55. Compare Zap, *supra* note 1 (“Ironically, one clue of a preservative’s presence is that an artifact is in good condition—nothing eaten away, the feathers whole, the colors bright. When an object appears to have not degraded at all, it’s a good sign that a permanent—and deadly—substance has been used”), with National Museum of the American Indian: Pesticides FAQ, <http://www.w.n-mai.si.edu/subpage.cfm?s-ubpage=-collections&second=consequence&t-hird=p-est> (last visited Oct. 1, 2010) (“It is not advisable to make assumptions on appearances alone about whether or not an artifact is likely to be contaminated with hazardous residues. If an artifact has evidence of prior infestation, this does not mean it is free of pesticide residues—it may have been treated with pesticides as a result of that infestation. Likewise, it is possible that an object in excellent condition has not been treated with pesticides”).
56. *Id.*

57. See Peter T. Palmer, *A Review of Analytical Methods for the Determination of Mercury, Arsenic, and Pesticide Residues On Museum Objects*, in *Collection Forum* 25, 39.
58. See Claudine Zap, *Poisoned Legacy*, *MotherJones*, Oct. 24, 2000 (describing pesticide contamination as “no secret in museum circles”); see also Odegaard, *supra* note 49, at 13 (“Many museum employees, based on experience or information reported in the literature, have been aware that many institutionally held objects were treated with chemical poisons to aid in their preservation”).
59. 2B Sutherland Statutory Construction § 50:1 (7th ed. 2009).
60. Restatement (First) of Torts § 388 (2009).
61. Restatement (Second) of Torts § 12 (2009).
62. The “supplier” referenced here refers not only to manufacturers and retailers, but to “any person, who for any purpose or in any manner gives possession of a chattel for another’s use.” This category would certainly include museums or agencies that repatriate contaminated cultural items.
63. See generally, *Guidelines for Handling Contaminated Museum Collections and Personal Protection Equipment Guidelines*, in *Old Poisons, New Problems*, 87–90.
64. 25 U.S.C. § 3001(3)(C).
65. See Odegaard et al., *Introduction*, in *Old Poisons New Problems* (describing a symposium convened by the Arizona State Museum as “one of the first forums designed to disseminate information on this issue” to Native American tribes).
66. See Palmquist, *supra* note 2 (noting that “some tribes have stubbornly insisted that their gods are powerful enough to overcome the pesticides”); see also Zap, *supra* note 1 (citing archaeologist Yolanda Chavez’s increased concerns about pesticide contamination after tribe members told her, “Maybe our songs or dances can take care of it”).
67. See Odegaard, *supra* note 45, at 35 (“Some pesticides, such as mothballs, can be absorbed by artifact materials and later crystallize on the surfaces. In other instances, powders, such as arsenic or DDT, were applied directly to artifacts and remain intact and visible on interior surfaces”).
68. See *id.* (citing “odors on or around museum artifacts and in storage and exhibit areas” as one means of assessing whether pesticides were applied).
69. See Odegaard, *supra* note 49, at 14.
70. See Odegaard, *supra* note 45, at 35 (noting that “old artifacts made of materials known to be susceptible to insect attack” like fur, skin, feathers, and wool “may be considered suspect for having some form of pesticide treatment”).
71. See Restatement (First) of Torts § 388 cmt. h (2009) (“It is not necessary in order that a supplier of a chattel for another’s use shall be liable under the rule stated in this Section that he should know that the particular chattel is dangerous for the use for which it is supplied. It is enough that he knows of facts which make it likely that the particular chattel may be dangerous, as where he knows that it is part of a lot, some of which he has discovered to be so imperfect as to be dangerous”).
72. See 2B Sutherland Statutory Construction 46:1 (7th ed. 2009) (“even if the words of a statute are plain and unambiguous on their face the court may still look to the legislative history in construing the statute if the plain meaning of the words of the statute is at variance with the policy of the statute or if there is a clearly expressed legislative intention contrary to the language of the statute”).
73. Zap, *supra* note 1, at 2 (quoting Keith Kintigh).
74. 136 Cong. Rec. H10989–90 (statement of Rep. Collins) (daily ed., Oct. 22, 1990).
75. See *Tyonek Native Corp. v. Sec’y of the Interior*, 836 F.2d 1239 (9th Cir. 1988) (citing *Three Affiliated Tribes of the*

Fort Berthold Reservation v Wold Eng'g, 467 U.S. 138, 149).

76. See 2B Sutherland Statutory Construction 73:2, 73:4 (7th ed. 2009).
77. See Restatement (First) of Torts § 388 cmt. k (2009) (“The fact that a chattel is supplied for the use of others does not of itself impose upon the supplier a duty to make an inspection of the chattel, no matter how cursory, in order to discover whether it is fit for the use for which it is supplied”).
78. See Restatement (Second) of Torts § 392 cmt. a (2009).
79. See Mapes, *supra* note 2.
80. See the Burke Museum website at www.wa-shi-ngt-on.-edu/-/bu-rke-mus-eum-/co-lle-cti-ons-/ethno-logy/in-dex.-php.
81. *E.g.*, the Field Museum in Chicago and the Southwest Museum of the American Indian at Autry National Center, http://sa-rwe-b.o-rg/-ind-ex/-php-7sy-mpo-siu-m_n-ati-ve_col-lec-tions-_and_-pesti-cides--p:sy-mposi-ums.
82. NMNH does not test human bones or stone funerary objects because these materials are inert and would not have been treated with preservatives. However, if bone or stone items were stored alongside treated artifacts or housed in containers or rooms where pesticides had been applied, museums and agencies governed by NAGPRA should warn tribal recipients of this fact.
83. Odegaard, *supra* note 49, at 14. This search should include catalog cards, specimen treatment cards, loan records, purchase orders for pesticides, contracts with exterminators, archaeological field notes, routine reports by staff members, and interoffice staff correspondence regarding pesticide application. Odegaard, *supra* note 45, at 33–34.
84. Odegaard, *supra* note 49, at 14.
85. The NMNH’s Statement on Pesticides, available at <http://an-thr-opo-log-y.s-i.e-du/-rep-atr-iat-ion/-pd-f/pesti-cidestate-ment.p-df>, instructs anyone handling ethnogra during the consultation or repatriation stage to wear disposable latex gloves while handling the objects, wash exposed skin with soap and water after contact, and store the objects in a secure container away from food supplies, utensils, clothing, and other items that may be worn or ingested. It also discourages children, pregnant women, the elderly, and people with weakened immune systems from handling the objects and anyone at all from wearing the objects.
86. Phone conversation with Bill Billeck, director of the National Museum of Natural History Repatriation Office, November 20, 2009.