

# KEEPERS OF CULTURE

Repatriating Cultural Items  
under the Native American Graves  
Protection and Repatriation Act



Roger Echo-Hawk

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Roger Echo-Hawk  
Denver Art Museum, 2002

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*About the cover:* The bird image was created by graphic artists Melissa Nethery and Jennifer Jonson-Jones. It is based upon a watercolor by Richard Martínez (San Ildefonso Pueblo) commissioned during the 1920s by Anne Evans, a Denver Art Museum trustee.

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Grants from the National Park Service NAGPRA grants program helped fund the development and preparation of *Keepers of Culture*. My service as a consultant and advisor to the Pawnee Nation and as a consultant to the Native American Rights Fund introduced me to repatriation, but *Keepers of Culture* really reflects my experience at the Denver Art Museum and Colorado Historical Society.

DAM's NAGPRA implementation program has unfolded through the Native Arts Department under the direction of Nancy Blomberg (Curator of Native Arts), with the assistance of Tamara Pope Roghaar (Curatorial Assistant), Kara Kudzma (Curatorial Assistant), and Brooke Rohde (Special Project Assistant). Jhon Goes In Center served on the DAM Board of Trustees from 1993 to 2002 and made it a priority to facilitate DAM's presence in Indian country on NAGPRA matters. The entire program has taken shape and proceeded under the leadership of DAM Director Lewis Sharp and Deputy Director Joan Carpenter Troccoli (now Director of the Institute of Western American Art at the Denver Art Museum). Attorney John R. Wilson provided thoughtful advice on matters of law for this project. In the DAM Publications Department, editors Laura Caruso and Lisa Levinson kept my prose from straying too far into various neverlands, while publication designer Jennifer Jonson-Jones created an elegant realm for readers to visit.

I presently serve as an assistant curator at DAM, but I started out this life as repatriation coordinator for DAM and for the Colorado Historical Society (CHS). The CHS NAGPRA implementation program during my tenure included Anne Bond (Director of Collections and Exhibitions), Susan Collins (State Archaeologist and Deputy State Historic Preservation Officer), and Carolyn McArthur (Associate Curator and NAGPRA Coordinator). After I left CHS, this team also came to include Bridget Ambler (NAGPRA Liaison), Todd Topper (Registrar), Catrina Elia (Director of Collections Management), Beth Conour (Physical Anthropologist), and Karen Rogers (Executive

Secretary, Colorado Commission of Indian Affairs). Bridget Ambler deserves special thanks for conducting helpful research on NAGPRA-related internet sites.

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In addition to the above-named persons, many other colleagues have shared their opinions and insights with me over the years. I have benefited greatly from the wisdom of my brother, Walter R. Echo-Hawk Jr., and from discussion and debate on repatriation issues with

Tim McKeown, Larry Zimmerman, James Riding In, Tom Killion, Bill Billeck, Russell Thornton, Lynne Goldstein, Roger Anyon, Christy Turner III, Lee Davis, Martha Graham, Steve Moore, Joe Watkins, Dorothy Lippert, the Closet Chickens, Frank McManamon, Tim Baugh, Moyo Okediji, and many others, including members of the more than ninety tribal delegations that have visited Denver over the past seven years.

One reviewer of the draft of *Keepers of Culture* provided comments that deserve special notice. Officials of the Blood Tribe of Alberta, Canada, carefully studied the manuscript and concluded that the references to Blood culture, religion, and history are generally incorrect and that my efforts to apply NAGPRA to Blood circumstances are misguided and objectionable. A tribal official consequently requested that all mention of the Blood Tribe be deleted from the final publication. After much consideration of these views, I have chosen to retain the Blood material, which reflects my firsthand experiences and my research in Denver Art Museum records and other sources. Hopefully, all the case studies in *Keepers of Culture*—including the Blood examples—convey useful insights into the workings of NAGPRA and have been portrayed accurately with relevant acknowledgment of differing viewpoints. Readers must judge for themselves whether the content of this publication is constructive or inappropriately offensive.

In forming my views on matters of history, law, and scholarship related to repatriation, my opinions have taken shape in the context of the governments and institutions at work, but I have deliberately avoided seeking any form of official government approval, whether tribal, state, or federal. Although the views of the Denver Art Museum are explicitly expressed on occasion, the opinions expressed in *Keepers of Culture* are my own unless otherwise directly stated.

Roger C. Echo-Hawk  
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February 2002







# Chapter one

## Introduction to Repatriation

## An Enduring Dream

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***L**ong ago, among the Blood people, a man lost his dog. After a determined search, he found the dog and lay down to sleep. In a dream, the dog spoke to the man and asked that he care for her young. In return for this kindness, the man would be given leadership of a new society: the Dog Society. As leader, he would wear a special sash made of dog fur—a sash imbued with spiritual life—and it was promised that the man would live a long life.*

*According to this Blood oral tradition, the Dog Society was founded upon the dream of goodwill among living creatures. The society endured among the Blood people for generations, but it came to an end with the deaths of the last members during the 1930s and 1940s. In its last days, the few surviving members hoped to revive the Dog Society as an active presence in the rich spiritual life of the Blood community. They needed the leader's sash for this purpose, but it fell into the hands of a man who sold it over the protests of the elderly society members. The Blood people had long endured pressure from Canadian civil and religious authorities to abandon their religious traditions, and times were hard. Unfortunately, this sale contributed to the demise of the Dog Society.*

*The Denver Art Museum (DAM) subsequently acquired the sash, and generations of DAM curators cared for it. In 1999, after extensive consultations, the Blackfoot Nation, acting on behalf of the Blackfoot Confederacy and the Blood Tribe, asserted a repatriation claim for the sash under the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA). Reviewing the known history of the sash, DAM concluded that it was sold by a Blood person who did not own it, and that it was communally owned by the remnants of the Blood Dog Society at the time it was sold.*

*Applying NAGPRA to this rare religious vestment, DAM agreed that it was an object of cultural patrimony to which the museum did not have right of possession. By repatriating the sash to the Blackfoot Confederacy, DAM lost a valued object from its collections. The meaning to the Blood people, however, was that a living, long-lost sash returned into the care of the community. In dreams of goodwill, the outcome of justice offers a special blessing to us all. In human terms, this is the significance of NAGPRA.*

## Introduction to Repatriation

Bringing the complicated technical aspects of NAGPRA into harmony with human complexities is an important challenge. Tribes, Native Hawaiian organizations, Alaska Native Corporations, lineal descendants of Native Americans, Native American traditional religious leaders, museums, and federal agencies are all affected by the provisions of the law. The implementation of NAGPRA proceeds from a carefully crafted framework of ideas, but these ideas must be applied to many differing circumstances in the real world.

*Keepers of Culture* draws upon the firsthand experiences of the author to illustrate the real-world workings of NAGPRA. This book reflects the opinions of the author, but it draws primarily upon the implementation efforts of the Denver Art Museum and at times explicitly expresses the official views of the museum.

This book has been designed as a practical, hands-on guide to the complete process of reviewing collections, gathering information, preparing well-researched claims, and repatriating items. Various case studies and references to actual situations and objects have been included to help illustrate the law. After more than a decade of implementation, numerous examples of situations exist nationwide, but the case studies used in *Keepers of Culture* are limited to the author's personal experiences in order to most accurately and fairly explore the workings of NAGPRA. Moreover, this book makes no effort to sketch the history of NAGPRA and repatriation in the United States. Instead, this work illuminates what NAGPRA means in practice.

Toward this end, *Keepers of Culture* reflects a new landscape of relationships between the academic community and Indian country. A complex relationship has always existed, of course, but in recent decades, academic institutions and Native American communities have increasingly found themselves exploring a new landscape of mutual interests. In *Keepers of Culture*, this new landscape is expressed as partnership. NAGPRA includes provisions that require communication among tribes, museums, and federal agencies, and this communication readily lends itself to the development of dialogue and mutual respect. These, in turn, provide the essential elements of partnership. The degree to which partnership represents a functioning



# spotlight on navigating nagpra & the regulations

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Implementation of NAGPRA requires careful use of both the law and the federal regulations. *Keepers of Culture* conveniently groups together the related passages from these two sources. For example, in chapter 6, “Sacred Objects,” readers will find excerpts from the law and the regulations in one location for easy use.

The law and regulations use complicated organizational systems that are best understood through hands-on experience. For readers who need to refer directly to the law and regulations, here is a brief explanation of what the citations in *Keepers of Culture* mean. Any mention of sections 1 through 15 refers to the text of NAGPRA. Citations of the law also appear as 25 usc § 3001 through § 3013 (the symbol “§” is used as an abbreviation for “section”). All federal laws are incorporated into the massive *United States Code*, so whenever you see “usc” you know you are dealing with federal law. References to sections 10.1 through 10.17, and to 43 CFR Part 10, pertain to the federal regulations. Regulations are compiled into the *Code of Federal Regulations*, abbreviated in citations as “CFR.” The regulations are also referred to as the “final rule” to distinguish the final version from earlier drafts.

The regulations were originally published in the *Federal Register* on December 4, 1995, together with a long preamble that discusses the choices the authors made in response to input from the general public. An amended version of the regulations was published in the *Federal Register* on August 1, 1997, without the preamble. (See the “Spotlight on Internet Resources” in this chapter for information on how to find copies of the complete text of the law and regulations.)

The provisions of NAGPRA are organized under a system of numbers and letters to permit exact reference to specific ideas. With a few exceptions, the major divisions of the law, sections 1 through 15, are separated into subsections designated by lowercase letters. These lettered subsections are further divided into numbered subsections, which are broken down into subsections headed by uppercase letters, and so on.

The federal regulations are organized in a similar manner. The significant organizational divisions for the regulations are numbered sections 10.1 through 10.17. These sections are separated into subsections designated by lowercase letters. The lettered subsections are further divided into numbered subsections, which are broken down into subsections headed by lowercase roman numerals.

principle or an elusive ideal is greatly dependent upon the attitudes of the involved parties toward each other and toward NAGPRA.

Misconceptions about NAGPRA flow freely among all the parties involved. “The law means that Indians will get back all religious items.” “Museums and federal agencies must put tribes in charge of decisions about cultural affiliation of human remains.” “Items that once belonged to famous tribal leaders automatically qualify as objects of cultural patrimony.” “NAGPRA says that museums don’t really own Indian objects; Indians own them.” *Keepers of Culture* attempts to make clear exactly why each of the above statements is wrong.

The interpretations of NAGPRA set forth in these pages will be subject to debate by knowledgeable experts. *Keepers of Culture* addresses the challenges posed by applying NAGPRA to collections, and it aims to create general agreement as to the meaning of NAGPRA terms and processes. Encouraging a shared understanding of the technical aspects of the law will hopefully increase consistent and fair application of the law by everyone, but museums, federal agencies, and Native American communities will still vary in their interpretations of the law, as well as in the many details of their implementation activities. NAGPRA is a complex law, and differences in implementation should be expected. Even so, Native Americans can study the law and regulations to judge whether museums and federal agencies stray too far from the law in their practices, and *Keepers of Culture* can help frame the issues.

The wording of the law itself is always the primary resource to follow. Federal regulations authored by the National Park Service (NPS) provide a secondary resource. Together, the law and regulations establish the authoritative references for interpreting and applying the law. As disputes are heard by courts and the NAGPRA Review Committee, and as additions and amendments to the federal regulations are formulated, aspects of *Keepers of Culture* may become outdated. For these reasons, this book should be regarded simply as one available resource for educational information—one that specifically reflects the experiences of the author and the Denver Art Museum.

Readers who wish to keep up with current thinking about NAGPRA might consider the annual NAGPRA training workshops held by the University of Nevada at Reno. Taught by C. Timothy McKeown and Sherry Hutt, “NAGPRA’s Evolving



Legacy” provides an up-to-date examination of the law and is highly recommended as both an introduction to NAGPRA and a refresher for developments in case law and NAGPRA Review Committee activities. Phone 775.784.4046 or 1.800.233.8928 to find out about upcoming workshops. Hutt and McKeown are the authors of a particularly useful survey of property aspects of NAGPRA and court cases involving the law, “Control of Cultural Property as Human Rights Law,” in *Implementing the Native American Graves Protection and Repatriation Act* (edited by Roxana Adams [Washington, D.C.: American Association of Museums, 2001], pp. 198–209).



The technical aspects of identifying and repatriating cultural items under NAGPRA are the focus of *Keepers of Culture*. Each chapter considers a specific topic in detail, and all of the chapters together provide a comprehensive review of the issues involved in applying NAGPRA and repatriating items. The appendixes of this book present a model claim and claim assessment developed by DAM and the Zuni Tribe. The glossary is intended as a convenient summary of NAGPRA terms and concepts.

Human remains and associated funerary objects receive some attention in *Keepers of Culture*, but situations involving new excavations and inadvertent discoveries since 1990 are not considered here (see section 3 of NAGPRA). The major focus of *Keepers of Culture* is to clarify the applicability of NAGPRA to items in museum collections that fall into the NAGPRA categories of unassociated funerary objects, sacred objects, and objects of cultural patrimony. The term “cultural items,” as used in *Keepers of Culture*, generally refers to these three classes of objects as a group, although NAGPRA also applies the term to human remains. *Keepers of Culture* discusses each of the three classes of cultural items and also explores in detail the key issues of cultural affiliation and right of possession.

## Repatriation Resources

Much has appeared in print on NAGPRA and the repatriation process since 1990 (see Rayna Green, compiler, *American Indian Sacred Objects, Skeletal Remains, Repatriation and Reburial: A Resource Guide* [Washington, D.C.: American



Indian Program, National Museum of American History, Smithsonian Institution, 1994]). A special 1992 issue of the *American Indian Culture and Research Journal* (volume 16, number 2), which presented papers on the treatment of human remains in Nebraska and California, set forth the issues of religious freedom and historical circumstances that ultimately led to the passage of federal repatriation laws. A 1992 issue of the *Arizona State Law Journal* (volume 24, number 1 [spring]) contained papers that more directly examined NAGPRA and provided very useful analyses of the law, its legislative history, and several case studies. The implementation of repatriation at the Smithsonian Institution's National Museum of Natural History is the subject of a volume of papers published in 1994 (Tamara Bray and Thomas Killion, editors, *Reckoning with the Dead: The Larsen Bay Repatriation and the Smithsonian Institution* [Washington, D.C.: Smithsonian Institution Press, 1994]). In 1995, Haskell Indian Nations University published the proceedings of a NAGPRA workshop that included firsthand accounts of Indians, museum officials, and federal officials (Myra Giesen, editor, *Native American Graves Protection and Repatriation Act of 1990 Compliance Workshop Proceedings*, Haskell Indian Nations University Studies in the Geography of the American Indian, number 2 [Lawrence, Kansas: Haskell Indian Nations University, 1995]). A 1996 issue of *American Indian Quarterly* (volume 20, number 2 [spring]) focused on repatriation issues, with personal accounts, case studies, and topical studies; this material, together with other papers, has also been issued as a book (Devon A. Mihesuah, editor, *Repatriation Reader: Who Owns American Indian Remains?* [Lincoln: University of Nebraska Press, 2000]). Another collection of interesting papers on repatriation and archeology appeared in 2001 (Tamara Bray, editor, *The Future of the Past: Archaeologists, Native Americans, and Repatriation* [New York: Garland Press, 2001]). *American Indian Art Magazine* features a column by Ron McCoy that frequently summarizes notices of intent to repatriate that have appeared in the *Federal Register*. All these publications contain material of varying usefulness on NAGPRA, but none can be characterized as a step-by-step guide to the repatriation process.

Two publications stand out as well-informed guides to NAGPRA and the repatriation process for cultural items. In October 1992, the Technical Information





# spotlight on who must comply with nagpra

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NAGPRA establishes a variety of required compliance activities for museums and federal agencies, and it sets forth standards that claimants must satisfy in seeking the return of objects. The term “museum” is very broadly defined in the law as “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items” (section 2 [8]).

The federal regulations include definitions for the terms “possession” and “control.” “Possession” means that the institution has “physical custody” of the cultural item together with “sufficient legal interest to lawfully treat the objects as part of the collection[.]” The term “control” means having a “legal interest” in cultural items “sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection . . . whether or not the [cultural items] are in the physical custody of the museum or Federal agency” (section 10.2 [i-ii]). Institutions are responsible for implementing NAGPRA with regard to all of the collections in their possession or control, including items loaned by them to other museums and federal agencies.

If a library operated by a small town has Native American collections in its possession or control, it qualifies as a museum under NAGPRA if it or the town receives funds from any federal source. If a museum doesn’t receive federal funds, it has

discretion to comply with certain aspects of the law, such as preparation of summaries and inventories (see glossary). If such museums ever in the future decide to apply for federal funds, it will be important to comply fully with NAGPRA.

Private owners of Native American objects are also exempt from any obligation to prepare summaries, inventories, or to consult with tribes, but they cannot violate the trafficking provisions of the law. Owners of Native American objects should take reasonable care to ensure that they really hold clear title to an item before they sell it. This conforms to American property law, in which if a person attempts to sell a stolen object, the rightful owner can intervene to assert ownership, and if a person knowingly attempts to sell stolen objects, he or she runs the risk of being charged with a crime. In addition, owners of items with attached human remains, such as scalps, can be charged with a violation of NAGPRA if they try to sell the item.

The treatment of unmarked graves in the United States is typically regulated by an array of tribal, state, and federal laws. Enterprising persons who purposefully disturb graves and endeavor to sell Native American human remains and associated funerary objects do so in violation of NAGPRA and common sense. It is offensive in American society today for a person to rifle the contents of any grave, marked or unmarked. Native American graves are not exempt from this moral standard.

Service of the American Association of Museums (AAM) issued a *Forum* entitled “Native American Collections and Repatriation,” prepared by Agnes Tabah and edited by Sara Dubberly. Aimed at assisting museums with implementing NAGPRA, this publication offered an analysis of the law and provided useful guidelines for conducting activities required by the law, such as preparing summary letters and inventories. The AAM guide featured museum policies, case studies, personal accounts, and reprinted material from various sources, such as the 1992 *Arizona State Law Journal* issue on repatriation, but did not offer a step-by-step guide through the complete repatriation process for claimants. It was updated and re-issued in 1993, but both versions relied only upon a draft of the federal regulations, since the final rule was not available until 1995. The AAM updated and expanded this guide in 2001 with the publication of *Implementing the Native American Graves Protection and Repatriation Act*, edited by Roxana Adams (Washington, D.C.: American Association of Museums Technical Information Service, 2001).

In 1996, the American Indian Ritual Object Repatriation Foundation (AIRORF) published *Mending the Circle: A Native American Repatriation Guide* (available through its website, [www.repatriationfoundation.org](http://www.repatriationfoundation.org)). In contrast to the AAM guide, *Mending the Circle* was aimed at tribes, and it included a brief—but useful—guide to repatriating cultural items from museums (pp. 12–14), as well as several papers on practical issues that claimants need to address when setting up tribal repatriation programs (pp. 29–44, 55–66). This publication also included a range of papers and firsthand accounts on repatriation but contained no references to actual examples of objects or situations that could illustrate the repatriation process.

*Keepers of Culture* differs from these guides in three important ways. First, as much as possible, references to actual objects and situations have been incorporated to help illustrate technical definitions and processes. These examples receive brief or extended treatment, and in some instances, more than one has been included to show the diversity of possible approaches to the law.

Second, this project focuses mainly on the practical challenges of applying NAGPRA and seeking the repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony held by museums and federal agencies, rather than attempting to offer a comprehensive review of all aspects of the law.



Other aspects of NAGPRA may be briefly mentioned or summarized to ensure that readers are aware that these issues exist, but the focus is on tribe/museum interaction and repatriation.

Third, *Keepers of Culture* provides information that goes beyond what appears in the AAM or AIRORF publications. The AAM guide helps museums to design programs to implement the law, while the AIRORF guide is aimed at assisting tribes with practical information on building tribal repatriation programs. *Keepers of Culture* has been designed to provide all involved parties with detailed information on issues that need to be addressed in applying NAGPRA to collections, preparing repatriation claims, and assessing claims.

Legal experts view NAGPRA as both human rights legislation and property law. Congress enacted the law as remedial legislation to address disparities endured by some Americans, but it deals with issues of property. Courts view human rights laws as intentionally designed by Congress to benefit a group suffering discrimination—in this case, Native American sovereign communities and lineal descendants of Native Americans. Courts may also employ what is known as the “trust doctrine” to interpret the intent of Congress in passing laws like NAGPRA to benefit Native Americans. As explained in Felix Cohen’s *Handbook of Federal Indian Law* (edited by Rennard Strickland and others [Charlottesville, Virginia: The Michie Company, 1982], p. 221): “Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress’ intent toward them is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.”

The trust doctrine is relevant because as an element in the canons of statutory construction, it has a potential impact on how NAGPRA may be implemented. For NAGPRA, it means that in situations where interpreting the law could bring ambiguous results, it is proper to read the law in a manner most favorable to Native Americans. Determining this outcome will require consultation with the affected Native Americans. Fair application of NAGPRA does not mean, however, that Native American claimants should automatically be favored in making claims since repatriation claims need to meet a variety of basic requirements.



Claims must satisfy these requirements because NAGPRA conforms to the fabric of U.S. property law. NAGPRA seeks to accommodate traditional Native American property concepts, but in a way that does not overturn existing American ideas about ownership. NAGPRA presumes that museums have proper title to their collections, and repatriation claims for unassociated funerary objects, sacred objects, and objects of cultural patrimony must show that the item was improperly taken from its rightful owners. The trust doctrine should not be employed to overturn property law; instead, it serves as a useful tool in instances where close calls can be reasonably resolved on the basis of consultation with Native Americans.

NAGPRA sets up an overarching framework of definitions and procedures designed to establish a set of principles that parties can apply to specific situations. In this system, the language of the law and the regulations serve as the primary rules of the road to repatriation. Tribes, museums, federal agencies, and lineal descendants should seek a shared understanding of the rules, because in the absence of such understanding, the system will not operate smoothly, in much the same way as if drivers on a highway each had their own interpretation of paint markings on the road surface.

Administrators of the law will necessarily pass through a learning stage before they feel comfortable in negotiating the complexities of NAGPRA. As tribes, museums, and federal agencies proceed toward their various destinations in American life, it is important for all of us to gain the necessary basic skills to share the road successfully. The intention of *Keepers of Culture* is not only to promote the creation of common expectations for everyone involved in repatriation, but also to provide a helpful illustrated perspective on repatriation processes involving cultural items. Hopefully, this book, as well as other accumulated resources, will help everyone avoid unwanted collisions.



# spotlight on internet resources

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The internet has useful resources on NAGPRA and repatriation. To access the sites listed here, type in the site address in the “address” box near the top of your internet screen, and then press “go” with your mouse or hit “enter” on your keyboard. (Note: some sites on the web contain “PDF” formats for which you will need to download a copy of the Adobe Acrobat Reader onto your computer. To download a free copy, go to <http://www.adobe.com/products/acrobat/readstep.html>, scroll down, and fill in steps 1 through 3. You’ll need to know your operating environment, such as Windows Office 2000, and will be required to fill in your name and e-mail address. Click the download button and follow the directions for registration.)

## **National Park Service site**

<http://www.cr.nps.gov/nagpra/index.htm>

This page contains links to the text of NAGPRA and the NAGPRA regulations and covers such topics as the NAGPRA Review Committee, the Native American Consultation database, NPS NAGPRA grants program, and the National Archeological DataBase.

NPS has an important role in making NAGPRA work. Congress delegated to the Secretary of the Interior the responsibility to implement the law, and, in turn, NPS was entrusted with this job and established a program for this purpose. This website gives convenient access to the program.

## **University of Iowa site**

<http://www.uiowa.edu/~anthro/reburial/repatriation.htm#NAGPRA>

This site contains numerous links to other sites that deal with repatriation issues in the United States and internationally and focus on case histories, bibliographies, personal opinion papers, and other topics.

## **American Indian Ritual Object**

### **Repatriation Foundation site**

<http://www.repatriationfoundation.org>

AIRORF is a private foundation dedicated to repatriation of Native American religious objects, with a focus on facilitating the return of privately owned objects to tribes.

## **National Museum of Natural History site**

<http://www.nmnh.si.edu/anthro/repatriation/index.html>

This site is operated by the NMNH Repatriation Office and contains useful information about the repatriation provisions of the National Museum of the American Indian Act and its amendments, as well as information on previous and ongoing repatriation initiatives at NMNH. This repatriation program should not be confused with that of the National Museum of the American Indian, which is covered by the same law but has its own separate repatriation program.

### **San Francisco State University sites**

<http://www.sfsu.edu/~nagpra/web.htm>

<http://bss.sfsu.edu/calstudies/arttest>

The first site contains a helpful and succinct summary of NAGPRA concepts and repatriation processes framed for general understanding. The second contains useful information about pesticides on collections affected by NAGPRA.

### **Federal Register notices**

[http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html)

Publication of notices of intent to repatriate and notices of inventory completion in the *Federal Register* is an important component of compliance with NAGPRA. Using the above website, tribes and museums can track the appearance of notices and can access past notices dating back to 1995. To search for specific notices, scroll down the screen to “*Federal Register* Volume” and check off the appropriate year or years of interest. Move down to “*Federal Register* Sections” and check “Notices.” Continue down to “Issue Date” and enter the applicable range of dates of interest for the search. Go next to “Search Terms” and type in appropriate search terms (such as the name of a tribe or museum) in quotation marks. Click the “Submit” button and a list of notices containing the search terms will soon appear. The text of each notice can be accessed by clicking on “text” or “html.”

### **NAGPRA-L discussion list site**

[majordomo@world.std.com](mailto:majordomo@world.std.com)

You, too, can voice your opinions on repatriation to the virtual world! To join the discussions on NAGPRA-L, you must first subscribe by sending the e-mail message “subscribe NAGPRA-L” to the above address; you will receive a message requiring your response before your account can be activated.





# Chapter two

Information-Sharing & Consultation





## Depictions & Dialogue

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*In 1869, near Summit Springs, Colorado, the Pawnee Nation and its American allies attacked and destroyed a large camp of Cheyenne and Sioux Dog Soldiers. This battle followed decades of intermittent war between the Pawnees and the Sioux-Cheyenne alliance. The attack broke the military power of the Dog Soldiers and encouraged the Pawnees to resume hunting expeditions in the region. In the aftermath of the battle, an American soldier picked up a ledger book from the ruins of the camp and found that it contained numerous drawings of incidents of war with Pawnee and American enemies.*

*Many years later, the ledger book found its way into the collections of the Colorado Historical Society (CHS). With the passage of NAGPRA, CHS administrators were faced with the question of the status of the ledger book under the law. Did it fit any NAGPRA categories of cultural items? What about cultural affiliation? Right of possession? What information could help answer these questions?*

*Initial consultations with the Southern Cheyennes and Northern Cheyennes brought the existence of the ledger book to their attention. Careful analysis of the drawings ultimately led scholars at CHS to conclude that eleven Cheyenne artists had drawn the scenes, and that the ledger book represented a communal record of individual Dog Soldier war honors. CHS staff consequently designed an ambitious plan in response to the NAGPRA requirements for information-sharing and consultation that involved the sponsorship of a special NAGPRA symposium on the ledger book. The daylong symposium, entitled “The Art of History,” was developed in partnership with Gordon Yellowman, the Southern Cheyenne repatriation coordinator. The symposium was soon expanded to include a second day in which the Denver Art Museum and the Rosebud Sioux Tribe explored NAGPRA applicability to a winter count—a form of historical calendar—in the DAM collection.*

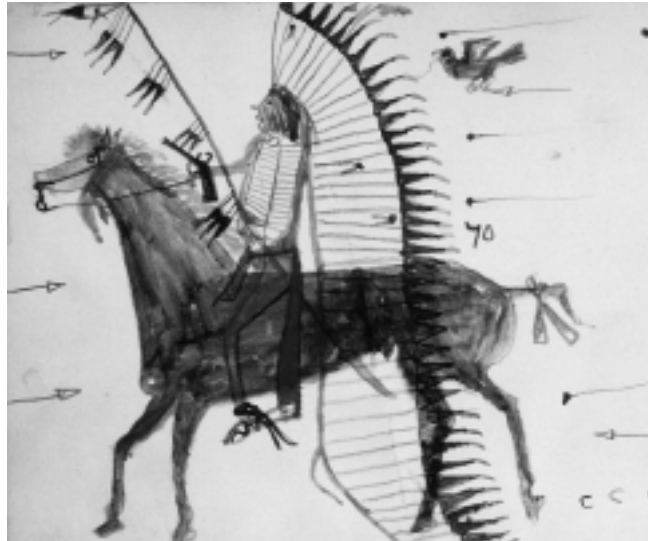
*“The Art of History” brought together tribal representatives, art historians, and NAGPRA experts to share opinions and discuss how NAGPRA applied to the CHS ledger book. The group considered a variety of topics. Is the ledger book culturally affiliated with the Southern Cheyenne and Northern Cheyenne tribes? Does it represent a funerary object, sacred object, or object of cultural patrimony? How do the United States military rules of engagement mesh with the NAGPRA right of possession standard?*

## Information-Sharing and Consultation

Meaningful dialogue on NAGPRA issues can take many forms, including activities like “The Art of History.” That symposium represented an effort at ideal consultation and information-sharing under NAGPRA because of its inclusiveness—it brought in experts, tribal officials, and museum representatives to consider together the status of important items under the law.

This chapter deals in depth with the concepts of information-sharing and consultation. *Keepers of Culture* begins with these concepts because they establish a necessary foundation upon which the applicability of NAGPRA to specific objects can proceed. NAGPRA took its final form through dialogue between Indian leaders and

leaders in the museum community, so it is appropriate that information-sharing and consultation hold central roles in the law. Through these concepts, the law promotes the ideal that federal officials, museum officials, tribal representatives, traditional religious leaders, and lineal descendants should work



This drawing of a Lakota war exploit appears at the end of the 1888 Spencer copy of the Baptiste Good Winter Count in the DAM collection.

together on a basis of mutual respect to define and resolve important issues.

By emphasizing consultation and information-sharing, the law encourages the adoption of a partnership approach to repatriation. In fact, as discussed below, various provisions of the law and regulations encourage a spirit of cooperative engagement by requiring museums and federal agencies to actively promote dialogue with Indian tribes about collections.



## **The NAGPRA Requirement to Share Information**

As mentioned above, NAGPRA requires museums and federal agencies to proactively share information about their Native American ethnographic collections, and this aspect of the law helps to set the tone for consultation activities that follow. The situations under which information-sharing is required overlap with the consultation provisions, which are considered later in this chapter.

- 1. NAGPRA requires museums and federal agencies to share a summary of information about collections that are or may be culturally affiliated with tribes.**

## **Important Points**

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### **Information-Sharing**

- 1** NAGPRA requires museums and federal agencies to share a summary of information about collections that are or may be culturally affiliated with tribes.
- 2** NAGPRA requires museums and federal agencies to share detailed information about human remains and associated funerary objects that are culturally affiliated with tribes.
- 3** NAGPRA requires museums and federal agencies to make available to tribes institutional records regarding the history of collections that are or may be culturally affiliated with tribes.
- 4** NAGPRA requires museums and federal agencies to share information that can assist claimants in preparing repatriation claims.
- 5** NAGPRA requires claimants to prepare claims that include enough information to sustain the claim's conclusions, and lineal descendants, tribal NAGPRA representatives, and religious leaders must share information to clarify their standing for consultation.

Section 6 of NAGPRA specifies that, using available institutional information, museums and federal agencies must create written summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony. The summary “shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.” Recognizing that it would be difficult for museums and federal agencies to accurately identify sacred objects and objects of cultural patrimony on their own, the National Park Service advised them to simply send out letters summarizing the entire collection relevant to each tribe and to invite further consultation.

In the 1995 federal regulations, NPS interpreted the summary provision of NAGPRA to mean that “each museum . . . that has possession or control over collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony must complete a summary of these collections” (section 10.8 [a]). This summary should provide useful information to culturally affiliated tribes and lineal descendants by describing the number of objects, kinds of objects, and “reference to the means, date(s), and location(s) in which the collection or portion of the collection was acquired, where readily ascertainable[.]” The letters must contain “information relevant to identifying lineal descendants, if available, and cultural affiliation” (section 10.8 [b]). The summary can also include more detailed information, such as lists of items.

It’s important to stress that the summary requirement applies to Native American collections in general and doesn’t just come into play upon the confirmed presence of unassociated funerary objects, sacred objects, or objects of cultural patrimony in those collections. The summary is also intended to provide an opportunity for institutions to clarify cultural affiliation for objects in collections (see chapter 4 for information on this aspect of cultural affiliation). Museums and federal agencies have typically met this summary requirement by sending out letters to tribes that either listed objects or contained brief narrative discussion of collections.

Summaries are not to be confused with inventories, which concern human remains and associated funerary objects. Summaries should contain sufficient information to notify tribes of the existence of collections that need investigation



through the consultation process, but they need not provide enough detail to settle questions about which items fit under the law. This NAGPRA requirement serves to open the door for dialogue. Tribes must consider how best to proceed with further investigation and consultation concerning objects of interest.

The law set a deadline that summaries were to be sent out to tribes by November 1993. Items acquired after that date aren't explicitly exempt from this information-sharing requirement, so museums and federal agencies would be prudent to regard this provision as an ongoing responsibility even though no specific guidelines exist on appropriate summary of objects acquired after 1993. Information about such acquisitions can be shared through ongoing consultations with tribes, and this process should be documented in some form. In some situations, institutions might consider whether it would be suitable to prepare a new summary, such as when a new collection is acquired that pertains to a tribe with whom consultations have not occurred or have been minimal.

## **2. NAGPRA requires museums and federal agencies to share detailed information about human remains and associated funerary objects that are culturally affiliated with tribes.**

Section 5 of NAGPRA requires federal agencies and museums that receive federal funding to compile a detailed census ("inventory") of human remains and inventory of associated funerary objects in consultation with tribal government officials, Native Hawaiian organization officials, Alaska Native groups, and traditional religious leaders. The deadline for completing this census/inventory was November 1995. NAGPRA refers to this document as an "inventory," but the Denver Art Museum prefers "census" because this term reflects the fact that human remains represent people, not objects. The federal NAGPRA regulations (section 10.9) provide detailed guidelines on how museums should inventory human remains. The NAGPRA inventory requirement applies equally to human remains collected by Indians and non-Indians and covers remains that originated from graves, from persons killed in battle, from murder victims, and from other contexts.

Museums and federal agencies typically hold human remains that fall into



two general classes: remains removed from mortuary contexts or death scenes, and remains attached to objects such as shirts and necklaces. *Keepers of Culture* contains some discussion on human remains and funerary objects from graves and battlefields but primarily focuses upon items that may qualify as unassociated funerary objects, sacred objects, and objects of cultural patrimony. Native Americans attached human body parts to such items as shirts and leggings, included them in religious bundles, and used them for other purposes. While hair locks and umbilical cords may have been freely donated to the makers of shirts and amulets, Native Americans sometimes cut off fingers and scalps from the bodies of slain enemies and incorporated them into objects.

Under NAGPRA and its regulations, the status of human remains attached to objects is complicated. For this reason, the treatment of such remains by museums and federal agencies will no doubt vary greatly. Tribes may wish to formulate their own policies toward such items and human remains after carefully studying the law and regulations in order to ensure that consultation with institutions will bring the most favorable possible results.

Human remains are not defined in NAGPRA, but section 10.2 of the regulations gives the following definition: “*Human remains* means the physical remains of a human body of a person of Native American ancestry.” The preamble to the regulations adds that NAGPRA “makes no distinction between fully articulated burials and isolated bones and teeth.” The preamble also states that a clause in the draft version of the regulations specified that “bones, teeth, hair, ashes, or mummified or otherwise soft tissue” are human remains, but this clause was dropped from the final regulation in response to criticism that it was too limiting (p. 62137).

This definition does, however, exclude “remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets” (section 10.2 [d][1]). The preamble to the regulations further specifies that the exclusion for naturally shed body parts does not apply to remains “for which there is evidence of purposeful disposal or deposition” (p. 62137). The preamble also notes that NAGPRA’s legislative history “is silent” regarding the “status of human remains that were not freely given but that have been incorporated into objects that



are not cultural items as defined in these regulations.”

The law and the regulations do not specifically direct museums to include human remains attached to objects in the required inventory/census, but museums and federal agencies should keep in mind that Native American communities will most likely be interested in *all* Native American human remains held by institutions, whether or not they are associated with an ethnographic object, and whether or not the human body parts can be considered to have been freely given. Museums and federal agencies should therefore consider providing detailed information about all human body parts in their collections to assist tribes in setting consultation agendas and repatriation priorities.

In accordance with recommendations made by the NAGPRA Review Committee (for more on this committee see chapter 10), the federal regulations direct that human remains attached to funerary objects, sacred objects, and objects of cultural patrimony must be treated by the museum as part of the object for the limited purpose of determining cultural affiliation (section 10.2 [d][1]). This means that Native American human remains attached to objects must be viewed as affiliated with the tribe from which the object originated even if this outcome is offensive to tribes that have a known cultural affiliation to the human remain.

This provision of the regulations may be difficult to reconcile to NAGPRA, which clearly empowers culturally affiliated tribes to claim human remains (see chapter 4 for more on cultural affiliation) and does not provide any exemption for human remains associated with objects. As a matter of law, federal regulations typically cannot overturn the actual language of a federal law. When a law is unclear or can be read in different ways, however, courts will usually respect the interpretation given by federal regulations if it fits the law, even if it's not the best possible interpretation. This idea is known in law as the *Chevron* doctrine. The *Chevron* doctrine might well be brought up among disputing claimants in a court situation involving cultural items with attached human remains. For claimants who wish to avoid court, it would certainly be advisable for the claimant affiliated with the human remains and the claimant affiliated with the object to work in partnership to repatriate cultural items with attached human remains.

The purpose of this provision in the NAGPRA regulations is to discourage



museums from taking unilateral action to separate human body parts from objects that may derive some special significance from the presence of the human remains. In some cases, the presence of a human body part may be what makes the object fall into one of the NAGPRA categories. Museums that develop plans for disposing of culturally unidentifiable or non-Indian human remains attached to objects would be prudent to develop any such plans in consultation with tribes that are or may be culturally affiliated with the object in question.

The responsibilities of museums and federal agencies for human remains attached to objects are complex. In most cases, the identity of the remains will be unclear and so may not be covered by NAGPRA at all, while in some instances, a museum or federal agency may need to consult with the tribe from which the item originated as well as with the tribe that is culturally affiliated with the attached human remain. It's important to determine whether the object qualifies as a cultural item under NAGPRA, because if it does not, claimants and institutions are clearly free to establish cultural affiliation for any attached human remains according to a preponderance of the evidence (see chapter 4 for more on cultural affiliation). Tribes, museums, and federal agencies may differ greatly in their understandings of the law and regulations on this point, so consultation will be important.

### **3. NAGPRA requires museums and federal agencies to make available to tribes institutional records regarding the history of collections that are or may be culturally affiliated with tribes.**

Museums and federal agencies are required by section 6 of NAGPRA to make information available about the history of specific items. Upon request, museum and federal agency officials are required to “provide lineal descendants, Indian tribe officials, and traditional religious leaders with access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of Native American objects subject to this section,” and “such information shall be provided in a reasonable manner to be agreed upon by all parties” (section 6 [b][2]).



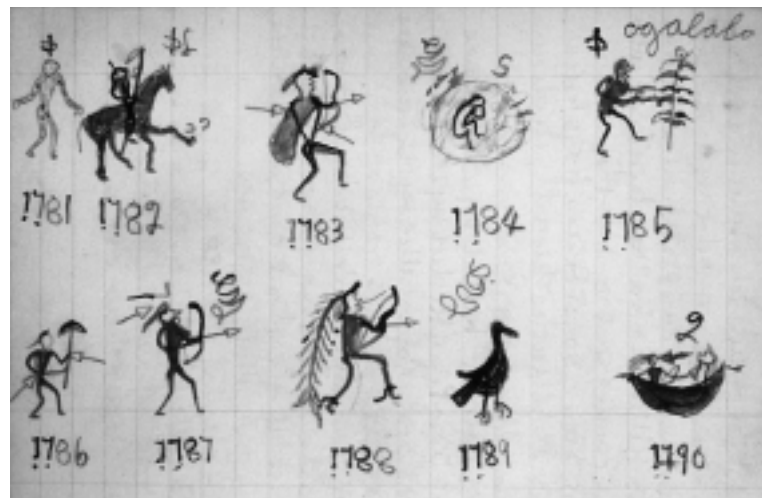


This provision of the law requires museums to share information that pertains to cultural affiliation and the circumstances under which an item entered museum collections, but all readily available museum records for items of special interest can be assembled and reviewed for potential relevance. This information can be shared in two main ways. First, museums and federal agencies can perform the work of identifying records, photocopying them, and sending them to tribes upon request. Second, museums and federal agencies can invite tribes to send a delegation to the institution to review the records and photocopy any documents of interest.

If documentation is to be shared in a “reasonable manner,” it follows that all parties must agree on a mutually satisfactory arrangement. Tribes, lineal descendants, and religious leaders cannot require museums and federal agencies

to accommodate requests that are unreasonably inconvenient, and institutions should review their policies to be sure that they do not interfere with making useful

A page from the Baptiste Good Winter Count. Sioux winter counts were prepared as calendars of important community events; each pictograph depicts an incident carefully selected to represent an entire year.



records available to tribes. Both parties should work together to establish a process for handling records.

Information pertaining to the following questions will be useful in identifying which objects qualify as cultural items: Does the institution hold objects that came from the burials of persons who are or may be culturally affiliated with a native community? Does the institution hold items that have been used by traditional religious leaders in ceremonial activities associated with the community? Does the institution hold items that are of central importance to the community and which could represent communal property of some kind? Do records exist that pertain to the transaction under which items that may qualify as unassociated funerary



objects, sacred objects, and objects of cultural patrimony left the community? (Each of these categories of cultural items is considered in greater detail in later chapters of *Keepers of Culture*.)

It is critically important for tribes to obtain copies of any records that can help to answer these questions, and it may also be important for tribes to learn what museum experts know about the objects in their collections. Museums and federal agencies should make every reasonable effort to share this information—to do otherwise would hinder the effective implementation of NAGPRA.

Museum and federal agency officials don't need to know for sure whether their collections contain cultural items covered by NAGPRA. In fact, determining that an item is a sacred object or an object of cultural patrimony under NAGPRA typically requires consultation with tribes. Museums and federal agencies therefore have an obligation to consult with tribes regarding their collections in general and to share information that will help clarify cultural affiliation and identify specific cultural items.

Although museums and federal agencies are under no obligation to make the above types of information available in the absence of an actual request by a tribe, NAGPRA does not prohibit institutions from establishing proactive programs to share information. Museums generally regard themselves as educational institutions, and getting records better organized to serve NAGPRA will benefit all future researchers. Because NAGPRA ultimately increases public access to meaningful knowledge, institutions that develop proactive programs can take pride in such efforts.

#### **4. NAGPRA requires museums and federal agencies to share information that can assist claimants in preparing repatriation claims.**

Special information-sharing requirements pertain to the development of repatriation claims. NAGPRA includes the following language, which establishes a statutory requirement that museums must honor when notified of an intent on the part of a lineal descendant, Indian tribe, or Native Hawaiian organization to prepare a repatriation claim: “Sharing of Information by Federal Agencies and Museums.—Any Federal agency or museum shall share what information it does



## spotlight on “The Art of History”

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In the course of a joint consultation with representatives of the Rosebud Sioux Tribe and Standing Rock Sioux Tribe, the Denver Art Museum learned that a winter count was of special interest to the Rosebud representatives. Dialogue led to a plan under which DAM and the Rosebud Sioux would hold a daylong symposium on the applicability of NAGPRA to the winter count. This was held as the second part of “The Art of History” (described at the beginning of this chapter), a symposium on a Cheyenne ledger book in the collections of the Colorado Historical Society. DAM’s only obligation under NAGPRA was to collect and share institutional records regarding the winter count, but DAM and the tribe believed that the symposium format, with its emphasis on bringing together experts to share information, would better address the status of winter counts as a class under NAGPRA.

The spirit of NAGPRA calls for museums and federal agencies to assist claimants by proactively seeking to work in partnership with them to identify informational needs and to make that information available in a useful form. Museums and federal agencies have no duty to prepare claims for Indian tribes or lineal descendants, but both institutions and claimants should jointly consider how the institutional information might be relevant and useful. Claimants and museums have a common interest in knowing that accurate information forms the basis of a claim. Independently, the resources of each party may be too thin to sustain credible research, but by pooling resources, museums and claimants can enhance their ability to gather and assess information that can clarify the applicability of NAGPRA.

possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section” (section 7 [d]).

This means that when a party with standing to make a claim under NAGPRA expresses an interest in repatriating specific objects, museums and federal agencies are required to assist such potential claimants in the preparation of claims by sharing relevant information. Potential claimants should consider providing formal written notification of their intent to prepare a claim. They should include a reference to this provision of NAGPRA and a request that all information relevant to claim preparation be made available. Museum and federal agency officials should then consider what kinds of information would be most useful to a prospective claimant and work to establish a mutually agreeable framework for sharing the information.



Museums and federal agencies that receive notification of an intent to prepare a claim may not withhold information or otherwise obstruct claimants from collecting institutional information about the object or objects under investigation. As a practical matter, it is essential for claimants to have all available institutional information about an object prior to preparing a claim. Claimants who do not have the full documentary record and decide to bypass notification of intent to prepare a claim run the risk of preparing and submitting a claim and then discovering that institutional information raises important issues that must be addressed.

The concept of “information” should be broadly interpreted. This provision of the law originated—as did many other provisions of NAGPRA—from a recommendation of a 1989 panel of museum, anthropology, and Indian representatives (“Report of the Panel for a National Dialogue on Museum/Native American Relations [Feb. 28, 1990],” appendix in *Arizona State Law Journal*, volume 24, number 1 [spring], pp. 487–500). The panel’s recommendation limited information-sharing to records pertaining to “the source and prior history” of the claimed object, but Congress did not include these limits in the final language of NAGPRA. Thus, as a matter of policy, museums should not limit themselves to sharing information related only to the origin and history of ownership of the object when notified of intent to prepare a claim. If institutional information pertains to cultural affiliation, fit to a NAGPRA category, or right of possession, it must be shared as well.

At the Denver Art Museum, when we receive a notice of intent to prepare or submit a repatriation claim for a specific object, staff collects the available documentation and provides copies free of charge to the claimant. At times, this information may include published material that staff knows of and can readily obtain, but we don’t usually conduct further detailed research. It’s the responsibility of claimants to perform more comprehensive research in oral traditions, ethnographic literature, and historical documents.

**5. NAGPRA requires claimants to prepare claims that include enough information to sustain the claim’s conclusions, and lineal descendants, tribal NAGPRA representatives, and religious leaders must share information to clarify their standing for consultation.**



The information-sharing provisions of NAGPRA are very specific for museums and federal agencies and are generally designed to assist potential claimants in gathering sufficient information to pursue their rights effectively. For lineal descendants, tribes, Native Hawaiian organizations, Alaska Native Corporations, and traditional religious leaders, the primary obligation to share information occurs in the context of claim preparation, and a more limited responsibility is raised when they must demonstrate their status as parties with rights under NAGPRA.

It is appropriate for museums and federal agencies to have reasonable knowledge that a party has standing as a lineal descendant, tribe, Native Hawaiian organization, Alaska Native group, or traditional religious leader. This will help define the institution's obligations in the course of consultation. Persons wishing to inquire into an institution's collections for NAGPRA purposes should therefore be prepared to clarify their status. Are they looking for religious items owned by an ancestor or funerary objects buried with an ancestor? Do they represent a group with federal recognition and are NAGPRA matters their official responsibility? Do they meet the guidelines set forth in the federal regulations (see section 10.2 [d][3]) regarding the definition of a traditional religious leader?

NAGPRA does not obligate Native Americans to claim cultural items. If they choose to seek repatriation, however, it is their obligation to prepare and submit written claims that contain sufficient information to meet NAGPRA repatriation standards. These matters are considered more thoroughly in chapter 10, but claimants must share information in a variety of areas, depending upon what is being claimed, and they cannot require museums and federal agencies to assist with any claim research beyond the provision of readily available information held by the institution. Museums and federal agencies have discretion to provide assistance in claim preparation that goes beyond what NAGPRA requires. The level of collaborative research is best determined through consultation.

Claims for human remains and associated funerary objects are relatively simple matters once an institution determines that the claimants are indeed connected by lineal descent or by cultural affiliation. Once formal findings have been made by an institution, and following National Park Service publication of the required notice of inventory completion, the lineal descendant or culturally affiliated tribe



need only prepare a brief written request for repatriation: “Dear museum official: We are now prepared to take custody of the human remains and associated funerary objects found by your institution to be culturally affiliated with our tribe [or: found by your institution to be my direct lineal ancestor]; please get in touch as soon as possible to discuss with us the timing and manner of the repatriation.” After receiving such a letter, museums and federal agencies then need to consult with the claimant to determine the specific arrangements of repatriation (see section 7 [a][3]).

Claims for unassociated funerary objects, sacred objects, and objects of cultural patrimony are covered in later chapters of *Keepers of Culture*.

### **Information-Sharing at the Denver Art Museum**

In keeping with both the letter and spirit of NAGPRA, the Denver Art Museum addresses the information-sharing provisions of NAGPRA in a variety of ways, all aimed at providing the best possible assistance to tribes. In responding to written inquiries, the Native Arts Department must balance staff resources against the recognition that it is expensive and time-consuming for tribes to send researchers directly to every museum. The Pawnee Nation, for example, received several hundred summaries in 1993 from museums and federal agencies, but lacked the resources to fund travel or to even conduct an effective analysis of the summaries so it could establish useful priorities. Tribes can divert resources to NAGPRA matters, but NAGPRA imposes the primary information-sharing requirements upon museums and federal agencies, not tribes.

Visits by tribal delegations to review and discuss objects in the DAM collection provide a key opportunity to make records available to interested tribes and to invite further research. In addition, when notified of an intent to prepare a claim or when presented with an actual claim, DAM staff make it a priority to collect readily available institutional information about the items in question.

In response to the 1993 summary information sent out by DAM to nearly seven hundred communities, a number of letters came back from tribes requesting



further information of different types. The staff in the Native Arts Department answered some of the letters with a convenient database printout that listed collections item-by-item, but this information was minimal and generally did not reflect the full range of data that actually existed in DAM files.

After hiring a part-time repatriation coordinator in 1995 (a position shared with the Colorado Historical Society), DAM still found it difficult to provide detailed information because staff was also trying to complete the NAGPRA-required inventory, hold consultation visits, respond to claims, and implement NPS grant-funded activities. Photocopying records can be time-consuming, and few museums and federal agencies have the resources to accommodate every request for records. DAM staff did give copies of catalog cards to visiting delegations as a top priority of information-sharing. NAGPRA doesn't require museums and federal agencies to ship out records upon request, since all parties must jointly agree on the manner in which such information requests are met.

For museums like DAM, which aim at model NAGPRA implementation, it is frustrating to receive a request for information and be unable to respond effectively. It was distressing to know that tribal officials waiting at their desks for a packet from DAM were waiting in vain. The solution ultimately came when DAM assisted the Colorado Historical Society and the Colorado Commission of Indian Affairs in setting up a special program designed to assist tribes and museums in implementing NAGPRA. DAM called upon this program for help in answering information requests and, over a period of months, got caught up on the backlog of requests.

Information-sharing is critical for NAGPRA. Superficial responses to requests from tribes for information may provide a quick fix, but they are ultimately unhelpful to implementation of the law. NAGPRA does not require that museums develop model programs. In hindsight, however, DAM could have better accomplished its goal of ideal compliance by diverting internal resources or seeking independent funding to hire a full-time repatriation coordinator in 1994, when Congress first made funds available for NAGPRA implementation. Because NAGPRA is a new and unprecedented law, it has been difficult for all parties to accurately plan for future needs.

In the end, tribes must work with museums and federal agencies to create reasonable ways to share information. In claim situations, NAGPRA requires a higher



level of effort on the part of museums and federal agencies, but when seeking to address more general questions about museum collections, tribes themselves are in the best position to determine their needs. To meet those needs, tribes must proactively make plans to contact institutions and work with them to identify and gain access to useful records.

### **The NAGPRA Requirement to Consult**

Museums and federal agencies are required by NAGPRA to consult with Native Americans under a variety of circumstances. Consultation essentially means that authorized representatives of tribes and institutions communicate in a meaningful manner on NAGPRA and what it means for each party. The nature of consultation will vary greatly, depending upon the particular agenda of the parties, but NAGPRA sets forth specific requirements that apply to tribes, lineal descendants, traditional religious leaders, museums, and federal agencies. The discussion below outlines these requirements. (The consultation provisions of section 3, which deal with new excavations and inadvertent discoveries after 1990, are outside the scope of this book.)

#### **1. NAGPRA requires museums and federal agencies to consult with tribes, lineal descendants, and traditional religious leaders following the sharing of summarized information about collections that are or may be culturally affiliated with tribes.**

Section 6 of NAGPRA states that after museums and federal agencies circulate summaries describing their collections, they must then actively consult “with tribal government and Native Hawaiian organization officials and traditional religious leaders” (section 6 [b][1][B]). The federal NAGPRA regulations further specify that museums must consult with those Indian tribes and traditional religious leaders “[t]hat are, or are likely to be, culturally affiliated with unassociated funerary objects, sacred objects, or objects of cultural patrimony ” (section 10.8 [d][1][B]). This consultation “must begin . . . no later than the completion of the summary





process [November 1993]” and “may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue” (section 10.8 [d][2]).

Although the regulations limit this consultation requirement to unassociated funerary objects, sacred objects, and objects of cultural patrimony, museums typically will be unable to unilaterally identify sacred objects and objects of cultural patrimony in their collections. The preamble to the NPS federal regulations discusses an objection raised by one commenter to the proposal that a museum official could identify a sacred object prior to consultation, but NPS responds: “Documentation may be sufficient to indicate that a particular item in a museum . . . collection might fit the definition of sacred object,” and “[t]he museum . . . should use this information to advance the consultation process” (p. 62150). This point also applies to objects of cultural patrimony and unassociated funerary objects.

Museum and federal agency officials should therefore prepare for consultation by reviewing readily available records and identifying items in the collections that could have some potential for NAGPRA applicability, although institutions are not expected to issue any unilateral determinations of applicability. It would also

## Important Points

### Consultation

- 1 **NAGPRA requires museums and federal agencies to consult with tribes, lineal descendants, and traditional religious leaders following the sharing of summarized information about collections that are or may be culturally affiliated with tribes.**
- 2 **NAGPRA requires museums and federal agencies to consult with tribes regarding the cultural affiliation of human remains and associated funerary objects.**
- 3 **The NAGPRA consultation requirements assist tribes with implementing NAGPRA programs, but NAGPRA does not require tribes, lineal descendants, or traditional religious leaders to consult with museums and federal agencies.**

be improper for museum and federal agency officials to decide—without consulting tribes—that NAGPRA does not apply to specific Native American objects. After reviewing records for preliminary assessments, museums and federal agencies are required to use their information as a basis for facilitating discussions with interested Native American communities.

At the Denver Art Museum, staff members typically prepare for visits by reviewing catalog cards to identify items that may hold the greatest interest for delegations. For example, if cards mention usage of an item in any form of religious activity, some potential then exists that it may qualify as a sacred object. Since DAM staff members are typically not in any position to know whether such religious activities are still being held or whether the items are needed by religious leaders involved in the ceremony, DAM refrains from identifying items as sacred objects. When consultations touch on items with a history of ceremonial usage, it's appropriate for discussions to turn to the state of present-day ceremonial activities held within communities. This may be a sensitive topic, however, and museums and federal agencies cannot require that tribal officials or religious leaders discuss such matters. Still, opportunity and encouragement to do so should be part of the consultation process.

The section 6 summary is intended to begin a dialogue that will ultimately result in the repatriation of items that fall under the law. Thus, the primary purpose of consulting with tribes, lineal descendants, and traditional religious leaders is for the museum or federal agency to share information that will help tribal officials and lineal descendants determine whether items meet the NAGPRA definitions for unassociated funerary objects, sacred objects, and objects of cultural patrimony and whether interest exists in claiming such items under NAGPRA.

The federal NAGPRA regulations require (section 10.8 [d][4]) that museums and federal agencies obtain the name and address of the Indian tribe official who will represent the tribe in NAGPRA consultations. Tribes must also be asked for recommendations on the consultation process. As consultation proceeds, museums and federal agencies should solicit the names and appropriate methods to contact lineal descendants and traditional religious leaders for any needed consultations. Tribes should also be invited to provide a list of types of objects that are considered



to be sacred objects and objects of cultural patrimony. Since NAGPRA requires museums and federal agencies to engage in consultation, they should document efforts to consult and create a record of each consultation.

Museums and federal agencies have great discretion in conducting consultations, so long as they meet the basic NAGPRA requirements. The quality of the consultation, however, depends upon the interest of all parties in establishing dialogue. The law and the regulations don't require that museums seek NPS grants to support consultation, nor do they require museums to hold special events designed to build partnerships with Indian tribes.

The spirit of the law, however, calls upon museums and federal agencies to develop cooperative relationships with native communities in order to fulfill the letter of NAGPRA. Museums and federal agencies therefore may want to develop projects aimed at partnership through consultation, particularly when it comes to objects of great mutual significance.

Consultation under NAGPRA can provide important opportunities for institutions to correct information in their records and expand their knowledge of items and cultural settings. In 1995, for example, a Hopi delegation visited the Colorado Historical Society and reviewed Ancient Puebloan collections from the Mesa Verde region. Upon being shown an object that had been identified as a snowshoe, elder Dalton Taylor recalled having used a similar item in his youth—but as a frame for transporting a captured live eagle, not as a snowshoe! In this case, consultation meant that CHS lost a snowshoe but gained an eagle frame.

Consultation does not mean that museums and federal agencies must defer entirely to the opinions of tribal delegations. In the CHS case, a sparse record and opinion of unknown authority was all that supported the original identification of the item as a snowshoe. Contrasting this record with the expert opinion of a recognized authority on Hopi culture (Dalton Taylor) leads to the reasonable conclusion that the item in question is more reliably identified as an eagle frame than as a snowshoe. If in the future, however, some other authority with greater weight comes forward, this former snowshoe could become more securely identified as something other than an eagle frame. Credible scholarship flows from an ongoing process, and consultation with tribal authorities has a legitimate place in this process.



## 2. NAGPRA requires museums and federal agencies to consult with tribes regarding the cultural affiliation of human remains and associated funerary objects.

Section 5 of NAGPRA requires museums and federal agencies to make findings of cultural affiliation for human remains and associated funerary objects and to consult with tribes in the course of making these findings. In addition, museums must create and share an “inventory” of culturally affiliated human remains and associated funerary objects. Findings of cultural affiliation are given detailed consideration in chapter 4 of *Keepers of Culture*. Funerary objects are more carefully considered in chapter 5.

Native American human remains for whom no affiliation can be established are included in a second inventory/census of culturally unidentifiable human remains. Museums and federal agencies have no obligation under NAGPRA to consult with any Indian tribe regarding this census. These remains are subject to special regulations still under preparation with the assistance of the NAGPRA Review Committee. The Review Committee has issued recommendations (*Federal Register*, volume 65, number 111, [8 June 2000], pp. 36462–4), that the Department of the Interior will use to write a formal federal regulation. For the moment, the recommendations provide useful guidance for various actions on culturally unidentifiable human remains.

According to the recommendations, a change from unidentifiable to affiliated is encouraged when “additional information becomes available through ongoing consultation or any other source.” This mention of information is best interpreted as a reference to information that qualifies as evidence useful for meeting the standard of a preponderance of the evidence (see chapter 4 for more on this topic). In other words, museums and federal agencies should reevaluate their original findings when evidence comes forward showing that the remains are ancestral to a tribe or a group of tribes. At the point when new information indicates a potentially affiliated tribe, museums and federal agencies must consult with the tribe prior to changing the status of human remains from culturally unidentifiable to culturally affiliated.

Establishing cultural affiliation for culturally unidentifiable human remains should be regarded as an ongoing obligation for museums and federal agencies.



# spotlight on tribal experts

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Consultation under NAGPRA offers an opportunity for museums and federal agencies to solicit tribal expert opinions on material culture. Experts need not have academic credentials, such as a Ph.D. in anthropology. Instead, persons with detailed knowledge of a topic should be recognized as experts who have useful information to contribute. In most Native American communities, traditional religious leaders are typically regarded as experts on religion, and elders are recognized as experts on culture and oral traditions.

It may not always be clear who has expertise on a given topic. When tribes visit museums, they often encounter an entrenched record of accumulated opinions about objects, whether or not the current staff holds expertise on the objects in question. Tribes may view this as arrogant and offensive, but this is also exactly how traditional knowledge works in tribal communities. Ideally, consultation should aim at building a dialogue based upon mutual respect. Curators and scholars at museums should not denigrate tribal experts, nor should tribal experts dismiss academic scholarship. Expert opinions should complement rather than replace written records, but when they conflict, some form of analysis needs to be

applied in order to weigh which information may be most reliable.

In consulting with traditional religious leaders of the Blood Tribe, the Denver Art Museum was informed that a headdress identified in DAM records as a component of a beaver bundle was exactly like a standard type of Motoki Society headdress and probably originated from the society. Tribal officials had consulted with traditional religious leaders of the Motoki Society for this opinion. A DAM research project had produced a detailed object history written by a Blood collector during the 1930s that pointed to a beaver bundle context for this same headdress. DAM took the position that the Blood Tribe needed to show why the written history was incorrect or less reliable than the expert opinion it had provided. Through more careful analysis of the written object history, however, DAM eventually discovered that the timing of the acquisition of the headdress was incompatible with the timing of the writing of the object history, so the history and the headdress were unrelated. In the end, the expert opinions of the Blood religious leaders offered the only credible information to identify the headdress—they had been correct all along.

Once the initial findings have been made in accordance with the law, the statutory requirement has been met, but if new information makes a change possible, it should be investigated.

The Review Committee recommendations also create two models for the disposition of culturally unidentifiable human remains that do not involve setting forth any affiliation to a federally recognized tribe. Tribes interested in repatriating culturally unidentifiable human remains from museums and federal agencies should study these models. One model, for example, involves “regional consultations” among tribes, in which they would work with a museum or federal agency to devise a plan to take before the Review Committee. In the 1990s, following this process, consortiums of tribes successfully repatriated and reburied culturally unidentifiable human remains held by a variety of institutions.

**3. The NAGPRA consultation requirements assist tribes with implementing NAGPRA programs, but NAGPRA does not require tribes, lineal descendants, or traditional religious leaders to consult with museums and federal agencies.**

NAGPRA establishes a variety of requirements for museums and federal agencies to consult with tribes, lineal descendants, and traditional religious leaders, and these provisions enhance the ability of Indian people to pursue their legal rights. The results of consultation are most effective if tribes maintain continuity in their NAGPRA implementation programs and keep a centralized NAGPRA archive that can be a resource for multiple uses. NAGPRA does not, however, require Indian tribes, Native Hawaiian organizations, Alaska Native Corporations, lineal descendants, and religious leaders to consult with museums and federal agencies. Because tribes can ignore or defer action upon requests for consultation, museum and federal agency officials should open the door and be ready to consult even if tribes do not accept the invitation immediately. Museums and federal agencies should keep a record of their efforts to invite consultation.





The Baptiste Good Winter Count records incidents dating back to the early 1700s and also features pictographic representations of oral traditions that refer to even older historical events.

### Traditional Religious Leaders

Traditional religious leaders have a special status under NAGPRA. The federal NAGPRA regulations state that as part of the consultation process, museums and federal agencies should ask tribes for the names of traditional religious leaders to consult with and ways to contact them (section 10.8 [d][4][ii][B]). The regulations contain guidelines to help determine who fits the definition of “traditional religious leader” (section 10.2 [d][3]):

The term *traditional religious leader* means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization or (ii) Exercising a leadership role in an Indian tribe or organization based on the tribe or organization’s cultural, ceremonial, or religious practices.

Museum and federal agency officials should rely upon these guidelines rather than upon individual self-identification or a curator’s knowledge of tribal culture as the basis for identifying a traditional religious leader. Some form of community or group recognition of status as a traditional religious leader is crucial. Official tribal recognition can serve this purpose, but other forms of public tribal recognition can also satisfy the guidelines. Tribes should work with traditional religious leaders not only to figure out how traditional credentials mesh with NAGPRA, but also to jointly set forth an approach to effective consultation.

Tribal delegations consulting with museums and federal agencies often include religious leaders, but tribes may sometimes feel protective of matters



related to religion, particularly since American history includes efforts by authorities in the United States to suppress and discourage Indian religious practices and ideology. Tensions among various religious and political groups within a tribal community may also come into play. If the official leadership of a tribe actively opposes recognition of an individual as a traditional religious leader, museums and federal agencies must still consult with that person if the individual clearly meets the guidelines for status as a traditional religious leader. Such a situation would be unfortunate for the religious leader, since claims must come from tribes or lineal descendants, and a tribe that opposes a religious leader has no obligation to prepare a claim on his or her behalf.

Museums and federal agencies are not typically in a position to mediate matters of internal tribal politics and should refrain from taking sides in tribal community religious and political matters. It might be prudent, however, for museums and federal agencies to encourage traditional religious leaders and tribal governments to work together as much as possible. For more detailed consideration of traditional religious leaders, see chapter 6 on sacred objects and chapter 3 on reviewing collections.

### **Fiduciary Duty and NAGPRA**

Museums need to consider their mission when they think about NAGPRA. In the course of planning the NAGPRA symposium “The Art of History,” for example, the question arose at the Colorado Historical Society as to whether such a proactive approach to information-sharing under NAGPRA could be seen as conflicting with CHS’s fiduciary duty to maintain collections. If the fiduciary duty of a museum is to collect, preserve, and interpret significant items for the benefit of the public, would it pose a conflict with this duty to sponsor an activity that could result in the loss of important objects? In this instance, CHS ultimately supported the symposium, but the event raised an interesting and highly significant question concerning fiduciary responsibilities of museums in general.

The language of NAGPRA achieved its final form as a result of careful sculpting





by the museum community and Native Americans, and it constitutes a mandate by Congress that museums deaccession and return certain objects under certain conditions. It is not a fiduciary duty of any individual museum to oppose, ignore, or undermine the intent of legislation crafted and supported by the museum community, passed by Congress, and signed into law by the President.

In addition, the law establishes an obligation for interested parties to sort out objects that were properly obtained from cultural items that were improperly taken from their communities of origin. The desired outcome of this process is that certain items for which a museum lacks right of possession will go back to the rightful owner; items for which a museum holds proper title will not be returned under NAGPRA. Conscientious implementation of NAGPRA therefore poses no genuine conflict with the fiduciary duty of museums to care for legally obtained collections. Fiduciary duty in the NAGPRA context means that museums should adopt a reasonable standard of accurately assessing the applicability of NAGPRA as a basis for honoring or denying repatriation claims.

For most museums, carrying out fiduciary duty ultimately means that the public benefits in various ways. In the case of NAGPRA, the public benefits from the process of sorting out issues of ownership and control of items in collections in an ethical way. Moreover, the public clearly benefits from a museum's efforts to communicate more fully with Native American constituents in order to learn more about legally held collections and to ensure that wrongfully held items go back to rightful owners. The public also receives an inherent benefit when museums comply with all federal laws, including NAGPRA. Museums that deliberately aim at minimal compliance with NAGPRA risk minimal compliance with their fiduciary responsibilities.

The interest, support, and participation of Native Americans can be greatly beneficial to museums and the general public. An effective NAGPRA compliance program sends a positive message that the museum wishes to be inclusive of Native American constituencies. This represents a common ideal in American society today, and the public expects museums to reflect such idealism. For many reasons—in addition to the fact that NAGPRA is federal law—museums should honor the intent of NAGPRA by engaging in effective consultation and information-sharing with tribes.



In short, museums have a fiduciary duty to proactively manage their Native American collections in a manner that results in a thorough and fair application of NAGPRA to objects in those collections, especially since this process results in the return of stolen objects to their rightful owners. This outcome conforms to the highest principles of American justice. The most judicious and effective implementation of the law will occur when museums and tribes work in partnership to identify items appropriate for repatriation.

NAGPRA does not establish any requirement that museums should develop programs of exemplary excellence in working with Indian tribes. Some museums may have minimally adequate implementation programs because few resources can be devoted to compliance. The National Park Service NAGPRA grant program is one way that museums and Native American communities can get the funds to implement an acceptable or high standard of compliance with the letter and spirit of NAGPRA.

Consultation and information-sharing, if pursued conscientiously, can advance the development of mutually rewarding long-term partnerships between Native American communities and American museums. Whether or not good relationships actually emerge from such efforts, museums can be assured that in pursuing a high standard of NAGPRA implementation, they are aiming at excellence both in cultivating constituencies and in meeting their fiduciary obligations.



Documents held by institutions are crucial to clarifying the applicability of NAGPRA to objects. Because museums and federal agencies control the records that clarify the history of objects in their collections, it's appropriate that they be legally responsible for initiating dialogue and making records available. For this reason, museums and federal agencies necessarily bear the greatest burden for ensuring that dialogue proceeds in a manner that maximizes the ability of lineal descendants and Native American communities to make effective use of NAGPRA.

Native American communities are not required under NAGPRA to pursue or engage in consultation or information-sharing, and their responses to dialogue are a matter of sovereign discretion. Ultimately, however, Indian tribes, Native Hawaiian organizations, Alaska Native groups, traditional religious leaders, and



lineal descendants must understand the law if they wish to assert their rights. Toward this end, the consultation and information-sharing provisions of NAGPRA serve as important tools to help Native Americans identify and clarify situations of interest.

As human rights legislation, NAGPRA is intended to correct long-standing imbalances in the playing field between museums and federal agencies on one hand, and lineal descendants and Native American sovereign communities on the other hand. An imbalance can be presumed to exist for museums that hold substantial collections of Indian objects but have never had Indian curators, administrators, or board members, and have neglected to develop formal outreach projects to get tribes involved in the institutional agenda. At minimum, this puts tribes at a disadvantage in knowing what collections are held by museums and what information is available about items of interest. When considering the consultation and information-sharing aspects of NAGPRA, museums and federal agencies need to recognize that Native Americans can only assert their rights if they have adequate information.

Accurate implementation of NAGPRA aims at social ideals of justice, fairness, rightful ownership, and building meaningful relations. Museums typically want the support of diverse constituencies, and tribes want to work with museums that are responsive to their concerns. Planned inaction on the part of museums only results in alienation, and tribal officials who discourage useful dialogue are undermining their own effectiveness in making NAGPRA work to their benefit. In the worst-case scenario, museum and tribal officials who deliberately employ an adversarial approach to NAGPRA will, of course, inevitably find themselves embroiled in adversity.

Experience shows that NAGPRA works best when all interested parties seek mutually agreeable ways of interacting as a basis for proceeding. Formal efforts by museums, federal agencies, and tribes to standardize NAGPRA consultation and information-sharing programs must include the flexibility to respond to each situation as a unique set of circumstances. Consultation and information-sharing, when pursued conscientiously by all parties, can lead to mutual respect and goodwill, and these feelings will contribute to productive interaction on NAGPRA matters.





## Chapter three

Reviewing Collections  
& Researching Histories



## In quest of History

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**F**or Wesley R. Hiller, an interest in collecting plant specimens was accompanied by a sense of adventure that occasionally took him beyond the boundaries of botany. On one research visit to the American Southwest during the 1930s or 1940s, he came across an intriguing ruin and took from it a woven jar:

*This water bottle I found in a hole in the wall of a ruin near Montezuma Canyon. The entrance had partly fallen in and the place was filled with debris—as were most all that were not sealed. While I know that the cliff dwellers did grass work this is the only piece that was found by any one on this expedition. There was no evidence that the place had ever been visited & it is extremely unlikely that it ever has. There is no water—no food & absolutely no way to make a living. The area is uninhabited—no whites. Now & then we came across a roving band of Navajos. While I have no proof I sincerely believe this bottle to be of great age.*

During the 1970s, the jar—and Hiller's papers—entered the collections of the Science Museum of Minnesota, in St. Paul. Examining information about this acquisition in 1998, officials of the Yavapai-Apache Nation believed that the jar could have come from an Ancient Puebloan ruin at Montezuma Castle National Monument in central Arizona.

According to Apache oral traditions, Apache religious leaders have long used such sites for storing ceremonial regalia and materials, and woven jars were frequently used as containers for this purpose. Apache religious leaders call the Montezuma Castle National Monument the “House of the Mountain Spirits,” and the ruins are known as a place where religious leaders stored items associated with the Mountain Spirit Ceremony. Could this jar be a sacred object needed for this or some other ceremony?

An Apache delegation from the Yavapai-Apache Nation visited the Science Museum in 1999 to inspect the jar and study the associated records. During their visit, tribal officials immediately recognized that the woven jar was probably not Apache. Suspecting that a Southern Paiute made the jar for trade or sale to a Navajo, the tribe compared the jar to Navajo examples in another museum and carefully reviewed the Science Museum records. This research led to the conclusion that Hiller must not have intended to refer to Montezuma Castle when he recorded the location of the find as Montezuma Canyon. Instead, the jar was likely found in the vicinity of Navajo Mountain/Paiute Canyon in northern Arizona. The tribe consequently declined to pursue any further interest in this jar under NAGPRA.

## Reviewing Collections & Researching Histories

Meticulous evaluation of objects and documentation provides an essential foundation for drawing reliable conclusions about the status of items under NAGPRA in the crucial areas of cultural affiliation, fit to definitions for cultural items, and right of possession. Firsthand examination of objects is often crucial in forming an accurate picture of the significance of individual items.

As the story on the previous page reveals, useful information about objects can be obtained not only from direct inspection of collections, but also from museum files and oral traditions.



At the Science Museum of Minnesota, Vincent Randall, then Chairman of the Yavapai-Apache Nation, examines the woven jar collected by Wesley Hiller.

In the end, the better the research, the better the quality of the NAGPRA assessment. Tribes often establish proactive programs to familiarize themselves with collections as a necessary step in applying NAGPRA, but claimants who do little or no research in museum records, ethnographic literature, and oral traditions are undermining their ability to assemble an accurate, successful claim.

### Reviewing Collections

Tribes can study summary information provided by museums and federal agencies to set priorities in scheduling visits to institutions that hold collections of interest. Museums and federal agencies can put into place proactive consultation programs, perhaps focusing on those tribes that may be culturally affiliated with specific collections known to have the potential to come under NAGPRA. These actions are important steps that can help determine when a visit should occur.

Visits are important to both parties not only because they serve to inform the tribe about collections, but because visits can open a meaningful face-to-face dialogue about many issues of mutual importance in addition to NAGPRA. The more



common ground that exists between a tribe and a museum, the more smoothly NAGPRA consultations will proceed.

Several contributors to *Mending the Circle: A Native American Repatriation Guide* (American Indian Ritual Object Repatriation Foundation, 1996, available at [www.repatriationfoundation.org](http://www.repatriationfoundation.org)) have provided practical advice for tribes about conducting consultations at museums. B. Lynne Harlan's "Museum Perspectives from Within: A Native View" touches on a number of issues that tribes should consider in visiting museums, and Rosita Worl's "Excerpts from Reclaimed Heritage: Repatriation Options and Process under NAGPRA" also raises practical issues for the consultation process.

### **1. Visiting museums is an important consultation activity that requires careful planning by both tribes and museums.**

In planning consultations, tribes should consider a variety of issues. One important initial step, after studying summary information, is to contact the museum and determine which staff person is responsible for arranging consultations. It's crucial to work hand-in-hand with museum staff, since accommodating a visit from a tribe entails coordinating people, scheduling a time, and reserving space to review collections.

## Important Points

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### Reviewing Collections and Researching Histories

- 1 Visiting museums is an important consultation activity that requires careful planning by both tribes and museums.**
- 2 Consultation visits can be funded through a variety of sources, and it is important for both museums and tribes to seek support for consultation activities.**
- 3 Claimants should make the study of institutional records a priority in planning consultation visits.**

Allowing ample time for planning—for both the tribe and the museum—will result in a more successful consultation. When absolutely necessary, most museums will do their best to accommodate visits made on short notice, but sometimes these are too inconvenient for a museum to accept. NAGPRA doesn't require museums to make collections available for inspection upon demand—the law asks that both parties work together to find a mutually agreeable means of establishing dialogue and interaction that will advance the objectives of the law.

Museums and federal agency repositories may hold collections on loan from some other institution covered by NAGPRA. In such cases, any consultation activities should be coordinated among all the parties. The museum or repository holding the loaned items may need to work out a formal arrangement for giving access to such collections. Tribal delegations encountering a loaned object at a museum can ask for information to help contact the owner, but should not expect one museum to speak for another.

Who should come on a tribal visit? Delegations can include a tribe's designated NAGPRA representatives, tribal government leaders, traditional religious leaders, tribal historians, knowledgeable elders, experts serving as consultants to the tribe, and tribal support staff. The purpose of the consultation will necessarily shape the makeup of the delegation for each visit.

The agenda of the consultation can vary depending on the nature of the collection and other issues. Consultation and information-sharing are required of museums and federal agencies, but the intent is to address the needs of tribes, so it is tribes who ultimately should decide the consultation activities. Tribes nevertheless often defer to institutions, because museums and federal agencies have more intimate knowledge of the relevant collections and available documentation. Consultation seems to work best when institutions provide opportunities for tribes to set the agenda, but are prepared with their own ideas about what will provide the most useful experience for the visiting delegation.

A number of things can happen in the course of a consultation. The focus can be upon a quick inspection of all or a portion of the institution's collections affiliated with that particular tribe. This can serve as the starting point for future dialogue and information-gathering. A more ambitious agenda for consultation can





include a review of collections, study of documents, consultation on NAGPRA, and dialogue on a broad range of mutual interests beyond NAGPRA. Whatever approach is adopted, conscious attention to relationship building is a key element.

In general, a good consultation process includes such activities as examining collections object-by-object, sharing the institution's documentation about each item, and discussing the significance of items under NAGPRA. Several visits may be needed to learn about the collection, study documents, focus on particular items, and have a meaningful dialogue on NAGPRA applicability. Religious leaders may wish to hold special activities, such as ritual prayers, smudging, or making offerings. It is useful to give museums advance notice of such wishes.

It may be useful for a tribe to photograph and videotape objects or request photographs from the institution. Photographs can be important records for tribal officials to show to elders and others in the tribal community. Video is a very useful tool because not only does it provide a visual record, it also preserves what was said. Museum curators are typically knowledgeable about the origin and history of their collections, and their expert opinions on the age of the items, cultural characteristics, and other matters may be helpful in establishing cultural affiliation.

Tribes should also get copies of important documents about specific objects, such as catalog cards, letters, accession files, field notes, and other archival records. Delegations can ask museums and federal agencies to provide copies of all relevant records, but institutions are generally unable to comply with such broad requests if they involve a significant amount of records. There is no specific requirement under NAGPRA that museums and federal agencies must devote staff time and resources to honoring blanket requests for documents. The best course of action may be for tribes to allow enough time during site visits to review records carefully, take notes, and make photocopies of significant papers.

**2. Consultation visits can be funded through a variety of sources, and it is important for both museums and tribes to seek support for consultation activities.**

Museums, federal agencies, and tribes are limited in consultations by how



much money, or how many people, they can devote to NAGPRA activities. Fortunately, there are several ways to obtain more resources. Tribes and institutions must first determine how important NAGPRA is in light of other responsibilities and programs, keeping in mind that the quality of dialogue on NAGPRA issues will reflect the priority that tribes and institutions each assign to NAGPRA implementation. Nothing in NAGPRA requires that museums or tribes make NAGPRA an overriding priority.

Federal agencies should identify what compliance activities would best carry out the law and shift resources accordingly. Museums and tribes can also redirect staff time and funds to support consultation activities. In 1993, for example, the Field Museum of Natural History invited the Pawnee Nation to select two people to travel to Chicago and conduct a review of Pawnee collections at the museum. The tribe accepted this offer, and two researchers spent several days examining objects and documentation. They prepared and submitted a report to the tribe on the collections, together with a videotape prepared by the museum staff and the researchers. This project was funded entirely by the Field Museum, but tribes can also devote internal funds and resources to NAGPRA consultations.



Pawnee bear claw necklaces are held in various museums, such as the Denver Art Museum, the Gilcrease Museum in Tulsa, the Field Museum of Natural History in Chicago, and the Eiteljorg Museum of American Indians and Western Art in Indianapolis.

Museums and tribes can also look outside for funds. The National Park Service has a grant program to support NAGPRA consultations. The Denver Art Museum's NAGPRA program received a consecutive series of NPS grants after the grants first became available in 1994. Between 1994 and 2000, DAM hosted about ninety visits from more than fifty tribes. Nearly half of these visits were funded by NPS grants to DAM, with the rest funded by NPS grants to tribes, other tribal funds, or NPS grants to other Denver museums.

Tribes shouldn't hesitate to ask museums whether there is funding to help with tribal expenses. On several occasions, DAM has redirected NPS grant money from existing grant projects to pay travel expenses for tribes that have asked for



# spotlight on tribal authorization

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When it comes to formal consultation activities required by NAGPRA, museums and federal agencies need to know that at least one member of the delegation is officially authorized to represent the tribe on NAGPRA matters. There are only two ways to do this. One, the tribal chairperson can prepare a brief letter setting forth the specific authority of a designated person. Two, the tribal council or governing body can pass an official resolution that identifies a person as having authority to represent the tribe on NAGPRA matters. Tribes should keep the National Park Service National NAGPRA pro-

gram informed on changes in this appointment (contact information at [www.cr.nps.gov/nagpra/index.htm](http://www.cr.nps.gov/nagpra/index.htm)).

It's not enough for a tribal citizen or tribal official to simply say he or she has the authority to represent the tribe on NAGPRA matters. Museums and federal agencies should handle these unofficial research visits in accordance with their general policies for outside researchers who wish to view collections or look at records. Such visits may help broaden the relationship between tribes and institutions, but they cannot qualify as official NAGPRA consultations.

help. NPS supports such changes so long as they do not interfere with the objectives of the grant. Tribes can also encourage museums to apply for NPS grants and offer to provide letters of support for any such grant applications.

In addition, tribes can request letters of support from museums and write their own NPS grant applications to fund consultation activities. DAM has provided such letters of support for grants prepared by the Cheyenne and Arapaho Tribes of Oklahoma, the Wind River Shoshone, the Pawnee Nation of Oklahoma, the Seminole Nation of Oklahoma, the Little Traverse Bay Bands of Odawa Indians, the Mendocino County Inter-Tribal NAGPRA Documentation Project, the Hoopa Valley Tribe, the Klamath Tribes, the Yurok Tribe, the Sac and Fox Nation of Oklahoma, the Hualapai Tribe, and the Northern Cheyenne Tribe. Not all of these grants were awarded, but the successful projects brought several delegations to DAM. Tribes should discuss with the museum exactly what activity the museum would agree to host, such as a collection review, document research, or some other activity.

Sometimes collections can be reviewed by exchanging detailed documentation without an actual visit to the museum. In 1994, for example, the Nebraska State Historical Society worked closely with the Pawnee Nation to provide museum



records about its Pawnee collections to a tribal researcher. The information served as the basis of a report recommending specific actions on a small number of items. Although this approach to consultation can be useful, it's not ideal because it limits interaction to consideration of NAGPRA and minimizes the opportunity for a broader dialogue on other issues.

### **3. Claimants should make the study of institutional records a priority in planning consultation visits.**

Weaving a coherent and accurate object collection history (also termed “provenance” or “provenience”) is essential to understanding NAGPRA applicability to specific items. For this reason, tribes should not underestimate the importance of gaining a clear understanding of an object's history and what it means under NAGPRA. In fact, claims that ignore the history of an item are fundamentally flawed in a manner that often jeopardizes the success of the claim, because the history of an object, and the story of how it came to be in a museum collection or federal repository, always impacts its status under NAGPRA. The goal when researching and preparing an object collection history should be to locate and assemble evidence that can be used to draw reasonable conclusions about the known history of an item. Toward this end, it's worth reviewing some general principles of historical research.

First, when photocopying or taking notes from institutional records, tribal researchers need to keep track of exactly where the information comes from. It's far more useful to write that the source is “Denver Art Museum, Native Arts Department, Accession Sheet dated May 27, 1938,” than to simply indicate “Denver Art Museum records.” If in doubt, ask museum staff for the proper way to reference material. Being specific about where information comes from allows other readers to consult those same sources and draw their own conclusions.

Second, researchers need to consider every significant piece of evidence—not just the evidence that favors a particular outcome. The deliberate omission of contradictory information from a collection history, if not justified in some responsible manner, may help to make a particular case but will not withstand careful scrutiny by another party. It's not unusual to find conflicting information, and one of the



reasons for careful research is to reconcile any such contradictions. A commitment to thorough analysis will lead to conclusions that reasonable readers will trust and endorse. Museums and tribes are in the best position to evaluate evidence accurately when they both have equal access to relevant documents and information.

Third, the more information and detail that can be assembled, the greater the level of confidence regarding an object's history. Sometimes there is no choice but to go forward on sparse evidence, but such situations are not ideal. If a museum's records about an object are minimal, it's still possible that further information can be found elsewhere, so repatriation research is most effective when it includes the broadest possible survey of relevant sources.



When a claimant does not agree with a museum or federal agency on an object's collection history, this can lead to disagreement on the applicability of NAGPRA. To avoid such situations, claimants might want to consider working in partnership with the institution in question to compare perspectives on an object's history. In working with the Blackfoot Confederacy, for example, DAM received a draft claim prepared by the Blood Tribe in 1999 that included object histories, and reviewing these, DAM believed that more research in DAM files would produce more accurate histories. DAM subsequently devoted a great deal of time to preparing collection histories on objects being considered for repatriation. In fact, DAM's approach to resolving the final claim depended greatly upon information from collection histories.

Tribes should also proceed with their own independent research on object histories. After receiving notice of a claim denial for a headdress at the Colorado Historical Society—a denial based in part upon a letter in CHS files that established the circumstances under which the headdress was separated from the tribe—the Southern Ute Tribe proceeded with its own research. The Ute researchers found information that challenged the history set forth in the letter. This, in turn, motivated CHS to conduct more thorough research and more careful analysis to reconcile the discrepancy. This lively debate ultimately led to a deeper understanding of the historical circumstances under which the headdress ended up in CHS collections and underscores the importance under NAGPRA of collection history information.



## A Collection History Case Study

Object collection histories are most useful when they can contribute directly toward assessing cultural affiliation, conformity to NAGPRA definitions for cultural items, and right of possession. An actual collection history prepared by the Denver Art Museum is provided below for a bundle returned by DAM to the Blackfoot Confederacy. The object history of this Blood sash bundle establishes its connection to the Blood Tribe (and thus a cultural affiliation to the Blackfoot Confederacy), its status as an object of central importance to the Blood Dog Society, and the exact circumstances under which it was separated from the group. This information is crucial for shedding light on whether this bundle is an object of cultural patrimony and who holds right of possession.

### *Accession:*

*1939.124.1 (PBI-25-P) Parfleche; 1939.124.2 (FBI-42-P) Black Fur Scarf;  
1939.124.3 (MBI-13-P) Red Flannel Stick Rattle*

### *Documents:*

*1) The DAM catalog cards for these three items state that all three are associated and were accessioned on January 3, 1939, as purchases from Madge Hardin Walters. They also were given the receiving lot number "S."*

*2) Two DAM accession sheets dated January 3, 1939, list the three objects. None of the catalog cards or accession sheets mention any association of these items with the Dog Society.*

*3) Clark Wissler examined these objects during the mid-1940s and in his manuscript on the Walters Blackfoot collection included them in his chapter on "Dog Societies" (file "Untitled Manuscript, 1947, by Clark Wissler," p. 119, 129). In describing the "black fur scarf" (1939.124.2, FBI-42-P), he noted "Dog Dancer," and observed that it is "[a]pparently black dog skin."*

*4) Given the description by Wissler of the "scarf" as a "dog skin" associated with a "Dog Dancer," the scarf and rattle are probably the objects that appear on one list as "Dog robe, rattle, and story" (file "Walters Notes" list entitled "Additions—*



Miscellaneous," a supplement to a list entitled "Madge Hardin Collection").

5) The reference in the above list to a "story" must refer to a history entitled "The Dog Robe" written by Percy Creighton (file "Blackfoot Collection Object Histories"), in which a man dreamed of a society whose leader "had a dog robe on him." A typed version of this history contains a brief excerpt from an unattributed transmittal letter (file "Walters Notes").

6) The excerpt from an unattributed letter mentioned above matches the text of a letter to Walters by Percy Creighton dated August 9, 1938, sending the robe and its history (file "Correspondence from Chief Percy Creighton"):

*I am sending you an article which is called the Dog Robe. At last I made my deal on this robe. I have been trying to get it last spring, they wanted \$75.00 for it. But I made the deal for \$55.00. They wanted to keep this robe to hold the society on. But the owner he let me have it for \$55.00. The owner's name is "Running Weasel." I told you about this robe some-time ago.*

7) Earlier that year, in a letter dated February 2, 1938, Creighton made his first mention of the robe:

*I was trying to make another deal on an old dog robe. This dog robe is the leading Robe of the Dog Society, now this society is different from the Brave dogs Society, its more for the older people, and it has a very nice history and also I have a buffalo headdress here with me and if I can make a deal on the dog Robe, I'll send them off together[.]*

8) A February 6 letter lists the dog robe as one of a number of items that could be sent to Walters, and in a February 10 letter, Creighton stated that he had "made another deal on a Dog Robe."



*Interpretation:*

*The evidence supports the following scenario. In 1938, a man named Running Weasel agreed to sell to Percy Creighton a dog robe, rattle, and parfleche, and on August 9, 1938, Creighton sent these items and a written history to Walters. Sometime prior to January 1939, Walters sent the items to DAM, and on January 3, 1939, they were accessioned as purchases.*

*DAM's NAGPRA Assessment:*

*The statement by Percy Creighton implies that the surviving Dog Society members wished to have this sash “to hold the society on,” indicating that the society had not yet agreed to its conversion to private property, but the party with physical possession sold it anyway. This Dog Society bundle can potentially meet the NAGPRA definition for NAGPRA sacred objects. DAM also finds that the bundle holds central ongoing importance to the Blackfoot Confederacy, and that it represented communal property inalienable by any individual at the time it was conveyed away, because title was vested in the Dog Society as a group, so it meets the NAGPRA definition for a NAGPRA object of cultural patrimony. DAM lacks right of possession to this bundle.*

The careful study of collection histories may not always lead to a shared understanding of what happened. The situation above offers a case in point. An extensive research project undertaken by DAM helped to clarify the fact that, during the 1930s, Blood society membership bundles were owned by the societies themselves rather than by any individual caretaker, but bundles of deceased keepers were occasionally, in effect, “deaccessioned” by societies when no new member came forward to assume keepership. In this circumstance, bundles became private property of the heirs of the deceased keeper (for more on this topic, see chapters 8 and 11).

The Blood Tribe disagreed with DAM's analysis, asserting that during the 1930s, the tribe itself—not the societies—owned society bundles, but all of the information set forth by the Blood Tribe in its claim contained consistent evidence of society ownership, not tribal ownership. The tribe also disagreed with DAM's contention that society bundles could be deaccessioned by societies if no need existed





for them. DAM's view was formed through extensive study of conveyance patterns reflected in numerous letters written by several Blood people during the 1930s and 1940s. Officials of the Blood Tribe, however, rejected the letters as a source of credible information.

NAGPRA claims may necessarily involve research on a variety of specific topics, but object collection histories inevitably play a key role in sorting out the status of individual items under the law. Claimants should expect museums to review all their readily available information, not just the information put forward in a claim. For this reason, it's ideal for claimants and institutions to jointly assess the evidence and seek a mutual understanding of what it means under NAGPRA. When this ideal is unattainable, it is ultimately the responsibility of a claimant to make a case that flows from reviewing all the relevant evidence, and it is ultimately the responsibility of museums and federal agencies to decide whether the evidence really sustains the claimant's conclusions.





# Chapter four

## Cultural Affiliation



## weighing identity

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***F**rom time immemorial among the Zuni people, members of two clans have borne the great responsibility of creating a pair of living icons known as Ahayu:da. These icons are created for the benefit of the Zuni community, and their proper treatment from creation to retirement helps to ensure spiritual harmony in the world.*

*At some point in recent time, two Ahayu:da were brought to life by these Zuni clans. After their purpose was fulfilled, they were ceremonially retired at an open-air religious shrine, where they would gradually disintegrate as the days and nights unfolded around them. Some unknown person, however, interfered with their rest and took them from the shrine, and the two Ahayu:da embarked upon a journey shrouded in mystery.*

*Sometime later, a man named Charles J. Norton acquired the two Ahayu:da and added them to his private collection of Native American ethnographic objects. In April 1972, he listed them in an inventory of his collection. Norton lived in Denver, Colorado, and he came to know the curators at the Denver Art Museum. Many items he collected over the years ended up at DAM.*

*When the Zuni Tribe embarked on international efforts to find and repatriate stolen Ahayu:da in 1978, Norton followed press reports of their efforts and kept a file of newspaper clippings. He kept track of events during the late 1970s when the Denver Art Museum became the first United States museum to return its collection of Ahayu:da to Zuni authorities. When he died nearly twenty years later, his will named DAM as the recipient of his collection of Native American objects and books.*

*In a closet of Norton's house, DAM curator Nancy Blomberg found a long box, and inside, lying together, were two wooden carvings. They had tags attached that read "Misc.—7, Zuni War God" and "Misc.—8, Zuni War God." Blomberg recognized them immediately as Ahayu:da. Knowing that the Zunis would be greatly interested in these Ahayu:da, Blomberg sent photographs to Loren Panteah, Acting Director of the Zuni Heritage and Historic Preservation Office. Panteah took the photos to his special team of advisors, the Zuni Cultural Resource Advisory Team. ZCRAT examined the photographs and Perry Tsadiasi, Zuni Bow Priest, provided his expert opinion that the carvings were genuine Ahayu:da.*

*This situation presents a clear example of cultural affiliation under NAGPRA. There were three pieces of evidence. First, the two Norton tags identified the icons as Zuni. Second, the expert opinion of the DAM curator concurred with the information on the tags. Finally, Zuni religious authorities agreed, and no contradictory evidence called this affiliation into question.*

## Cultural Affiliation

Sovereign governments everywhere typically exert regulatory authority over graves, human remains, culturally important objects, commercial transactions, community lifeways, and many other matters. In the United States, our shared political fabric has been woven from the complex interplay of power by three classes of sovereigns: the federal government, state governments, and tribal governments.

As a federal law, NAGPRA expresses the authority of the federal government, but it requires museums and federal agencies to acknowledge the fact that tribal governments also exercise political authority in the United States. For established museum collections, NAGPRA permits the exercise of tribal government authority through the linking connection of “cultural affiliation.” Congress included a cultural affiliation requirement in order to ensure that a “reasonable connection” exists between claimant groups and cultural items (House of Representatives, 101st Congress, 2nd session, 1990, House Report 877, p. 14).

The concept of “cultural affiliation” has a specific statutory definition in NAGPRA, with the meaning that “there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group” (section 2 [2]). The inclusion of this language in the law means that all other ways of employing the term “cultural affiliation” are irrelevant for implementing NAGPRA. Detailed guidelines in the law itself and in the federal regulations inform museums, federal agencies, and Native American communities how to apply this concept.

**1. NAGPRA gives museums and federal agencies the responsibility to make findings of cultural affiliation for Native American human remains and associated funerary objects. Native American sovereign communities not found to be affiliated through this process can themselves assemble and submit a preponderance of the evidence showing a cultural affiliation.**

Section 5 of NAGPRA requires that, following consultation with affected communities, federal agencies and museums make findings of cultural affiliation for



human remains and associated funerary objects held in their collections. Consultation ideally means an exchange of opinions, evidence, and interpretations. It does not mean that federal agencies and museums can leave the decision about cultural affiliation to tribes. Museums and federal agencies are required by NAGPRA to assume this responsibility and must assess the entire readily available spectrum of relevant evidence and issue an accurate and fair finding that reflects that evidence.

These findings are issued as an inventory, as required by section 5 of NAGPRA, accompanied by publication of a notice of inventory completion by the National Park Service in the *Federal Register*. Museums and federal agencies cannot repatriate culturally affiliated human remains and associated funerary objects until thirty days have passed after the publication date. Preparation and publication of inventories and notices are not dependent upon submission of any claim. Instead,

## Important Points

### Cultural Affiliation

- 1 **NAGPRA gives museums and federal agencies the responsibility to make findings of cultural affiliation for Native American human remains and associated funerary objects. Native American sovereign communities not found to be affiliated through this process can themselves assemble and submit a preponderance of the evidence showing a cultural affiliation.**
- 2 **The NAGPRA section 6 summary can be useful for establishing cultural affiliation for cultural items, but if it does not clearly set forth affiliations for specific objects, claimants must submit evidence to satisfy the cultural affiliation requirement for claims. Museums and federal agencies must sit in judgment of such efforts.**
- 3 **NAGPRA lists oral traditions and expert opinion as categories of evidence that can be used for cultural affiliation.**
- 4 **Museums and federal agencies have the sole authority to make findings of cultural affiliation. In the absence of any formal dispute situation or court challenge, NAGPRA does not give any party, such as NPS or the NAGPRA Review Committee, the authority to overrule or modify any finding of cultural affiliation.**

museums and federal agencies are obligated to complete these documents whether or not tribes request them. Upon publication of the notice, it's a simple matter for culturally affiliated tribes to make a claim, which need be only a brief request to discuss the place and manner of the return (see chapter 2 for a discussion of inventories).

Federally recognized Native American communities that were not identified through this process as culturally affiliated can assemble and present a preponderance of the evidence showing a cultural affiliation (section 7 [a][4]). Museums and federal agencies presented with such evidence must render a decision accepting or denying such affiliation.



NAGPRA and the federal regulations set forth specific legal standards for findings of cultural affiliation. A “preponderance of the evidence” is required to support a finding of cultural affiliation, and this evidence can be drawn from “geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion” (section 7 [a][4]). This means that some credible evidence must be available that is relevant to the affiliation. If there is no credible evidence, then it's reasonable to conclude that the human remains in question are culturally unidentifiable.

Under U.S. law, all the available evidence must be scrutinized and weighed to establish a preponderance of the evidence. This legal standard generally assumes that conflicting evidence exists that leads to differing conclusions. The assignment of weight is performed by comparing the conflicting evidence and determining which is slightly more convincing.

A preponderance of the evidence exists when the evidence tends to favor the conclusion that an asserted fact is more probable than not. The level of support need only be more than 50 percent. There can sometimes be a great deal of credible evidence against a conclusion, but if it is even slightly outweighed by credible evidence favoring a conclusion, then the legal standard for a preponderance of the evidence is satisfied in favor of the conclusion.

Under the federal NAGPRA regulations, a cultural affiliation is established when a preponderance of the evidence “reasonably leads to such a conclusion”



(section 10.14). (One way to evaluate what may be “reasonable” is to consider whether a third party with no vested interest in any particular outcome would agree with the conclusion reached.) The federal regulations lay out a specific, three-part process for concluding the existence of a cultural affiliation (section 10.14 [c]). Each of the criteria must be satisfied to support a legitimate finding of cultural affiliation.

*First Criterion.* A present-day Indian tribe must have standing to make a claim. In other words, claimant tribes need to be federally recognized. Tribes recognized only by states, tribes lacking federal recognition, and private Native American organizations typically do not have standing to make claims under NAGPRA. Individual persons lacking any specific authority to represent a tribe also cannot claim human remains or cultural items on behalf of a tribe, although lineal descendants can claim the remains of directly traced ancestors, as explained in chapter 9 of *Keepers of Culture*.

*Second Criterion.* Evidence must support the existence of an “identifiable earlier group.” Support for the existence of such groups may include evidence that 1) establishes the group’s “identity and cultural characteristics”; 2) shows “distinct patterns of material culture manufacture and distribution methods”; or 3) establishes the group “as a biologically distinct population.” These are guidelines, not inflexible requirements. Other unspecified support for the existence of the earlier group is also permissible.

The regulations do not provide instructions as to the nature of this earlier group. No requirement exists to show that the earlier group is exactly like—or even generally resembles—the claimant tribe. In Pawnee history, for example, four separate sovereign tribes existed during the early 1800s, and these formed a confederated union of four sovereign states after mid-century. Since the 1930s, the Pawnee Nation has had a constitutional government that acts on behalf of all four bands. These changes over time should not be used to prevent the present-day Pawnee Nation from claiming human remains and cultural items from a nineteenth-century Pawnee community.



*Third Criterion.* Under the federal NAGPRA regulations, evidence must show that the claimant tribe and the earlier group have a shared group identity that can be reasonably traced, and a preponderance of the evidence “must establish that a present-day Indian tribe . . . has been identified from prehistoric or historic times to the present as descending from the earlier group.” This finding “should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection . . . and should not be precluded solely because of some gaps in the record.” In most cases, this requirement for showing a shared group identity will be easily met by simply noting that the historical tribe is commonly understood to be directly ancestral to the claimant tribe. The question to raise is whether or not the connection would be readily grasped by other parties who are not familiar with tribal history. If not, the claimant should prepare more specific evidence and arguments.

Congress considered and rejected a definition for cultural affiliation requiring the “reasonable establishment” of “a *continuity* of group identity from the earlier to the present day group” (Jack Trope and Walter Echo-Hawk, “NAGPRA: Background and History,” in *Repatriation Reader: Who Owns American Indian Remains?*, edited by Devon Mihesuah [Lincoln: University of Nebraska Press, 2000], p. 162 fn. 150). So, although evidence must reasonably identify the claimant tribe as descended from the earlier group from which the human remains or cultural items in question originated, it is not necessary for the evidence to demonstrate a continuous connection or unchanged existence over time.

Archeological classification systems can be useful in setting forth earlier groups that potentially extend back in time many centuries or millennia. Archeological groupings are most useful when they serve to distinguish a population that arguably had a formal group structure that would have been recognized and acknowledged by individual members, such as some form of independent sovereignty. Since archeological groupings often may not be readily equated with formal governmental structures in time, it is reasonable to rely on the principle that the more evidence for a shared identity within an archeological grouping, the stronger the case for presuming the existence of a coherent group distinguishable from neighboring contemporaries. If archeological literature generally employs a



Expert opinions provide useful information for cultural affiliation under NAGPRA. The collector of these boots attributed them to the Arapaho, but DAM curator Frederic Douglas—an expert on Native American artistic traditions—identified them as Cheyenne.





grouping, it can be assumed that it represents a population that can potentially satisfy the NAGPRA requirement for an earlier group. In tracing linkages to later groups, gaps in the connections should not be used to deny a cultural affiliation.

In the case of the Pawnee Nation, for example, archeologists have long accepted a classification system in which Historic Pawnee (1750 to 1875) is directly descended from the Lower Loup phase (1600 to 1750), even though the exact social and political structures of the Lower Loup phase and early Historic Pawnee are not completely clear. Lower Loup is not intended to represent a tribe or any specific form of political structure, but rather a population deemed to be directly ancestral to the later Pawnees.

Much debate surrounds connections of Lower Loup to earlier groups, but under NAGPRA standards, the Central Plains tradition (1000 to 1400) is an earlier group (or set of groups) that has been widely accepted as culturally affiliated with the later Pawnees and Arikaras, despite the existence of a lengthy gap between the Central Plains tradition and the Lower Loup phase.

An even earlier grouping, the Plains Woodland tradition (0 to 1000) covers such a large region with so many distinguishable populations that it seems unlikely that all Plains Woodland groups saw one another as members of a single population. In addition, a range of evidence suggests that it is not reasonable to conclude that all Plains Woodland groups led directly into the Central Plains tradition. In this case, it would be appropriate to identify more specific Plains Woodland populations as traceable ancestors of the Central Plains tradition and other groups.

Exactly what kind of evidence, and how much, should a claimant be prepared to present to establish cultural affiliation? The NAGPRA cultural affiliation standard requires that evidence show a connection between the claimant tribe and the human remains or cultural items. No standard is set forth requiring multiple lines of evidence or any specific amount of information. Extremely minimal evidence can serve as a basis for a responsible finding of cultural affiliation under NAGPRA, so long as it is credible. If no evidence is available, then human remains and cultural items must be classified as culturally unidentifiable.

A general rule of scholarship is that information is not evidence until it has undergone some form of critical assessment. Evidence derived from geography, for



example, is most useful when critical evaluation provides the basis for assigning it weight of some kind. In other words, a reasonable person might well conclude that geography would provide no credible basis for the Prairie Band of Potawatomi Indians to assert a cultural affiliation to ancient human remains in central Kansas because this tribe was not in the region before its removal to the area during the nineteenth century. Conversely, geography might add to the useful realm of evidence available to the Wichita Tribe for asserting claims to ancient human remains in central Kansas, but it would carry much less weight, if any, for human remains dating to the nineteenth century, long after their historical departure from the region. Critical analysis in some form—in this case, considering what is known about who lived where and when—should be viewed as key when applying the NAGPRA standards for cultural affiliation.

Although a wide range of evidence can be employed to sustain a cultural affiliation, the standard does not permit reliance on speculation, spiritually based insight, or unfounded personal opinion. Speculation can help formulate research questions, however, and Native American communities can rely upon spiritual insight to shape repatriation priorities and research agendas. Unfounded personal opinions might well be beautifully stated, expressed with vigorous conviction, or be widely shared, but no such circumstance makes them useful as evidence.

Spiritually based insights might also be useful as a preface to the presentation of evidence, especially if a cultural affiliation dispute goes before the NAGPRA Review Committee (see chapter 10 for discussion of NAGPRA Review Committee dispute resolution). According to Jonathan Haas, a former member of the Review Committee, spiritual insight has been employed to help make arguments on cultural affiliation before the Review Committee. This citizen's advisory group includes three people who are traditional religious leaders, and since the members of this committee are expected to provide input based upon their experience and expertise, spiritual insights may have a reasonable impact on some committee members. The entire committee also aims at informally achieving consensus in making findings and recommendations (which are not legally binding). Most typically, however, tribes should not expect academic institutions or courts to rely upon spiritual insights as evidence of cultural affiliation.



## spotlight on Multiple cultural affiliations

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Nothing in NAGPRA prevents the existence of cultural affiliations to more than one present-day Native American tribe. The federal regulations require identification of the earlier group associated with the human remains or cultural items, and it may be ideal, in terms of convenience, to trace a connection of this earlier group to only one descendant tribe, but if the evidence points to a larger descendant group involving more than one tribe, museums and federal agencies should accept multiple cultural affiliations.

When more than one community is culturally affiliated with cultural items or with human remains and associated funerary objects, this places a special burden upon potential claimants. It will be necessary in such situations for all of the culturally affiliated groups to at least have the opportunity to participate in a repatriation claim made by any one claimant. Affiliated tribes can jointly sponsor a claim, write an official letter or resolution of support for one claimant, write a letter declining interest in participating, or even oppose another's claim. At a minimum, in cases of multiple cultural affiliation, claimants should document all their efforts to solicit involvement from other interested parties.

Opposition to a claim by one or more culturally affiliated tribes could prevent repatriation to a claimant. In cases of competing claims or active opposition by one culturally affiliated tribe to the

repatriation claim of another affiliated tribe, federal agencies and museums have the authority under NAGPRA to find a reasonable means of ranking the groups to identify which should receive the claimed items, and to then proceed despite opposition from a less affiliated tribe. This is specified in the NAGPRA section on competing claims (section 7 [e]), where the statute grants authority to federal agencies and museums to "clearly determine which requesting party is the most appropriate claimant[.]" Museums should only proceed if the basis for ranking competing claimants is clear and can be documented.

For communities that wish to proceed with claims under circumstances involving multiple cultural affiliations, it would be advisable to begin with discussions in which all affected groups have the opportunity to define the level of their preferred involvement. Next, they may want to jointly discuss such specific issues as desired religious activities, the selection of a reburial site, and the pooling of needed resources for transportation, containers, and other expenses. Finally, they would prepare and submit a repatriation request. In all of these areas, it may also be practical to involve the targeted museum. NAGPRA does not require museums to help tribes repatriate, but many museums will nevertheless provide needed assistance upon request.

For museums and federal agencies, all readily available evidence must be considered, not just information that favors or disfavors an affiliation. The preponderance standard is particularly useful in those cases where conflicting evidence exists. In such situations, a review of all the evidence should be conducted with the intent of assessing whether it can be said to slightly favor or slightly disfavor an affiliation.

Indian tribes that decide to argue for a cultural affiliation in those cases where the NAGPRA section 5 inventory did not include them as affiliated should be prepared to present the results of a systematic review of available oral traditions, anthropological literature, institutional records, historical documents, or other evidence. A simple letter or verbal statement asserting a position on cultural affiliation is not sufficient unless it is backed up by evidence.

**2. The NAGPRA section 6 summary can be useful for establishing cultural affiliation for cultural items, but if it does not clearly set forth affiliations for specific objects, claimants must submit evidence to satisfy the cultural affiliation requirement for claims. Museums and federal agencies must sit in judgment of such efforts.**

Section 7 of NAGPRA and section 10.10 (a)(1)(ii)(B) of the federal NAGPRA regulations require tribal claimants to establish cultural affiliation for claimed cultural items if it has not been explicitly settled by museums through the summary information process set forth in section 6 of the law. Museums and federal agencies thus have the authority to use section 6 summaries to specify cultural affiliation for objects. This section of NAGPRA doesn't require museums and federal agencies to consult with tribes in the course of making findings on cultural affiliation, although consultation must follow completion of the summary. This differs from the section 5 inventory, which requires museums and federal agencies to consult with tribes *prior* to issuing findings of cultural affiliation for human remains and associated funerary objects.

In preparing claims for unassociated funerary objects, sacred objects, and objects of cultural patrimony, claimants must address cultural affiliation as one of



the required standards for repatriation. The same cultural affiliation standards that apply to human remains and associated funerary objects also apply to unassociated funerary objects, sacred objects, and objects of cultural patrimony. In other words, a preponderance of the evidence must show a reasonably traced connection, and gaps in the record cannot preclude affiliation.

In those cases where the summary explicitly settles affiliation for an item, a tribe found to be affiliated would need only to refer to the summary. Otherwise, tribes are obligated by NAGPRA to gather and present evidence to demonstrate an affiliation, and museums and federal agency officials need to weigh the evidence and decide in favor of or against a claimant. Tribes should study the summaries carefully and consult with institutions as to the relevance of the summary to cultural affiliation for specific items.



The section 6 summaries sent out by museums and federal agencies serve as an important beginning point for addressing cultural affiliation for specific items. A summary can assign cultural affiliation of items or simply invite consultation to address this and other issues under NAGPRA. Museums and federal agencies should be careful in making determinations of cultural affiliation, whether such findings are explicit or implied. For example, if an institution's pattern of summaries shows that the summary for one tribe covers an item that is not covered in any other summary, this implies that the institution has made a judgment, however tentative, about who is affiliated. To understand patterns like this, a claimant must either conduct careful research among the institution's summaries or must consult with knowledgeable staff. It may take careful evaluation to understand the pattern, as the following analysis of Denver Art Museum Apache summaries shows.

DAM provided sixteen summaries on its Apache collections to ten tribes in November 1993. These took the form of narrative letters in five categories, including "Western Apache," "Chiricahua Apache," "Jicarilla Apache," "Mescalero Apache," and "Lipan Apache." The San Carlos Apache Tribe received two separate letters, the White Mountain Apache Tribe received one letter, the Yavapai-Apache Nation received one letter, the Tonto Apache Tribe received one letter, the Yavapai-Prescott Tribe received one letter, the Apache Tribe of Oklahoma received five



letters, the Mescalero Apache Tribe received three letters, the Fort Sill Apache Tribe received one letter, and the Jicarilla Apache Tribe received one letter.

Each of the sixteen DAM summaries notified the recipient of “collections which our records indicate may have been created by your group.” The first six tribes listed above all received letters stating that DAM held “approximately 150 objects identified as Western Apache[.]” This was based upon a database survey that actually listed fifty-six entries for items identified as “Apache/Western” and seventy-nine entries for items identified as “Apache.” It’s unclear why DAM staff included both groups in one category of “Western Apache.” In 1996, DAM sponsored a consultation with nine tribes—all self-identified as “Apache”—which provided an opportunity to clarify this situation by sharing detailed information and making each object available for inspection.

The items covered by the Western Apache summary included a cap with the accession number 1941.179. (Museums typically use a numbering system to give each object a unique number when it enters—is “accessioned” into—the museum collection.) This cap, together with other items, became the subject of a claim submitted to DAM by a consortium of five tribes known as the Western Apache NAGPRA Working Group: the White Mountain Apache Tribe, the San Carlos Apache Tribe, the Fort McDowell Yavapai Tribe, the Tonto Apache Tribe, and the Yavapai-Apache Nation.

The DAM Western Apache summary letter went to four of the above tribes, but not to the Fort McDowell Yavapai Tribe. In addition, two other tribes received the letter: the Yavapai-Prescott Tribe and the Apache Tribe of Oklahoma, neither of which was a participating member of the Western Apache NAGPRA Working Group. None of the summary letters explicitly stated that any of the specific items were considered by DAM to be culturally affiliated with any of the tribes. The DAM summaries indicated DAM’s determinations as to which tribes were potentially affiliated with the cap and other items, but they explicitly left unsettled the specific affiliations according to the “preponderance of the evidence” standard. This distinction is important because DAM needed a basis for advancing consultations with potentially affiliated tribes, but lacked the technical knowledge to settle the affiliation question.

In the end, the list of claimant tribes didn’t match the list that DAM had





Yavapai-Apache Nation representatives review baskets at DAM. In early April 1997, representatives of nine tribes visited DAM to review Apache collections and hold NAGPRA discussions.

address the NAGPRA requirements regarding their asserted affiliation to the cap (1941.179). DAM suggested several options available under NAGPRA for the consortium to consider and encouraged it to fine-tune the claim. This situation underscores the fact that claimants are often in the best position to clarify specific cultural affiliations by submitting evidence to support their claim. For this reason, it is greatly appropriate that NAGPRA requires claimants to assemble and present evidence showing a cultural affiliation to the source of claimed items.

In essence, the NAGPRA section 6 summary requirement creates a process that begins with sharing enough information to start communication (section 6 [a]), followed by consultation (section 6 [b][1][B]) and additional information-sharing (section 6 [b][1][C]). Through this process, the cultural affiliation of items can be determined and, if necessary, reconsidered according to accumulated evidence.

It's important to emphasize that NAGPRA findings on cultural affiliation take shape from the outcome of evidence. When summaries establish cultural affiliation, subsequent consultation might well bring forward information that will justify modifying the original finding. Claim preparation and assessment can also make it necessary to adjust one's initial findings of cultural affiliation. NAGPRA findings of cultural affiliation must therefore be viewed as flexible constructions dependent upon the readily available evidence.

At any given point, museums and claimants should endorse only those findings that can be supported by evidence at hand. If NAGPRA required only that museums or claimants express unsubstantiated opinions regarding cultural affiliation, any claimant could approach museums and federal agencies and make claims for any objects whatsoever, and museum and federal agency officials would be powerless to deny such claims. It is to the benefit of culturally affiliated tribes

originally used to determine to whom to send which summary. Following extensive analysis of the claim, DAM agreed that cultural affiliation could be satisfied with most of the items, but concluded that the Western Apache NAGPRA Working Group needed to more directly



that cultural affiliation be based upon actual evidence of some kind. Museums and federal agencies are obligated to ensure that critically evaluated evidence provides the basis for cultural affiliation.

### **3. NAGPRA lists oral traditions and expert opinion as categories of evidence that can be used for cultural affiliation.**

NAGPRA includes “oral traditional” information as one possible source of evidence for cultural affiliation (section 7 [a][4]), but no statutory definition is offered for this term, and the federal regulations provide no guidance as to how such information can be used. The most common definition, however, is that “oral traditional” means information from a firsthand observer that has been verbally transmitted to another party and may be available in both spoken and written form. In more technical academic usage, oral traditions are distinguished from oral history, which is considered to be information recorded directly from a firsthand observer.

In implementing NAGPRA, “oral traditional” information should be treated as information in both verbal and written form that originated from a firsthand observer or observers, and may include both oral tradition and oral history. This is important because the legal preference for excluding hearsay and widespread skepticism toward oral traditions among academic scholars have historically worked together to discredit reliance on oral traditional information. NAGPRA requires a more thoughtful approach rather than automatic dismissal.

Some general standards are appropriately applied to oral traditional information. Museums, federal agencies, and tribes may have little experience in using such information under NAGPRA. As a matter of academic scholarship, oral traditions present a complex realm of information requiring careful research and analysis. For NAGPRA, however, parties may not have access to the best and most current expert scholarship. Instead, parties may necessarily have to rely upon their own resources to evaluate readily available oral traditional information. Museums and federal agencies do not have the option to ignore readily available oral traditional information.

How should institutions inexperienced with oral traditions go about assessing





this information? A reasonable person, upon hearing comments made by another person, tends to assume veracity, but typically maintains varying levels of skepticism and disagreement depending upon the speaker, the topic at hand, and the circumstances of transmission. Very few people automatically assign complete accuracy and truth to all statements made by other parties, whether oral or written.

NAGPRA therefore does not require that all oral traditional information be credited at face value. Instead, it is reasonable to try to appraise the credibility of the oral traditional information. Moreover, it's important to distinguish oral traditional information from speculation and unfounded personal opinion, which may be occasionally inserted into oral traditions. For this reason, museum and federal agency officials ought to be prepared to critically evaluate oral traditional information with the same care given to archeological data and written records.

Academically trained scholars typically make little use of oral traditions, and tribal cultural experts may tend to ignore archeological, ethnographic, and historical documentation. For this reason, an academic scholar may form a different expert opinion than a tribal elder, traditional religious leader, or tribal historian. NAGPRA requires that the expert opinions of *all* the above parties be included in weighing evidence, but it is still useful for museums and federal agencies to understand the basis for expert opinions.

In forming an expert opinion, academic scholars and tribal historians generally make every effort to adhere to a higher standard of proof in assessing evidence than NAGPRA requires. In fact, it would be irresponsible for an academic scholar to use “a preponderance of the evidence” as a typical standard for drawing conclusions, because too much is left open to doubt and there's too much potential for error. Museum administrators and federal officials who rely exclusively upon expert opinions of academic scholars must therefore evaluate whether those opinions employ an overly stringent standard of evidence. Museums and federal agencies must often call upon academic scholars for guidance on cultural affiliation but, under NAGPRA, should be cautious in denying an affiliation based upon an expert opinion that uses a standard that differs from “a preponderance of the evidence.”

Some tribal elders, traditional religious leaders, and tribal historians are careful to limit their expert opinions only to information that they have the right to keep



and transmit, or they may have other reasons for ignoring the larger realm of readily available information. Tribal officials who rely exclusively upon expert opinions of such persons should therefore make some effort to evaluate the extent to which these opinions may depart from the NAGPRA standard of evidence. This is an important responsibility because the NAGPRA standards will be applied by museums and federal agencies regardless of the standard that tribal officials may employ.

An important difference should be acknowledged, however, between the responsibility of a tribal official and the duty of a museum or federal agency official. Tribal officials need to understand what NAGPRA requires and should be prepared to give guidance on known cultural affiliations and potential affiliations of their tribe. In dealing with institutions, tribal officials may need to provide information through the consultation process that can assist an institution in accurately evaluating a tribe's affiliations. Museums and federal agencies, on the other hand, are responsible for gathering readily available information, consulting with tribes, and then making findings based on a preponderance of the evidence. NAGPRA does not include any provision that permits a museum or federal agency to depart from the law if it wishes, or if it is advised to take such a course by a tribe.

A significant cultural difference often exists between academic scholars and tribal cultural authorities. Criticism is an important factor in the professional development of academic scholars. Academic professionals expect their arguments to be challenged and believe that critical perspectives help improve scholarship. Tribal cultural authorities, however, generally tend to emphasize the attentive, uncritical absorption of cultural practices and traditions. Critical dialogue plays a role in traditional culture, but it often serves primarily as a means of evaluating the level of knowledge and accurate performance of ritual duties by tradition-keepers.

Because of this ingrained cultural practice, when the NAGPRA consultation process elicits oral traditions from an elder or religious leader, it will be greatly offensive to tribal officials for a museum or federal agency to challenge or reject this information. It is nevertheless the duty of museum and federal agency officials to responsibly weigh information and openly disagree with elders and religious leaders when it is absolutely necessary to do so, based on the evidence at hand. This will be viewed as offensive, so officials should exercise the greatest possible levels of



deference, respect, and diplomacy on those occasions when they must disagree with an elder or religious leader.

In conducting consultation activities, tribal leaders may need to include elders and religious leaders in collection reviews and other information-sharing activities, but to include elders or traditional religious leaders in technical discussions with museum and federal agency officials on issues of NAGPRA applicability is to expose them to potential humiliation. It is the responsibility of tribal government officials to learn NAGPRA and employ its standards. This is not the responsibility of an elder or religious leader. The process of gathering and sharing information through consultation can be handled separately from the process of preparing careful documentation and conducting negotiations in which oral traditional information will be subject to assessment and may be reasonably discredited.

For findings of cultural affiliation, NAGPRA does not expect museums and federal agencies to rely only upon archeological, anthropological, and written historical records. NAGPRA does not expect tribes to rely only upon oral traditions. NAGPRA does not expect that greater weight automatically be assigned to a piece of information because it may be authored by a scholar, by a white person, or by an Indian.

The law expects that all readily available information will be fairly reviewed, and that a finding of cultural affiliation will be based on a preponderance of the evidence. This evidence may not be extensive in quantity, or it may consist of many diverse elements—and it need not be in complete agreement. It should, however, be credible and convincing, and both oral traditions and expert opinions can contribute to this outcome.

**4. Museums and federal agencies have the sole authority to make findings of cultural affiliation. In the absence of any formal dispute situation or court challenge, NAGPRA does not give any party, such as NPS or the NAGPRA Review Committee, the authority to overrule or modify any finding of cultural affiliation.**

An interesting notice appeared in the February 20, 2001, issue of the *Federal Register*. In this “Notice of Inventory Completion,” the Colorado Historical Society (CHS) announced that it had consulted with twelve tribes and found them to be



culturally affiliated with the remains of 260 persons and 548 associated funerary objects (*Federal Register*, volume 66, number 34 [20 February 2001], pp. 10906–9). The notice states that CHS officials made this determination on the basis of “traditional territories and oral traditions.” As discussed earlier in this chapter, both geography and oral traditional information are listed in NAGPRA as evidence that can be applied to determine cultural affiliation.

Elsewhere, the CHS notice states that the remains are all believed to date from before 1884 and “[b]ased on the totality of the circumstances surrounding the acquisition of these human remains and associated funerary objects, and evidence of traditional territories, oral traditions, archeological context, material culture, and cranial measurements, officials of the Colorado Historical Society have determined that there is cultural affiliation with the present-



According to Marvin Cohodas, an expert on basketry, this basket was made about 1914 by Elizabeth Hickox, a Karok artist.

day tribes who jointly claim a presence in the region prior to and during the contact period.” The notice mentions CHS consultations with twelve tribal governments in October 2000 and goes on to describe a document signed by these tribes “claiming cultural affiliation to all of the human remains and associated funerary objects described above.”

Pursuant to NAGPRA requirements, the National Park Service published this notice in the *Federal Register*. NPS must publish notices, but no administrative party—including NPS—has specific authority under NAGPRA to regulate and overturn determinations made by museums and federal agencies. Even the NAGPRA Review Committee lacks such policing ability in the absence of any formal dispute brought before it and holds only the power to review implementation of the law. Why is this important? Study of the CHS findings raises sensitive matters that deserve thoughtful attention from Native American communities, museums, and federal agencies.



The remains of most of the 260 persons listed in the notice were originally found by CHS in 1995 to be culturally unidentifiable, but in this 2001 notice, CHS changed its findings for the entire group. In the analysis given below, the basis for this change is carefully studied and challenged, but it's also vital to keep in mind that the CHS notice represents the outcome of a genuine effort by the museum to consult with tribes and get them involved in arranging the disposition of human remains.

Information about the circumstances under which the remains were found varies in the CHS notice, but a closer look at one specific situation identifies some principles that are important to how cultural affiliation functions under NAGPRA. The first human remain listed in the notice is a scalplock:

In 1935, human remains representing one individual consisting of a scalplock were donated to the Colorado Historical Society by David H. Moffat, a well-known businessman who settled in Colorado about 1860. The circumstances under which Mr. Moffat acquired the scalplock are not clear. Museum documentation and accession records indicate that the individual is Native American. No known individual was identified. No associated funerary objects are present. (p. 10906)

This echoes the information set forth for this human remain in the 1995 CHS NAGPRA inventory, which also states that, based on museum records, the scalplock was “[f]rom an Indian” and adds that “the donor lived in Colorado during a time of conflict between white settlers and Indian people” (Roger Echo-Hawk, *Indentured Spirits: A Census of Native American Human Remains and Inventory of Associated Funerary Objects at Colorado Historical Society* [Denver: Colorado Historical Society, 1995], p. 289).

The evidence in CHS records that the scalplock originated from “an Indian” supports the view that it belonged to a person who lived and died somewhere in the New World and was probably a citizen of an Indian tribe. Information clarifying the circumstances under which the scalplock was taken from its owner would be very



helpful for the purpose of determining cultural affiliation. The only cited information, however, serves to connect David Moffat with Colorado, so the identity and cultural affiliation of the scalplock remains a mystery, other than that it came from an “Indian.” It might be appropriate to speculate that the scalplock originated in Colorado, but speculation is not evidence under any reasonable standard.

The notice cites evidence of traditional territories, archeological context, material culture, and cranial measurements. These realms of evidence, however, do not apply to the scalplock. Does evidence from oral traditions make the cultural affiliation connection? The notice and the 1995 CHS inventory don’t list any such evidence pertaining directly to the remains of this person. The two-page document signed by the twelve tribes in October 2000 asserting affiliation of the tribes to this scalplock does not contain any oral traditions mentioning this scalplock or otherwise clarifying the circumstances under which it was removed from its owner.

In brief, this notice, the 1995 CHS inventory, and the October 2000 cultural affiliation agreement shed no light upon the exact or probable tribal identity of this person. It is therefore wholly a matter of speculation, rather than credible evidence, whether the owner of the scalplock was a citizen of any one of the signatory tribes. It seems extremely doubtful that an uninvolved third party could find a reasonable foundation in evidence to agree with CHS that the scalplock is culturally affiliated with any specific tribe or tribes. So how did CHS determine that this human remain is culturally affiliated with twelve tribes?

Although the CHS notice has no evidence pertaining to cultural affiliation for this scalplock, the notice does contain information suggesting that the cultural affiliation for this individual was negotiated by CHS in consultation with twelve tribes. Under NAGPRA, in the absence of any formal challenge, the scalplock is now officially affiliated with twelve tribes. It is the scalplock of a person found by CHS officials to be a member of some kind of unspecified earlier group considered by CHS to be ancestral to the present-day Cheyenne and Arapaho Tribes of Oklahoma, the Comanche Tribe, the Fort Sill Apache Tribe, the Kiowa Tribe, the Northern Cheyenne Tribe, the Oglala Sioux Tribe, the Pawnee Nation, the Rosebud Sioux Tribe, the Southern Ute Tribe, the Three Affiliated Tribes of the Fort Berthold Reservation, the Uintah and Ouray Ute Tribe, and the Ute Mountain Ute Tribe. In



the absence of any dispute or court challenge, no government official or committee has the authority under NAGPRA to officially challenge the CHS finding.

This situation illustrates an important principle: a museum or federal agency can consult with any federally recognized Indian tribe and subsequently issue a mutually agreeable finding, and NAGPRA does not establish any further process that will ensure scrutiny by a party with authority to challenge the finding. The notice publication requirement in NAGPRA establishes a process under which challenges are possible, but no third party has automatic responsibility to review notices and ensure that repatriation occurs in compliance with the law. Another tribe could submit a competing claim, or some party could go to court and request intervention, but these are only possibilities under NAGPRA.

What can be termed “negotiated cultural affiliation” provides a means for Indian tribes to repatriate human remains and associated funerary objects from museums and federal agencies. Since NAGPRA places museums and federal agencies in charge of making findings of cultural affiliation, the law does not appear to contain any explicit mechanism to prevent negotiation from replacing research.

A critical review of this phenomenon is set forth below to define this approach to cultural affiliation and to aid parties in making informed decisions about how best to address cultural affiliation. Indian tribes, museums, and federal agencies have many reasons for preferring negotiation over research as a basis for findings of cultural affiliation, and this already appears to be a widespread practice in the implementation of NAGPRA, but it is a questionable approach to the law.

### **Negotiated Cultural Affiliation**

CHS originally determined that the human remains covered by its notice were culturally unidentifiable. The institution and the twelve tribes could have developed a plan for interested tribes to repatriate, either with the approval of the NAGPRA Review Committee or in conformance with future federal regulations still under preparation (see discussion on this point in chapter 2). Why wasn't this option pursued?



The request for CHS to affiliate the remains came from the twelve tribes themselves, who cited allegedly similar situations at the University of Nebraska and Agate National Fossil Beds, managed by the National Park Service. Negotiated cultural affiliation ignores matters of evidence and shifts the focus away from research and assessment. Since it serves to expedite repatriation, it can be attractive to tribes lacking resources, expertise, or interest in sponsoring analytical scholarship on evidence pertaining to cultural affiliation. It also does away with any expense and inconvenience associated with approaching the NAGPRA Review Committee for a recommendation to deal with culturally unidentifiable human remains.

Museums and federal agencies also have many reasons for adopting this approach. For some institutions, pursuing a negotiated cultural affiliation may seem to provide a convenient way to put Indians in charge of Indian remains, although this can also occur with culturally unidentifiable human remains. It also requires less staff time than research, preparation of documentation, and assessment of the evidence relating to specific remains, as called for by the NAGPRA process. Expediency in dealing with NAGPRA may be preferred (or even necessary) in order to get on with other high-priority business.

This approach to cultural affiliation provides an immediate and well-received response to the preferences of the tribe with which the museum has chosen to negotiate. This can result in positive publicity for a museum. Indeed, a reporter for the *Denver Post* reported very favorably on the CHS agreement, writing in a front-page story that an unspecified “quirk” in NAGPRA stalled reburial efforts—probably a reference to cultural affiliation—but this “historic agreement” cleared the way and even provided for a happy ending to “an agonizing journey of body and soul” (Kevin Simpson, “Tribes Sign Repatriation Agreement,” *The Denver Post*, 18 October 2000). Front-page good news is a powerful reward for museums that depend greatly upon public goodwill.

For institutions that agree to expedite cultural affiliation by negotiating with interested tribes rather than investigating the matter through research, this strategy may seem to offer a convenient, streamlined option for dealing with extremely sensitive collections like human remains. In the short term, it can earn a museum





much goodwill from recipient tribes and the public. Negotiating cultural affiliation simply requires that all interested parties agree on the outcome. Virtually all American museums today want to cultivate positive relationships with Indian communities, and the negotiation of cultural affiliation may lend itself to building such relations.

But, tempting as it may be, tribes, museums, and federal agencies should reject the negotiation of cultural affiliation in implementing the NAGPRA cultural affiliation standard. Tribes may inadvertently encourage museums and federal agencies to adopt a somewhat capricious and arbitrary approach to the cultural affiliation standard in pushing them to rely upon negotiation rather than evidence. It would be problematic for tribes to send the message that an institution can choose to negotiate today and feel free to insist on evidence tomorrow. Museums will quickly learn when it is in their sole interest to win negotiated goodwill and when it is in their sole interest to insist on evidence.

By including cultural affiliation as a condition for repatriation, NAGPRA requires museums and federal agencies to respect and honor the status of culturally affiliated tribes by denying claims made by tribes with no affiliation. The law protects the sovereign interests of culturally affiliated tribes in human remains and cultural items only to the extent that it ensures that other tribes cannot successfully claim items when the evidence fails to sustain a connection. It is reasonable for tribes to expect museums and federal agencies to issue findings that provide trustworthy reflections of the available evidence and to stand by such findings. NAGPRA upholds tribal sovereignty by requiring a preponderance of the evidence in favor of cultural affiliation.

This principle can be demolished by negotiated cultural affiliation. A tribe could negotiate cultural affiliation for human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony that are actually affiliated with a second tribe, and only the vigilance of the second tribe in tracking and accurately analyzing the publication of notices in the *Federal Register* would enable it to assert and protect its rights.

With negotiated cultural affiliation as a feature in the NAGPRA landscape, no tribe can afford to assume that museums and federal agencies are going to rely upon evidence as the basis for determining cultural affiliation. To protect their own



sovereign interests, tribes must carefully scrutinize the findings of museums and federal agencies; institutions that use negotiated cultural affiliation deserve special vigilance.

A superficial review of published notices may not be sufficient to inform tribes that their sovereign rights are at stake. The CHS notice discussed above includes references to evidence, but it takes a close knowledge of the actual situation and scholarly analysis to understand exactly how the cited evidence applies to each set of listed remains. Negotiated cultural affiliation can give rise to situations where it may be difficult for tribes who are not party to the negotiations to hold museums and federal agencies accountable for their actions. In some cases, this may be like looking for a pin in a haystack of needles!

It will be to the detriment of the museum community as a whole if the deliberate elimination of the evidentiary basis for cultural affiliation by some museums creates the expectation among tribes that affiliation need not be a matter of research and evidence. Museums and federal agencies that continue to require evidence may unfairly come to be viewed as anti-repatriation, anti-Indian, and hostile to the interests of tribes. It might also be useful to keep in mind that once a museum has entered into a negotiated cultural affiliation with a tribe on human remains, it would be inconsistent for the museum to later insist that the same tribe provide evidence when it comes to looking at the museum's ethnographic collections.

Another potential drawback for all parties to negotiated cultural affiliation is that an outside party may be motivated to challenge the findings in order to delay or thwart an objectionable disposition. Since NAGPRA does not set forth negotiation as an alternative to establishing a preponderance of the evidence, negotiated cultural affiliations may wither under critical scrutiny. Following the widely used NAGPRA Review Committee format for dealing with culturally unidentifiable remains (see the chapter 2 discussion on cultural affiliation of human remains) would bring results that would be less likely to encounter such a challenge.

NAGPRA protects museums from liability if they repatriate in good faith (section 7 [f]), but an aggrieved party who can show that a past repatriation occurred as a result of a deliberately negotiated cultural affiliation may be in a position to pursue a lawsuit against the museum, especially if a preponderance of readily available information can sustain an alternate cultural affiliation. In such cases,



## spotlight on ancient Colorado affiliations

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Pursuit of a high standard of partnership with tribes should not replace a commitment to accurate implementation of NAGPRA. This principle is readily stated but difficult to practice when the preferences of tribes conflict with what NAGPRA requires. This reality may help explain the outcome of the Colorado Historical Society's efforts to engage in consultation with twelve tribes regarding the ancient remains of a dozen persons from eastern Colorado that date back more than a thousand years to what archeologists call the Plains Woodland period.

Beginning in the mid-1990s, CHS created a NAGPRA program that solicited tribal consultation and encouraged tribes to take action. By the late 1990s, for example, CHS had built a model partnership on NAGPRA with the Colorado Commission of Indian Affairs. Through this program, CHS planned and held a special symposium in October 2000 that brought together scholars and tribal representatives to consider the Plains Woodland remains. In planning the symposium, CHS was responding to efforts of the Southern Ute Tribe to repatriate the remains of a Plains Woodland man from the Colorado Springs area. The Pawnee Nation had also asserted an interest in all Colorado Plains Woodland human remains on the basis of an independent research project conducted by the author of *Keepers of Culture*.

NAGPRA does not explicitly require institutions like CHS to investigate cultural affiliations that may be suggested through consultation or through new research, but the law creates an environment in which changes in institutional findings can occur if new evidence comes forward—a view consistent with the June

2000 recommendations of the NAGPRA Review Committee (see chapter 2 for more on consultation regarding cultural affiliation of human remains). Since evidence is not static in scholarship, NAGPRA findings should respond to new information. CHS showed a reasonable willingness to maintain flexibility in dealing with cultural affiliation as a matter of evidence.

Under NAGPRA, it would have been appropriate for CHS to follow the symposium with new findings, if justified by the evidence. For Plains Woodland human remains, it would seem necessary to prepare a formal assessment of evidence as a basis for making a new finding of affiliation under NAGPRA. In fact, the symposium brought forward information from the Pawnees and one archeologist that arguably established an affiliation of Colorado Plains Woodland to the Pawnees and Arikaras, and a likely affiliation with the Wichitas.

Several months after the symposium, however, CHS found the Colorado Springs Plains Woodland human remain to be culturally affiliated with all twelve tribes, at the request of the Pawnee Nation and the Ute Mountain Ute Tribe. The other eleven Colorado Plains Woodland persons at CHS were left as culturally unidentifiable. The CHS notice of inventory completion does not clarify the basis for this decision. CHS sent the notice to forty-three tribes, and only the Hopi Tribe expressed reservations regarding the CHS approach to cultural affiliation. CHS was subsequently awarded a NAGPRA grant from the National Park Service to implement its findings and rebury the one Plains Woodland person, along with the remains of 260 people discussed elsewhere in this chapter.

the museum or federal agency will be held accountable, not the recipient tribe.

A final point concerns academic responsibility. NAGPRA does not require scientific certainty in weighing evidence about the historical past, but the general public expects to get reliable scholarship and factual information about historical circumstances from museums, universities, and historical societies. Negotiated cultural affiliation represents an expedient means of dealing with issues of evidence in a way that may not be easily reconciled to even minimal standards of scholarship. All academic institutions aim at preserving professional integrity and credibility in public education, and NAGPRA does not require that this be sacrificed. In considering cultural affiliation and other aspects of the law, it is appropriate for academic institutions to respect the principle that accurate history is researched, not negotiated.

NAGPRA has sparked many new explorations of human history. As tribes and academic institutions address issues that involve historical circumstances, finding trustworthy answers to pressing questions about the past will create a meaningful, enduring legacy for everyone.

If the letter and spirit of NAGPRA are designed to create a systematic means for achieving fair and just outcomes to questions of control of human remains and ownership of cultural items, then all involved parties have an obligation to help make the law work. The law requires conscientious consultation, information-sharing, research, and implementation, no matter which party is favored by the outcome. Effective use of these principles will bring equitable results.

Hopefully, museum and federal agency officials will reject negotiated cultural affiliation as adverse to the interests of both museums and Indian tribes. Since the language of NAGPRA apparently leaves open the possibility of negotiated solutions, tribes and museums may feel free to explore this approach, but they should acknowledge that others who rely upon the outcome of evidence—rather than solely upon the outcome of negotiation—are conscientiously following the letter and spirit of NAGPRA.







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# Chapter Five

## Unassociated Funerary Objects



## in the cities of the dead

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*I*n the Land of the Three Rivers during the 1830s, leaders of the Chaui Pawnee Tribe founded an earthlodge city south of Kits Katus (Flat River, known today as the Platte River). Many Chaui families moved there from north of the Loup River and took up residence in their new homes. The city had been established along an old thoroughfare the Chaus followed to their hunting grounds, and they called this city Marsh along the Road because a marshy area lay nearby.

The Chaus dwelt at Marsh along the Road for only a short time and by the end of the 1840s had joined together with two other Pawnee tribes to build a new metropolitan center known as Pahuku, located farther downstream along the Kits Katus. During their residence at Marsh along the Road, however, the Pawnees established cemeteries upon hill-tops overlooking the city, and there they buried their deceased loved ones, together with treasured personal possessions.

A hundred years later, long after the Pawnees were forced to leave the Land of the Three Rivers and move south to Oklahoma, American archeologists conducted excavations at Marsh along the Road, which they termed the Clarks site. They found and excavated dozens of burials on the adjacent hills, and many human remains and associated funerary objects ended up at the Nebraska State Historical Society (NSHS). During the late 1980s, the Pawnee Nation claimed these human remains and funerary objects under the provisions of a new state law, LB340, and reburied them in their ancient Nebraska homeland.

A few years later, NSHS staff conducted an inventory of their collections and came across a small rusted mass of gun parts and a partial clay pipe. They soon realized that these items were from graves on Burial Hill 6 at the Clarks site. The human remains had already been repatriated to the Pawnee Nation and reburied, but these items had been overlooked. Documentation sufficient to meet the NAGPRA requirements identified the items as originating from individual Pawnee graves at Marsh along the Road, the Clarks site.

Meeting with a Pawnee tribal representative in 1999, the NSHS agreed that the objects met the NAGPRA definition for unassociated funerary objects because these items had been placed with individual human remains in the course of mortuary rites and were subsequently removed from the specific burial sites of persons culturally affiliated with the Pawnee Nation. The human remains were no longer in NSHS keeping, but the Pawnee Nation could claim the pipe and gun fragments under the provisions of NAGPRA.

## Unassociated Funerary Objects

**1. NAGPRA defines two separate classes of funerary objects. Unassociated funerary objects have a specific definition in the law and are treated differently than associated funerary objects.**

NAGPRA provides statutory definitions for “associated funerary objects” and for “unassociated funerary objects”:

“[A]ssociated funerary objects” . . . shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

“[U]nassociated funerary objects” . . . shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe[.]  
(section 2 [3][A&B])

The above definition for unassociated funerary object includes the term “burial site,” and NAGPRA also provides a statutory definition for this term:





“[B]urial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited. (section 2 [1])

The inclusion of these definitions in NAGPRA means that all other ways of employing the specific terms are irrelevant to implementation of NAGPRA. The federal NAGPRA regulations provide guidelines to assist museums, federal agencies, and Native American communities with applying the concepts of “funerary object,” “burial site,” “associated funerary object,” and “unassociated funerary object” to items in their collections:

## Important Points

### Unassociated Funerary Objects

- 1 NAGPRA defines two separate classes of funerary objects. Unassociated funerary objects have a specific definition in the law and are treated differently than associated funerary objects.
- 2 Items originating from the bodies of persons killed in battle may potentially meet the NAGPRA criteria for funerary objects.
- 3 Under the federal regulations, not all items used in mortuary practices qualify as unassociated funerary objects.
- 4 Some funerary objects meet the technical definition for associated funerary objects even if no associated human remains exist in any museum collection.
- 5 Museum records are typically crucial for identifying items from burial contexts, but in some cases, research and consultation may be important in establishing mutual agreement as to whether such items meet the NAGPRA definition for unassociated funerary objects.

*Funerary objects* means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains. The term *burial site* means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of grave site . . .

(i) *Associated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.

(ii) *Unassociated funerary objects* means those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects. (section 10.2 [d][2])

As discussed in chapter 2 of *Keepers of Culture*, items meeting the definition



for associated funerary objects are included in the inventory required by section 5 of NAGPRA, while unassociated funerary objects are covered by the summary required by section 6. This means that the question of cultural affiliation of associated funerary objects is determined by museums and federal agencies in consultation with affected tribes, and this is accomplished through the inventory process. The cultural affiliation of unassociated funerary objects, however, may or may not be settled by the summary, with consultation following issuance of the summary.

The primary distinction between the two classes of funerary objects is that specific human remains can be linked to associated funerary objects, while none are available for unassociated funerary objects. In cases where human remains and associated funerary objects are held by different institutions, the institutions can work together to consult with tribes, make suitable findings of cultural affiliation, and publish a joint notice of inventory completion. In and of itself, reunification of separated components of what was once one burial is an appropriate goal for museums, whether or not it ultimately leads to repatriation. Tribes can encourage museums to take action but should be aware that some institutions may refrain from initiating any special measures for a variety of reasons.



The law and regulations raise three issues that guide the general applicability of the category of unassociated funerary objects to museum collections. First, has the claimant provided evidence to support the argument that the object is “reasonably believed to have been placed with individual human remains either at the time of death or later” during the performance “of the death rite or ceremony of a culture”? Second, does the evidence support a reasonable belief that the object was *intentionally* placed in association with human remains? Finally, does a preponderance of the evidence show that the item was “removed from a specific burial site of an individual” who is either culturally affiliated with the claimant tribe or is a known person? These questions should be settled by evidence, not speculation.

An important concept at the heart of the legal definition for both classes of funerary objects is that the remains of a dead person were dealt with in accordance with the documented mortuary practices of a society, and the objects in question



had some relationship with the remains in the course of those ritual mortuary activities. Such activities can occur at the time of burial or later, but some form of deliberate association must link objects and human remains.

For the Pawnee funerary objects at the Nebraska State Historical Society, for example, it doesn't matter whether the firearm and pipe were originally placed in, on, or near the actual grave if it can be reasonably determined that they were in some way deliberately associated with a gravesite. Pawnee mortuary practices historically did include intentional placement of a wide variety of objects in and on graves, both at the time of burial and later. Such items were believed to represent possessions of the deceased person.

What would the law say, however, if incidental objects such as pottery fragments were found in the soil filling a Pawnee grave? Could these have been considered possessions of the dead?

The circumstances of the burial might clarify such a situation. In other words, a scattered group of pottery sherds in grave-fill for a burial located in a house floor



Representatives of the Pawnee Nation and the Nebraska State Historical Society jointly investigate the applicability of NAGPRA to items from Pawnee graves.

might be reasonably viewed as incidental to the interment, because the Pawnee used storage pits as repositories for discarded trash. A scattered group of small sherds in grave-fill for a burial in a cemetery, however, could be reasonably viewed as an intentional funerary possession of the deceased since it would be unlikely for people to visit the cemetery for the purpose of discarding trash.

It is true that later visitors to the site might leave garbage in the vicinity of a grave or make some other use of the area. Such situations might be further complicated by mixing of materials through plowing, rodent tunneling, and other forms of soil disturbance. Tribes should work with museums and federal agencies to jointly



# spotlight on burial moccasins

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Museum records for some moccasins with beaded soles list them as “burial moccasins.” Does this mean they came from graves or were made exclusively for funerary purposes? To make this case, claimants will need to conduct additional research beyond a museum’s documentation. Burial moccasins most often will fall outside the NAGPRA definition for unassociated funerary objects because such moccasins are not necessarily from a funerary context, as a brief survey of published literature suggests.

According to a Denver Art Museum exhibition catalog published in 1974 by Richard Conn, Curator of Native Arts, the term “burial moccasins” is typically applied to moccasins with fully beaded soles that were probably “made as gifts for honored friends or relatives” (*Robes of White Shell and Sunrise*, [Denver: Denver Art Museum], 1974, p. 102). In another exhibition catalog published a few years later, Ralph

Coe wrote that “ ‘Burial’ moccasins were beaded on the soles and used in the [Sioux] women’s adoption ceremony. Many surviving pairs were never buried, but were evidence of wealth and prestige” (*Sacred Circles*, [n.p.: Arts Council of Great Britain, 1976], p. 173). According to Ted Brassler, “Wealthy horse owners had the soles of their moccasins covered with beadwork, indicating that they no longer needed to walk” (“Plains,” in *Art of the North American Indians: The Thaw Collection*, edited by Gilbert T. Vincent, Sherry Brydon, and Ralph T. Coe [Cooperstown: Fenimore Art Museum, 2000], p. 133).

These expert opinions clarify that burial moccasins are not necessarily from a grave or removed from the feet of a dead person. They might be from a grave, but to determine this would require more information than a mere reference to the use of the term “burial moccasins” on a museum catalog card.

review the available information in those cases where some doubt may exist as to whether an item qualifies as a funerary object.

## **2. Items originating from the bodies of persons killed in battle may potentially meet the NAGPRA criteria for funerary objects.**

What about items removed from the bodies of persons slain in battle? The funerary objects provisions of NAGPRA were intended to focus on items taken from gravesites, but can potentially cover items taken from slain victims of war if the elements of the statutory definition can be reasonably satisfied. Where such items fit the definitions for associated or unassociated funerary object, however, right of



possession for such items may still present a complicating factor, difficult to determine in some cases (see chapter 8, “Right of Possession”).

For example, nineteenth-century Pawnee mortuary practices were diverse and situational. To make a case for battlefield spoils as unassociated funerary objects, the Pawnee Nation would need to show that leaving the body of a slain person undisturbed at the site of death, together with any personal items, was an accepted death rite during the period in question. The NAGPRA definition of a burial site does not require that a dead body be buried, but it does assume that some form of intentional disposition has occurred in accordance with customary death rites of the society.

Claimants can’t just speculate or offer opinion on these matters—they need to provide evidence to sustain their arguments. For a Pawnee Nation official to simply state that an item taken from a dead Pawnee on a battlefield is an unassociated funerary object would leave unanswered important questions as to whether this circumstance was truly a death rite for Pawnees of the period in question. The Pawnee Nation would need to assemble evidence from oral traditions, historical documents, ethnographic records, or other sources to show that when a person was slain on the field of battle, the remains could be left undisturbed where they lay, together with articles of clothing and other items. Such research would clarify whether Pawnees at the time viewed this treatment as an appropriate disposition of the dead.

When a battle has taken place in a community setting, such as a camp or town, the status of items taken from the battlefield may be even more complex. Some items, such as clothing and other personal effects, will have a direct association with a dead body, and may therefore have some potential for meeting the NAGPRA definition for funerary object. Other items, however, may have been taken from a hastily abandoned house or camp, and may not have had any direct or intentional association with a slain victim of the incident.

### **3. Under the federal regulations, not all items used in mortuary practices qualify as unassociated funerary objects.**

The federal NAGPRA regulations disqualify certain items from the definition of unassociated funerary object: “Objects that were displayed with individual human



remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects” (section 10.2 [d][2][ii]). In other words, NAGPRA does not cover any items that may have been employed in the course of the death rite but were later turned over to living persons. For societies in which a cultural practice existed of distributing certain items used in mortuary rites to living persons, a photograph of the funerary rite showing a claimed object in association with a deceased person is not sufficient to meet the NAGPRA definition for funerary object.

#### **4. Some funerary objects meet the technical definition for associated funerary objects even if no associated human remains exist in any museum collection.**

NAGPRA sets forth two subclasses of funerary objects that qualify as associated funerary objects even when no associated human remains exist. The law states that “items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects” (section 2 [3][A]). Museums and federal agencies should keep this definition in mind when preparing their section 5 inventories because it will be their responsibility to consult with affected tribes prior to making determinations of cultural affiliation for these items.

The Denver Art Museum included one such item in its section 5 inventory. DAM identified a Hohokam ceramic jar as an associated funerary object because it was used as a container for cremated human remains. As specified on the DAM catalog card, “the jar contained a few pieces from the cremation it once held: a couple of Glymeris shell fragments, etc.” Strictly speaking, it’s possible to classify the shell fragments as unassociated funerary objects and subject to a different process than the jar, but DAM chose to treat the jar and shells as a composite unit rather than as separate items. The cremated human remains were never in the possession or control of DAM authorities, and their fate is a mystery. At a consultation with DAM, one tribal representative observed that it was common knowledge that collectors often discard cremated remains from Hohokam funerary jars.

It’s not absolutely certain that the jar was “exclusively made . . . to contain



human remains,” but in consultation with the affiliated tribes, all agreed that it would be preferable to class it as an associated funerary object. It would have been speculative for DAM to decide that the jar was used for purposes in addition to its use as a funerary urn. Because the catalog card stated that the jar served as a container for cremated remains, the evidence favored exclusive use for funerary purposes. The same logic holds for the shell fragments. Found in a funerary context, these shells can be interpreted as items made exclusively for burial purposes.

**5. Museum records are typically crucial for identifying items from burial contexts, but in some cases, research and consultation may be important in establishing mutual agreement as to whether such items meet the NAGPRA definition for unassociated funerary objects.**

It's important for tribes to carefully review museum and federal agency records to identify items from the graves of culturally affiliated persons. These records will typically provide the basis for showing that an item fits the category of unassociated funerary object. A museum's section 6 summary might not provide notice of funerary collections, since it is really designed to open consultations rather than settle the status of items under NAGPRA. If summaries fail to notify tribes of the existence of unassociated funerary objects, museums and federal agencies should use the consultation process to share such information.

The NAGPRA definition also requires a certain level of specificity for the relationship of objects to human remains: “the objects can be identified by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe” (section 10.2 [d][2]). For this reason, an item lacking any information other than that it came from a cemetery of some kind, such as a mound, may not meet this definition because it can't be linked to an individual grave. The issue is not one of a minimal amount of information; rather, it is the ability of the available information to sustain a reasonable conclusion that an item was removed from the grave of an individual. Consultation between tribal representatives and museum officials may be crucial in resolving such cases.









# Chapter six

Sacred Objects

## the performance of tradition

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***F**or the Motoki Society, visiting the Denver Art Museum was an unsettling experience. The museum had developed a special consultation project to bring traditional religious leaders and tribal officials of the Blackfoot Confederacy to Denver to talk about NAGPRA. Still, it was distressing for the leaders and Grandmothers of the Blood Motoki Society to know that society religious bundles were on the museum's shelves. Under their leadership, the Blood Tribe began to seek the return of these living bundles.*

*Between 1998 and 2000, delegations composed of Motoki Society leaders and Blood Tribe officials visited DAM six times. They made it clear to museum officials that the traditional religious leaders wished to have the bundles for several reasons. One important purpose was to reincorporate the bundles into the annual opening of the Motoki Society bundles during the Blood Sun Dance. The Motoki Society would find new keepers for the bundles, and every year they would come together during the Sun Dance to hold this special ritual.*

*Based on this information, DAM officials concluded that the bundles were needed by traditional religious leaders for the performance of a present-day, ongoing ceremony, and the religious leaders were acknowledged by the community as having the responsibility to perform duties related to Blood ceremonial traditions. The bundles therefore met the NAGPRA standards for sacred objects.*

## Sacred Objects

Religious freedom is an important component of our shared cultural heritage in the United States, but intolerance toward Native American religious practices has historically played a powerful role in shaping U.S. public policy. Federal officials' active suppression and discouragement of Indian religious activities during the late nineteenth and early twentieth centuries left a lingering imprint on Indian country.

NAGPRA recognizes that this legacy must be addressed as a matter of national concern. The law empowers Native American traditional religious leaders to identify items needed for ceremonies and to support claims made by lineal descendants and tribes for those sacred objects that were improperly alienated from rightful owners. Tribal officials can study how NAGPRA deals with "sacred objects" as a basis for working effectively with traditional religious leaders to identify items of interest at museums.

### **1. NAGPRA and the federal regulations provide a strict definition that must be met before items qualify as sacred objects.**

NAGPRA provides a statutory definition for "sacred objects":

"[S]acred objects" . . . shall mean 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[.]  
(section 2 [3][C])

The inclusion of this limited definition in NAGPRA means that all other ways of employing the term "sacred object" are irrelevant to implementation of NAGPRA. The federal NAGPRA regulations provide guidelines to help museums, federal agencies, and Native American communities apply the statutory concept of "sacred object" to items in their collections:



*Sacred objects* means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term *traditional religious leader* means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization or (ii) Exercising a leadership role in an Indian tribe or organization based on the tribe or organization's cultural, ceremonial, or religious practices. (section 10.2 [d][3])

## Important Points

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### Sacred Objects

- 1 **NAGPRA and the federal regulations provide a strict definition that must be met before items qualify as sacred objects.**
- 2 **The NAGPRA definition for sacred objects consists of three interrelated elements.**
- 3 **The concept of a traditional religious leader is broadly defined in the federal NAGPRA regulations, and it is not wholly dependent upon recognition by tribal governments.**

**2. The NAGPRA definition for sacred objects consists of three interrelated elements.**

The law and regulations raise three issues to be resolved when deciding whether an item in a museum collection fits the definition of sacred object. First, has the claimant provided evidence that the object is a “ceremonial object” that is “devoted to a traditional Native American religious ceremony or ritual and which [has] religious significance or function in the continued observance or renewal of such ceremony”? Second, is the object “needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents”? Third, is the religious leader “a person who is recognized by members of an Indian tribe or Native Hawaiian organization as . . . responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization,” or does the religious leader hold “a leadership role in an Indian tribe or organization based on the tribe or organization’s cultural, ceremonial, or religious practices”?

Despite use of the term “sacred” to designate these items in NAGPRA, claimants need not reveal information about the spiritual qualities of objects, religious symbolism of rituals, theological concepts, or the significance of the use of objects during rituals. Information of this sort is typically irrelevant to demonstrating that an item fits the NAGPRA definition for sacred objects. As educational institutions, museums have a legitimate interest in these matters, but they can’t require claimants to divulge such details in order to prove that an item qualifies as a sacred object under NAGPRA. The sacred object category is not complicated, but it does include very specific elements that must be satisfied. In the opinion of the Denver Art Museum, a claimant can meet the NAGPRA requirements by filling in the blank spaces below.

The claimed item \_\_\_\_\_ is needed  
*(insert museum accession or catalog number)*

by \_\_\_\_\_ for the performance  
*(insert name or other identifying information for a specific person)*

of \_\_\_\_\_, and the above-named person  
*(insert name or other identifying information for a specific ceremony)*

is recognized by members of my tribe as a traditional religious leader.

\_\_\_\_\_  
*(signature of tribal chairperson)*



The federal NAGPRA regulations for sacred objects state that the category is limited “to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony.” An earlier draft of federal repatriation legislation would have required that claimants show that an item was originally used in the exact ceremony for which it is presently needed, but Congress deleted this requirement from NAGPRA. Congress recognized that “the practice of some ceremonies has been interrupted because of governmental coercion, adverse social conditions or the loss of certain objects through means beyond the control of the tribe at the time” (“NAGPRA: Background and History,” in *Repatriation Reader: Who Owns American Indian Remains?* edited by Devon Mihesuah [Lincoln: University of Nebraska Press, 2000], pp. 143–4).

Claims under the sacred object category can ideally refer to past usage of the claimed item in the ceremony for which it is again needed, but museums and federal agencies should not require proof that ceremonial practices have continued unchanged. As an example, the Denver Art Museum holds a Crow Sun Dance bundle that originated from Two Leggings. According to Hubert Two Leggings and Ken Dawes (lineal descendants of Two Leggings—see “Under the Family Tree” in chapter 9), the old-time Crow Sun Dance lapsed some time ago, and the present-day Crow Sun Dance originated after World War II from the Shoshoni.

Since Congress eliminated any obligation for claimants to show that a claimed item is needed for the exact ceremony for which it was originally made, it would be questionable to regard items used in the old-time Crow Sun Dance as unavailable under NAGPRA for contemplated use in the present-day Crow Sun Dance. Both Sun Dance ceremonies are generally similar, although the purpose and structure may differ. The ceremonial differences may well be a matter of concern to Crow traditional religious leaders, but not to the Denver Art Museum.

Change occurs in every religious tradition. It would be unfair, as well as inappropriate under NAGPRA, for museums to attempt to restrict the use of sacred objects only to ceremonies unaltered over time. Traditional religious leaders should think about whether objects used in older forms of ceremonies are needed for the practice of newer versions of those ceremonies.



Although museums in general shouldn't question an asserted need by a traditional religious leader, it would be difficult for a traditional religious leader to convincingly argue that a sincere present-day need exists for an item that had no original ceremonial usage or was used in a completely different ceremony. Congress did not intend to empower traditional religious leaders to arbitrarily bestow ceremonial usage upon random items in



Traditional religious leaders like Gordon Yellowman (on the right), a Southern Cheyenne Sun Dance Priest and Chief on the Council of Forty-Four Chiefs, play a central role in identifying sacred objects.

museum collections. Museums and federal agencies should not require claimants to show usage in an unchanged, ongoing ceremony but can rely upon the regulations to look for general correspondence between past use and present need. The regulations specify that sacred objects “are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony.”

Traditional religious leaders should reserve for themselves the ability to identify current needs for ceremonial objects. This makes it impossible for museums to make unilateral determinations as to which items qualify as sacred objects under NAGPRA. Museum anthropologists may be capable of identifying items that might potentially meet the criteria, and this information can be used to advance the consultation process. Tribal delegations should proceed with caution in dealing with museums and federal agencies that seem intent on dictating which items will or will not qualify as sacred objects under NAGPRA.

Museums and federal agencies necessarily must judge whether to honor or deny claims for sacred objects, but their authority is limited to evaluating information submitted to them by a claimant. A museum or federal agency should deny a claim if the claimant has failed to include sufficient information to show that the





## spotlight on Religious vs. sacred

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The term “sacred” can be somewhat misleading because under NAGPRA a sacred object is really a ceremonial object. In other words, all NAGPRA sacred objects have a religious character, but not all religious items qualify as sacred objects. This distinction is important, as emphasized by the federal NAGPRA regulations: “While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony” (section 10.2 [d][3]). Items that have a religious character of some kind do not meet the technical NAGPRA qualifications as sacred objects unless a recognized traditional religious leader needs them for ceremonial use.

Tribal officials responsible for implementing NAGPRA do their traditional religious leaders a disservice if they fail to clarify for them the technical difference between religious items and NAGPRA sacred objects. Failure to make this clear may expose religious leaders to insulting disagreement by museum and federal agency officials. If asked only to identify sacred objects in a museum collection, most people would naturally ponder the question: “Well, what is sacred among these items?” It’s confusing for traditional religious leaders to know they are expected to identify sacred objects, but then encounter skepticism simply because they lack the essential information that under NAGPRA, “sacred objects” are really limited to items needed for present-day use in religious ceremonies.

claimed item qualifies as a sacred object under NAGPRA. A claimant can always return with additional information that satisfies the NAGPRA standards. Where possible, museums and federal agencies can assist claimants by filling in the gaps with any readily available information.

### **3. The concept of a traditional religious leader is broadly defined in the federal NAGPRA regulations, and it is not wholly dependent upon recognition by tribal governments.**

NAGPRA does not provide a definition for a traditional religious leader, but the regulations give useful guidance (section 10.2 [d][3], quoted earlier in this chapter). The definition means that Indian tribes and Native Hawaiian organizations can



officially recognize a person as a traditional religious leader, although they lack the power to defrock a person holding this status so long as some members of the group support his or her status. Public recognition is not wholly dependent upon the official views of tribal governments. Museums and federal agencies should keep in mind, however, that if tribal officials say that a person is a traditional religious leader, this should be accepted at face value even if some tribal citizens disagree.

The definition is general enough in the regulations to cover many persons in a community, including some who otherwise lack formal religious authority. For example, Pawnee traditional religious leaders might include people who lead ceremonial dances, put on funeral feasts, hold cedar ceremonies, and conduct similar religious activities. These people perform cultural duties related to the ceremonial and religious traditions of the Pawnee Nation. The NAGPRA regulations would also include members of Nasharo Council, whose leadership responsibilities in the Pawnee Nation are established by the tribal constitution but really derive from Pawnee cultural practices. The president of the Pawnee Indian Veterans might also qualify, as a person who exercises a leadership role in an organization based on Pawnee cultural practices.

The canons of construction for federal Indian law require a liberal interpretation of “traditional religious leader.” This doesn’t mean, however, that any person can identify himself or herself as a traditional religious leader—some form of public recognition is crucial. Mere participants in a tribe’s cultural or religious practices who are not recognized as being responsible for the performance of ceremonial duties or who lack any form of leadership status would also fall short of the NAGPRA regulatory guidelines.

Meeting the technical qualifications for a traditional religious leader under the federal NAGPRA regulations does not mean that a person will automatically be considered to have such a role. In the instance of the president of the Pawnee Indian Veterans, few Pawnees, if any, would typically regard this person as a traditional religious leader, and few people who have held that office in the organization would think of themselves as traditional religious leaders. In certain circumstances, however, it might be important for the Pawnee community to keep open the ability of the president of this organization to meet the qualifications set forth



Bunky Echo-Hawk, a Pawnee singer and Southern Plains traditional straight dancer, performs at the Denver Art Museum.

in the NAGPRA regulations. One such situation might arise if the original drum used in the Pawnee Homecoming Powwow during the 1940s was identified in a museum collection, and the Veterans determined a need to seek its repatriation. For this reason, the members of tribal communities should reserve for themselves the ability to identify a person as a traditional religious leader under NAGPRA.

Museum and federal agency officials lack the authority to designate a person as a traditional religious leader, but such officials are required to judge whether the information submitted to them satisfies the regulations. Prudent exercise of this authority respects tribal religious lifeways by requiring museums and federal agencies to reject unproved or spurious declarations of status.





# Chapter seven

Objects of Cultural Patrimony



## icons of community

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**B**uckskin Charley, a prominent Southern Ute chief, had several headdresses during his life. At his death in 1936, a son named Antonio Buck inherited one of these headdresses. When Buck died during the 1960s, his daughter placed the headdress into the keeping of the Colorado Historical Society, where it remains today.

Several photographs show Buckskin Charley wearing this headdress. When it was turned over to CHS, the Ute people viewed it as a meaningful symbol of Ute history. For both Buckskin Charley and his son, Antonio, this headdress signified their status as leading members of the Southern Ute community. This important headdress was exhibited by CHS for a time, but it then ended up in storage and passed into obscurity. By the 1990s, it was virtually forgotten.

A second headdress formerly owned by Buckskin Charley also made its way into CHS collections during the 1960s. This headdress was donated by a woman who reported that it had been given by Buckskin Charley to a man named Barry Sullivan. Several photographs in CHS collections show the two men together in 1925, just before Sullivan's death, but no photographs of Buckskin Charley show him wearing this headdress.

During the 1980s and 1990s, CHS exhibited this second headdress at its facility in Montrose, Colorado, and identified it as Buckskin Charley's personal headdress. This encouraged the Southern Ute people to think of it as the symbol of his leadership status, reflecting the enduring culture of the Ute people in a time of great change. With its impressive crown and trailer adorned with numerous eagle feathers, this headdress had become a focal point of Ute identity by the mid-1990s.

Between 1996 and 1998, the Southern Ute Tribe submitted three claims for the headdress given by Buckskin Charley to Barry Sullivan, and each claim identified the headdress as "cultural patrimony" under NAGPRA. The claims highlighted the significance of Buckskin Charley as a Ute leader and emphasized the present-day importance of the headdress as an embodiment of Ute history.

On all three occasions, CHS meticulously set forth the relevant NAGPRA standards and how they applied to this headdress. Evaluating each claim, as NAGPRA mandates, CHS found that the tribe had failed to address the requirements of the law. As a matter of fact, none of the claims could sustain a fit to any NAGPRA category of cultural items.

These events were greatly frustrating for the Southern Ute Tribe. The CHS explanations of the law seemed to present impossible hurdles. What exactly does NAGPRA require to show that an item qualifies as an object of cultural patrimony?

## Objects of Cultural Patrimony

### 1. NAGPRA and the federal regulations set forth a strict definition that must be met before items qualify as NAGPRA objects of cultural patrimony.

NAGPRA provides a statutory definition for “cultural patrimony”:

“[C]ultural patrimony” . . . shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.  
(section 2 [3][D])

The inclusion of this definition in NAGPRA means that all other ways of employing the term “cultural patrimony” are irrelevant to implementation of NAGPRA. The federal NAGPRA regulations provide guidelines to assist museums, federal agencies, and Native American communities to apply the concept of “objects of cultural patrimony” to items in their collections:

*Objects of cultural patrimony* means items having on-going historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects



must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole. (section 10.2 [d][4])

**2. The standard for defining objects of cultural patrimony consists of three interrelated elements.**

The law and regulations raise three issues that guide the general applicability of the category of “objects of cultural patrimony” to museum collections. Claims must satisfy each of these elements before an item qualifies as a NAGPRA object of cultural patrimony. A convenient way to summarize this NAGPRA category is that it covers important items considered to have been communal property at the time of separation from the group. Each of the three factors of importance for this category is discussed in detail below.

## Important Points

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### Objects of Cultural Patrimony

- 1** NAGPRA and the federal regulations set forth a strict definition that must be met before items qualify as NAGPRA objects of cultural patrimony.
- 2** The standard for defining objects of cultural patrimony consists of three interrelated elements.
- 3** Cultural patrimony under NAGPRA does not include such items as the personal property of famous chiefs or privately owned cultural artifacts of great significance.

*Ongoing Central Importance.* The first element of the NAGPRA definition for cultural patrimony requires the claimant to provide evidence that the claimed object has an “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself[.]” This element of the definition focuses on two primary issues. Claimants must show that the item has a *central* historical, traditional, or cultural importance and that such importance is *ongoing*, extending from the past into the present.

The importance of objects can be demonstrated in several ways. One way is to survey ethnographic and historical literature for references to the item. If extensive literature exists on a tribe’s culture, and this literature frequently discusses an object, this can provide an effective indicator of the item’s central historical, traditional, or cultural importance. Simply summarizing this literature should be sufficient to show central importance.

If little ethnographic or historical literature is available, oral traditional information can be gathered from living people to help in assessing centrality. A researcher would want to ask the following question of knowledgeable experts: How would you describe the significance of this item to the tribe’s history, traditions, and culture? Some disagreement among experts is not important, so long as reliable information can be provided to show or to disprove central importance. It’s not reasonable to expect everyone in the community to agree on how important something is, because people in every community typically hold a wide range of opinions on any given topic. In arguing central importance, however, a claimant presumes that the society in question generally sees the item as greatly significant.

It’s also important to determine the ongoing nature of central importance for a claimed item. If a tribe asserts that an item is important at present, this view must be accepted at face value, even if a museum or federal official knows that some tribal citizens don’t agree. When a tribe states that an item has past central importance, this implies that such a view can be substantiated by historical evidence.

It would be ideal for a claimant to provide evidence showing that at the time of separation from the group, the item held central importance, but nothing in NAGPRA or the federal regulations requires this level of specificity. In fact, items of great central importance sometimes left community custody because many people





turned away from traditional tribal culture and adopted new values by which to measure the significance of items. Importance can vary over time, and demonstrating ongoing importance simply involves a reasonable showing that an item not only presently holds this status, but also formerly held this status.

*Communal vs. Private Property.* The second element claimants must satisfy to meet the NAGPRA definition for objects of cultural patrimony requires that claimants submit evidence that the claimed items could not “be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe” because it was not “property owned by an individual Native American.” The relevant question here is whether an item was property owned by a group or by an individual.

A useful concept to apply can be termed “authority of alienation.” Who has the authority to sell, give away, trade, or otherwise dispose of (that is, alienate) an item? As discussed in more detail in chapter 8 of *Keepers of Culture*, NAGPRA uses “authority to alienate” as a basis for evaluating “right of possession” (see section 2 [13]). Under NAGPRA, objects of cultural patrimony are owned by a group such as a religious society, a clan, a band, a tribe, or some other group. Communal ownership means that no individual can act alone to convey away such items in the absence of group authority.

Several ways exist to show that an item is communal property. Tribes can declare items to be communal property, although, as discussed later in this chapter, they cannot make this status retroactive and designate an item to have been communal property in the past. Explicitly identifying presently owned objects as communal property may provide a useful tool to help prevent future commercial interest in items that are now under the control of the tribe, so tribes may wish to give thought to adopting resolutions that list important communal property.

In the course of researching Zuni Ko’Ko (masks), the Denver Art Museum located a paper published in 1932 that referred to certain Zuni Ko’Ko as “tribal property” and distinguished such items from individually owned Ko’Ko. Important tribal communal property is often the subject of ethnographic studies, so such publications can be usefully researched for NAGPRA purposes.





This kachina figurine was made by an unknown Zuni artist and wears a Salimobiya Ko'Ko (mask). Masks of this kind are considered communal property among the Zuni.

Circumstantial information can also point toward communal ownership. In the Zuni situation, for example, some evidence showed that tribal authorities have historically sought to regulate and control the disposition of Ko'Ko. Public regulation can apply to both private property and communal property, but it may still be useful as a potential indicator of communal ownership. If the record shows that an individual is engaging in the surreptitious sale of an item, this can indicate either that the item was stolen or it has status of group ownership, or both. Circumstantial evidence can be useful in building a clear picture of an item's status as property.

In thinking about the ownership of objects, tribal religious authorities sometimes view items as belonging to a divine being or spiritual entity. Among the Pawnees, for example, funerary objects placed in a grave are commonly viewed as possessions of the dead. It's believed that the dead take matters into their own hands when the living violate the sanctity of the grave. This does not mean that the Pawnee Nation or any lineal descendants of deceased Pawnees expect the dead to assert legal property rights under NAGPRA.

This issue, however, has come before a court. In discussing one NAGPRA court case in Hawaii, Sherry Hutt and Tim McKeown note that the court "ruled that the remains themselves did not have standing" to file a complaint with the court ("Control of Cultural Property as Human Rights Law," in *Implementing the Native American Graves Protection and Repatriation Act*, edited by Roxana Adams [Washington, D.C.: American Association of Museums Technical Information Service, 2001], p. 204). Under NAGPRA, a party hoping to control disposition must serve as a claimant for unassociated funerary objects, sacred objects, and objects of cultural patrimony. Acting on their own discretion, museums may or may not be attentive to special spiritual matters, but under NAGPRA, museums must look for living claimants to come forward to make claims, assert ownership, and argue for their authority to control the disposition of items.



## spotlight on divine vs. Human Ownership

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In the course of consultations with tribes at the Denver Art Museum, traditional religious leaders have several times observed that certain items are viewed as the property of a deity or that the Creator is the real owner of material objects. When tribes assert divine ownership as a basis for arguing that an item is an inalienable object of cultural patrimony, museums and federal agencies are essentially being asked to judge a deity's intentions for the disposition of an object. Does the deity approve or disapprove of the object being held by a museum or federal agency? Does the deity want the museum to repatriate the item to a tribe? How can a tribe prove that a deity has not consented to the fate of an item as it has moved from place to place over time?

In creating NAGPRA, Congress deliberately avoided the issue of divine ownership and properly withheld from NAGPRA any obligation for parties to comprehend and clarify divine will for ownership of claimed items. NAGPRA instead sets forth reasonable requirements for tribal, museum, and federal agency officials to evaluate the ownership status of objects of cultural patrimony as items that are communally owned by a human group of some kind, rather than by a deity.

Although it may be useful for a tribe to preface a NAGPRA argument with observations on important spiritual matters, claims must be founded upon consideration of human ownership of items. If the concept of "ownership" does not seem to fit, then the question can be shifted to who has the clearest authority to control the disposition of an item. Perhaps in some cases the tribe can identify an

individual or group that retains sufficient authority to ensure appropriate treatment and handling of objects that have been placed under spiritual authority.

It is the responsibility of tribal officials who implement NAGPRA programs to ensure that the law is understood and accurately applied by the tribe. Tribal officials should therefore give careful thought to any decision to bring forward traditional religious leaders for the sole purpose of arguing that humans lack ownership of a claimed item. Expecting a religious leader to negotiate NAGPRA applicability with museums and federal agencies assumes that the religious leader is willing to marshal complex legal and historical matters that may be beyond the scope of his or her usual duty as a custodian of religious knowledge. It might be more appropriate for tribes to rely on traditional religious leaders as essential sources of information, rather than as negotiators.

Some traditional religious leaders may assert that all material objects ultimately belong to the Creator or some other deity, set of deities, or other spiritual authority, so museums and federal agencies should hesitate to accept the argument that an item is inalienable because it belongs to a divine being. The same is true of the argument that no one can own an object because it is really a living being. In such cases, it's important to frame the discussion in more mundane terms and keep the focus on which human or human group has authority to determine the disposition of the object at hand, regardless of whether such object is considered to have spiritual life or be owned by a deity.

*The Time of Conveyance.* The third element of the NAGPRA definition for objects of cultural patrimony requires that claimants submit evidence showing that claimed items were “considered inalienable by such Native American group at the time the object was separated from such group.” In other words, evidence needs to be submitted that pertains to the communal ownership status of a claimed item at the time it was conveyed away from the group, rather than at an earlier or later period.

This typically requires historical research to gather evidence relevant to the time period when the item was separated from the group. Researchers should not merely look for statements on communal importance, but also for evidence that can shed light on whether the item was regarded as private property or as communal property at the time. Oral traditions can be useful, so long as the information is reasonably pertinent to the time in question. Historical records and ethnographies may also contain useful information. The more information that can be marshaled, the stronger the case.

In submitting a third claim to the Colorado Historical Society for the Buckskin Charley/Barry Sullivan headdress, the Southern Ute Tribal Council adopted a resolution (20 January 1998, number 98-05) expressing its official determination that the headdress “is an item of the Southern Ute Indian Tribe’s cultural patrimony.” In the popular sense of the term “cultural patrimony,” tribes are free to attach great significance to any item that represents their culture.

Under NAGPRA, however, tribes have no authority to retroactively designate items as NAGPRA objects of cultural patrimony. NAGPRA requires claimants to supply evidence showing that an item was communal property during the period when it was alienated, and this necessarily means that tribes must perform historical research.

In the case of the Ute headdress, CHS documentation indicated that Buckskin Charley gave the headdress to Barry Sullivan sometime between 1900 and 1925. So, to demonstrate that the headdress meets the NAGPRA definition for an object of cultural patrimony, the tribe would need some evidence that this headdress (or all Ute headdresses as a class) was communal property during this time.



**3. Cultural patrimony under NAGPRA does not include such items as the personal property of famous chiefs or privately owned cultural artifacts of great significance.**

Museums necessarily collect items of great cultural importance. In popular usage, “cultural patrimony” covers almost any object that symbolizes an important aspect of a culture. It may be useful as a beginning point for tribes to review collections and think about which items stand out as objects of great communal importance in some sense. Communal importance, however, is not the same thing as communal property.

To successfully use NAGPRA, claimants must look past the common meaning of terms and focus on what NAGPRA requires. Whatever standard is employed to identify items that have the potential to fall under the cultural patrimony category, it’s essential for claimants to show that the NAGPRA definition is satisfied. Individuals are free to do what they wish with their private property, whether or not they are prominent community leaders, and such privately owned items do not qualify as

*Harvest Dance*, a watercolor by San Idefonso artist Awa Tsireh, was commissioned by a DAM trustee during the 1920s.



objects of cultural patrimony under NAGPRA. Tribes may wish to have an item attributed to a famous tribal leader returned as an object of cultural patrimony, but often it was the famous tribal leader who conveyed

away the item in question in the first place. In the case of the Buckskin Charley headdress, for example, the only piece of information linking the headdress to him was a letter stating that he gave away the headdress himself. If this information is accurate, was his decision to make this gift to Barry Sullivan proper? If the information is not accurate, then how do we know that the headdress is really associated with Buckskin Charley?



Tribes should recognize that in such instances, the first question to ask is: Was the item communal property at the time of its alienation, or was it private property owned by the leader? A second question then arises: If evidence shows that the claimed item was communal property, did the leader convey it away under proper authority, or did the leader act improperly? A final question may then arise: By submitting a NAGPRA claim, are we comfortable in arguing that our much-revered leader did something objectionable and illegal in alienating the item? These questions require accurate research rather than strongly articulated opinion.







# Chapter eight

Right of Possession





## a bundle of rights

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**Y**oung Buffalo bundles are transferred from one keeper to another among members of the Blood Tribe Motoki Society. The ritual transfer of these bundles confers membership in this women's society, with ceremonial privileges and rights to esoteric religious and historical knowledge. The bundles have spiritual life and are cared for like precious children.

To the extent that Motoki bundles are viewed as property, bundle keepers do not own their bundles; instead, the Motoki Society as a group holds the authority to determine their disposition. Under NAGPRA, Motoki Society headdress bundles in active use represent communal property, inalienable by any individual, regardless of whether such individual is a citizen of the Blood Tribe or a member of the Motoki Society.

Captured In the Middle Woman was a member of the society and served as the caretaker of a Young Buffalo bundle. After her death about 1915, her bundle was transferred into the care of her daughter, Black Faced Woman. According to family oral traditions, Black Faced Woman died in 1946.

In the spring of 1938, a son of Black Faced Woman offered to sell the Young Buffalo Headdress Bundle to Madge Hardin Walters, a dealer in San Diego. Walters had arranged for several Blood people to mediate sales of bundles and other items to her. Walters agreed to purchase this Motoki Society bundle, and in January 1939 she sold it to the Denver Art Museum. DAM was pleased to acquire such a unique bundle.

A basic principle of American common law is that a thief cannot convey title and right of possession for stolen articles, and later purchasers of the item do not acquire proper title. Stolen items must be returned by a later purchaser if the owner can show that the item was taken improperly. Later purchasers have no right to ask for compensation from the rightful owner, even if they were unaware of the doubtful title at the time of the purchase.

This principle of ownership is a key idea in NAGPRA. Claimants must raise a challenge to an institution's right of possession for claimed items. In the case of Black Faced Woman's bundle, research showed that proper title in 1938 rested with the Motoki Society as a group, not with Black Faced Woman or her son. No evidence showed that the rightful owners had agreed to the sale of the bundle to Walters.

DAM had no idea that it was purchasing an item with flawed title. In September 2000, DAM returned the bundle under NAGPRA to the Blackfoot Confederacy so it could be placed back under the control of its rightful owners, the Blood Motoki Society. For the Motoki Society, a long-lost child had returned into its care.

## Right of Possession

NAGPRA creates a process under which unassociated funerary objects, sacred objects, and objects of cultural patrimony that left the keeping of Native American communities under improper circumstances can be returned. This is a fair outcome of NAGPRA, and it is an outcome that is fully consistent with American property law. Museums and federal agencies faced with the prospect of returning objects under NAGPRA are not giving up items that belong to them, nor are they returning items because of any special rights of Native Americans.

NAGPRA essentially provides a process in which parties do not need to sue one another, hire attorneys, and go to court as adversaries. Instead, museums, federal agencies, tribes, Native Hawaiian organizations, Alaska Native Corporations, and lineal descendants have the option of working as partners to sort out what belongs to whom.

### **1. NAGPRA and the federal regulations set forth a definition for right of possession that is consistent with American property and ownership concepts.**

The concept of “right of possession” has a statutory definition in NAGPRA:

“[R]ight of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7 (c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 USC 1491 in which event the “right of possession” shall be as provided under otherwise applicable



property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains. (section 2 [13])

This statutory definition is further amplified by standards presented in the repatriation section of NAGPRA:

Standard of Repatriation.—If a known lineal descendant or

## Important Points

### Right of Possession

- 1 NAGPRA and the federal regulations set forth a definition for right of possession that is consistent with American property and ownership concepts.
- 2 Authority of alienation is a key concept in evaluating right of possession.
- 3 Claimants must present evidence that raises a challenge to a museum's right of possession for a claimed item.
- 4 Museums and federal agencies must consider whether they can counter a challenge to their right of possession through the presentation of evidence that overcomes the claimant's evidence.
- 5 What is a Fifth Amendment "taking"?
- 6 No one owns a dead body, and whoever originally furnished a grave owns those funerary objects.
- 7 The right of possession for items taken in warfare can be determined by consulting U.S. military rules of engagement and evidence pertaining to customary warfare practices of tribes.

an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has right of possession to the objects. (section 7 [c])

The federal regulations also set forth guidelines to be followed by claimants, museums, and federal agencies in considering right of possession. The regulations state that unassociated funerary objects, sacred objects, and objects of cultural patrimony must be expeditiously returned when claimants meet various criteria and when the following process occurs:

(iii) The known lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency does not have a right of possession to the objects as defined in § 10.10 (a)(2); and

(iv) The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession; and

(v) None of the specific exceptions listed in § 10.10 (c) apply. (section 10.10 [a][1][B][iii-v])

The “exceptions” listed in section 10.10 (c) of the regulations include four “circumstances,” with the fourth one referring to additional “repatriation limitations and remedies” listed in section 10.15. Only one of these exceptions has a bearing on the topic of right of possession; it is considered in point 5 below.



## 2. Authority of alienation is a key concept in evaluating right of possession.

The language of NAGPRA and the regulations sets forth both a *standard* for ascertaining right of possession and a *process* for implementing this standard. The standard involves examining who held the “authority to alienate” (that is, the right to sell, give away, trade, or otherwise dispose of) an item and whether or not that party consented to the conveyance. The process for implementing this standard is discussed in the next several sections of this chapter, but it requires claimants to make a case challenging an institution’s title to the item, and then it provides opportunity for the institution to consider whether it can defend its right of possession.

Establishment of an item’s collection history is the first step in applying the authority of alienation standard. Who conveyed away the item? For unassociated funerary objects and objects of cultural patrimony, the general circumstances of the alienation may also provide a sufficient basis for assessing right of possession. Does the evidence show an owner selling the object? If it is communal property, was the group represented in the sale? If it is a funerary object, did the next-of-kin convey the object away? When nothing is known of the manner in which the original alienation occurred, it is harder both to challenge and to defend right of possession.

The next step is to evaluate whether the party who conveyed away the item had the authority to do so. This depends greatly upon the ownership status of items. For Blood Motoki Society headdress bundles, the Blackfoot Confederacy stated to the Denver Art Museum that the Blood Tribe has always held title, to the degree that the concept of property ownership could apply. All available evidence, however, indicated that the Motoki Society itself, acting as a group, has the exclusive authority to determine disposition of headdress bundles kept by members. With this in mind, right of possession can only be transmitted by the Motoki Society, not by any individual member of the society or citizen of the Blood Tribe. For a museum to hold right of possession to a bundle, the Motoki Society, and not the tribe, would need to have been involved in the decision to sell it or would need to have relinquished authority of alienation in some manner.

The violation of authority to alienate should be distinguished from violation





The original version of this shirt was created about 1850 by a Blackfoot named Big Plume. It was ritually transferred to Chewing Black Bones, who gave his consent for a Blood named Three Calf to make this version in 1930.

of moral standards in alienating an item. If a person chooses to sell a family heirloom, for example, this conveyance may morally offend other family members and later descendants. A lineal descendant might say, with understandable conviction, “He should never have sold our family heirloom!” Although most people would be sympathetic to this stance, the important issue under NAGPRA is whether the seller held the legal authority to alienate the item in question, not whether he or she was morally right or wrong to do so.

### **3. Claimants must present evidence that raises a challenge to a museum’s right of possession for a claimed item.**

U.S. common-law conceptions of property begin with the general assumption that parties in possession of property, which they consider to be owned by themselves, have title to the property. If another party believes the property to have been taken improperly in some manner, that party bears the initial burden to raise a challenge to the other’s ownership.

Under NAGPRA, claimants must make what lawyers term a *prima facie* argument regarding the right of possession for an unassociated funerary object, sacred object, or object of cultural patrimony. This means that, on the face of it, an asserted contention should be credible when standing alone, before other competing evidence is brought forward.

It doesn’t mean that a claimant can simply state that “the museum does not have right of possession because the item is important to our community.” This opinion lacks any reference to evidence that challenges the museum’s ownership.



In the above example of a Motoki Society Young Buffalo bundle, a *prima facie* argument could be framed as follows:

This is a Motoki Society bundle, which is owned by the society as a group, and it holds ongoing central importance. The museum obtained it from the son of the keeper, who lacked the authority to alienate the bundle. DAM could not have obtained good title through the son. For this reason, DAM lacks right of possession.

A reasonable party would need to know the basis on which it is asserted that the Motoki Society owns such bundles. This key point would need to be supported by evidence, perhaps in the form of references to historical records, ethnographic literature, brief statements by Motoki leaders, or other expert opinion. A reasonable party would also wish to understand how it is known that the bundle was conveyed away by the son of the keeper, so this also needs documentation of some kind. A claimant needs to consider what kind of evidence and arguments would raise doubt about property title.

In general, strongly asserted opinions lacking any basis in evidence do not constitute a *prima facie* argument. Moral points can preface the presentation of evidence, and NAGPRA claimants may wish to start with such statements. It's not enough, however, to contend that property title is clouded due to circumstances of cultural oppression, conversion to Christianity, or impoverishment. Poor, culturally oppressed Christian Indians sell, give away, or trade things every day, and these circumstances do not inherently cloud such transactions.

Consider the example of a personally owned automobile. Few people would agree that it would raise credible doubt regarding title to say, "I think your car could be mine because I had one like it that was stolen last year." The current car owner is unlikely to say, "OK, now I doubt whether I have good title." He or she, however, might ask: "Why do you think this specific car is yours?" This shifts the focus away from unfounded opinion to the production of evidence that can sustain the opinion. Following this point, an appropriate *prima facie* argument would be:



My car was stolen last year, and it had a dent on the passenger door, as shown in this photograph. I have the title for my stolen car and a copy of the police report regarding the theft. I know you bought your car last month, and it is the exact make, same color, and it has the same dent. I think this is my car that was stolen.

In the face of such a story, complete with evidence, the recent purchaser of the car knows that a good argument has been made that raises doubt about title and right of possession. The recent purchaser now has the burden to prove that the title is good, and this is accomplished by providing evidence that reasonably overcomes the challenge.

**4. Museums and federal agencies must consider whether they can counter a challenge to their right of possession through the presentation of evidence that overcomes the claimant's evidence.**

If a claimant has failed to raise a *prima facie* challenge to right of possession based upon evidence, the museum or federal agency is obligated to deny the claim. The unsuccessfully claimed item can be returned to the claimant as a gift if the museum or federal agency has the ability to gift items, but it should not be returned under NAGPRA. NAGPRA presumes that institutions have title to their collections, even when those collections include unassociated funerary objects, sacred objects, or objects of cultural patrimony. Simply showing that an object qualifies as a cultural item in one or more of these three NAGPRA categories does not compel its repatriation.

Let's assume, however, that a claimant has raised a sufficient *prima facie* argument. The next step is for the museum or federal agency to consider whether there is any evidence to support its claim to hold title. Suspicion on the part of museum officials that relevant evidence may exist somewhere does not offer grounds to counter a *prima facie* argument that challenges title.

Claimants have no obligation to help museums and federal agencies prove right of ownership, but ideally tribes will choose to work in partnership with





## spotlight on Blood Conveyances

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The Denver Art Museum encountered a situation that raised important questions about the meaning of patterns of conveyance among citizens of the Blood Tribe. As one result of an ambitious project to apply NAGPRA to Blackfoot Confederacy collections (see chapter 11), DAM published two very different notices of intent to repatriate in the *Federal Register* in March and April 2000 (volume 65, number 41, pp. 11075–6; volume 65, number 82, pp. 24712–4). The first notice covered five objects of cultural patrimony to which DAM lacked right of possession, including a Motoki Society bundle and a Motoki Society bundle component (a belt). The second notice covered seventeen gifts to which DAM asserted a right of possession, including six Motoki Society bundles and one Motoki Society bundle component (a paint bag).

Why did DAM treat these bundles differently under NAGPRA? The answer, as explained below, involved complex research that pinned down the exact status of these bundles as *communal* property that in some situations could become *private* property.

DAM files hold numerous letters from four Blood Tribe individuals who conveyed Blood items to a collector named Madge Hardin Walters during the 1930s and 1940s. Careful analysis of the letters revealed that well over one hundred Blood people were mentioned as engaging in cash transactions and offers to sell ritual objects. This represents a substantial percentage of adult citizens of the Blood Tribe at that time, especially since not every Blood adult would have had custody of a ritual object, and other collectors were also dealing with the tribe. DAM concluded that ritual objects were being treated as private property by a significant portion of the Blood community.

This analysis revealed another interesting pattern. No convincing record could be found of a Motoki Society member selling her own headdress bundle, but

DAM found a number of clearly documented instances in which the bundles of deceased keepers had been sold by heirs. This explained how a minimum of thirty-one Motoki Society headdress bundles had been sold or offered for sale by a total of thirty to fifty people, including a highly respected Motoki Society leader. The bundles had all been inherited from deceased keepers and were being sold by heirs. Were these bundles viewed as private property, or were scores of heirs stealing them from their rightful owners, the Motoki Society?

DAM's research showed that a form of "deaccessioning" was at work during this period. If a Motoki Society keeper died, the Society would seek a new keeper, but if none could be found, then the Society permitted heirs to control the orphaned bundle. Once it gave control of orphaned bundles to heirs of the deceased keepers, the Motoki Society surrendered its authority to control the disposition of such bundles. Heirs could then properly sell them, even if such sales offended some people morally. Through this process, orphaned bundles lost their status as communal property.

This analysis by DAM is important, because the implication of the Blood Tribe's position was that well over thirty people were stealing and marketing communal Motoki Society property, to say nothing of the scores of people who were selling other religious items. Instead, it appears that this charge can be fairly leveled at only a very small number of Blood individuals; just a few of the DAM bundles had retained their communal property status and had been improperly sold (for an example, see the collection history case study in chapter 3). DAM concluded that the Blood community in the 1930s and 1940s presented an active market for the sale of religious items, but the Blood people were not a nation of thieves.

institutions to clarify right of possession, no matter whom the evidence favors. Consultation and information-sharing offer opportunities to jointly review available information. A commitment to follow the evidence, rather than to seek a desired result, is a commitment to a fair and accurate outcome.



In an important paper on NAGPRA, two leading experts observe that “One pattern that defines Indian-white relations in the United States is the one-way transfer of Indian property to non-Indian ownership” (Jack Trope and Walter Echo-Hawk, “NAGPRA: Background and History,” in *Repatriation Reader: Who Owns American Indian Remains?* edited by Devon Mihesuah [Lincoln: University of Nebraska Press, 2000], p. 128). Similarly, another expert observes, “The vast inventory of Native material culture now housed in Western repositories is eloquent testimony to the larger historical realities and colonial processes through which Native lifeways were suppressed and cultures disenfranchised” (Phillip Cash Cash, “Medicine Bundles: An Indigenous Approach to Curation,” in *The Future of the Past: Archaeologists, Native Americans, and Repatriation*, edited by Tamara Bray [New York: Garland Press, 2001], p. 139).

These observations refer to the significance of conquest and colonialism as definitive historical processes but tend to minimize the extent to which such property as beads, metals, fabrics, and other materials flowed profusely into Indian hands and became products that left those same hands by mutual arrangement. The movement of property in cultural settings is typically complex and difficult to characterize by generalization.

Every object in a museum collection has a visible or invisible history of conveyance. Somehow that item left the hands of its maker and original owner and ended up in a museum. This truism is important because, as noted above, some people may tend to see the existence of extensive collections of culturally meaningful objects at museums as symbolic of the immoral exploitation of Indian cultures to the disadvantage of Indian people. Exploitation can certainly occur in situations in which both parties agree to a transaction, but exploitation may not necessarily cloud title. Under NAGPRA, the genuinely important challenge is to successfully identify those cultural items that left an owner’s hands through theft or some other similarly improper circumstance.

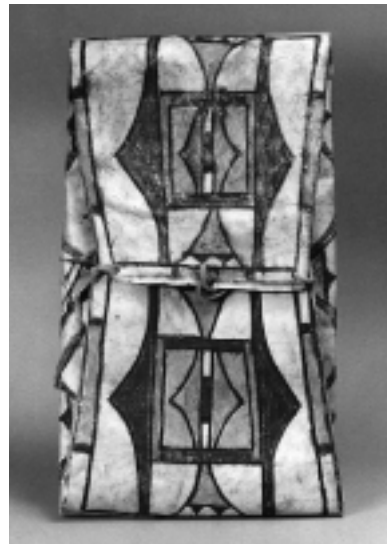


When tribes assert that large numbers of items in museum collections and federal agency repositories were improperly alienated, they indicate (whether they mean to or not) a willingness to research object histories and establish a *prima facie* argument on this point. Tragic circumstances of some kind are implied that could account for the massive exploitation of the tribe's ancestors in recent time. If this turns out to be accurate, museums and federal agencies have an arguable moral

obligation to assist with the extensive research needed to clarify title.

As stated above, however, behind every object is the story of how it left the hands of a specific person. If many objects from a tribal community are suspected of having been improperly alienated, this suggests that many Indian people were involved. Were they all unfairly victimized by white people? Were they all thieves who stole from each other to enrich themselves?

NAGPRA demands research and precise evidence on this topic, not sweeping generalizations.



Right of possession is determined by the history of an item, as with this Blackfeet parfleche. According to John Ewers, an expert on Northern Plains tribes, this parfleche more closely resembles Crow parfleches and may have been given by a Crow owner to a Blackfeet.

If the historical record supports the view that many tribal citizens of previous generations were fleeced of their important religious and cultural possessions, NAGPRA provides a good opportunity to address this troubling legacy. If, however, many tribal citizens were simply making decisions to market religious and cultural items, it is not at all fair for a later generation to accuse their own parents and grandparents of thievery and then to demand that museums give back items that they really own free and clear.

Submission of a claim under NAGPRA means that the item in question is presumed by the claimant to have been stolen from the tribe or from a tribal citizen. Tribes should be wary of submitting claims that essentially accuse their own immediate ancestors of pilfering important items on a massive scale.



## 5. What is a Fifth Amendment “taking”?

The Fifth Amendment of the U.S. Constitution states, “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” When the federal government takes control of private property to carry out some important public purpose—such as building an interstate highway—it must follow a legal process, and it must compensate owners. This activity is generally referred to as a “taking.” Since NAGPRA is federal law regarding property, some potential for a taking might exist. This possibility is remote, but, should it occur, an institution or claimant will certainly need the advice of a lawyer. The discussion here touches only briefly on one of the most esoteric legal implications of NAGPRA. The federal NAGPRA regulations provide some guidance regarding the reference to Fifth Amendment takings in NAGPRA:

Exceptions. These requirements for repatriation do not apply to . . . Circumstances where a court of competent jurisdiction has determined that the repatriation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony in the possession or control of a museum would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution, in which event the custody of the objects must be as provided under otherwise applicable law. Nothing in these regulations must prevent a museum or Federal agency, where otherwise so authorized, or a lineal descendant, Indian tribe, or Native Hawaiian organization, from expressly relinquishing title to, right of possession of, or control over any human remains, funerary objects, sacred objects, or objects of cultural patrimony. (section 10.10 [c][3])



The preamble to the federal regulations suggests a situation in which a taking might occur: “It is possible, though not likely, that human remains may be subject to Fifth Amendment concerns, e.g., where the human remains have been incorporated into another object” (p. 62154). As this language suggests, it’s difficult to imagine a realistic scenario under which a museum might need to honor a claim for a component of an object and also be forced under NAGPRA to return the object to which it is attached or associated. Claimants may work in partnership with museums to jointly evaluate whether any risk of an unfair taking of property could be raised by a claim. Effective consultation, as well as accurate application of the law by both the claimant and the museum, should minimize any risk of raising a Fifth Amendment taking.

Sherry Hutt and Tim McKeown provide a detailed discussion of takings and observe that NAGPRA has safeguards against the taking of property in violation of the Fifth Amendment (“Control of Cultural Property as Human Rights Law,” in *Implementing the Native American Graves Protection and Repatriation Act*, edited by Roxana Adams [Washington, D.C.: American Association of Museums, 2001], pp. 201–2). They also point out that NAGPRA “was implicitly drafted to rectify takings from tribal people.” NAGPRA encourages tribes and lineal descendants to give thought to their property rights, but it does not force museums to surrender ownership of properly acquired items.

The reference to “otherwise applicable law” in the federal regulations above and in the law (section 2 [13]) will be unclear and confusing for most people. Some experts believe that this language could pertain to circumstances where a museum would claim title to stolen cultural items through the legal theory known as “adverse possession.” This concept essentially means that the item was acquired by the museum without good title, but it has been held for some period of time in an “actual, hostile, exclusive, and continuous” manner by the museum with the owner’s clear knowledge. Museums thinking about employing this theory should know that the concepts of “partnership with tribes” and “adverse possession” are in complete conflict. The general public today typically expects museums to treat tribes as welcome constituencies rather than as parties to wrest property from in an openly adversarial manner.



**6. No one owns a dead body, and whoever originally furnished a grave owns the funerary objects.**

NAGPRA sends a confusing message regarding right of possession for human remains and associated funerary objects. The law states that right of possession can be applied to human remains and associated funerary objects (section 2 [13]), but then it withholds human remains and associated funerary objects from any applicability of the repatriation standard on right of possession (section 7 [a][1] and 7 [c]). What does this mean?

Under U.S. common law, no one can hold a “property interest” in a dead body. As explained by Jack Trope and Walter Echo-Hawk: “This rule makes it impossible to own the remains of a Native American; the dead . . . are simply not chattels to be bought and sold in the marketplace.” These experts point out that landowners merely have “technical possession” of graves located on their land and hold the contents “in trust” for the relatives of the deceased. Trope and Echo-Hawk also observe that “whenever funerary objects are removed from graves, they belong to the person who furnished the grave or to his known descendants” (“The Native American Graves Protection and Repatriation Act Background and Legislative History,” in *Repatriation Reader: Who Owns American Indian Remains?*, edited by Devon Mihesuah [Lincoln: University of Nebraska Press, 2000], p. 131). In brief, dead bodies cannot be owned, but funerary objects have status as property.

In defining right of possession, NAGPRA states: “The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains” (section 2 [13]). This language clearly gives museums and federal agencies authority to review their records to see if next-of-kin or culturally affiliated tribes consented to the original acquisition of human remains and associated funerary objects in collections.

In any such cases, if known lineal descendants and culturally affiliated tribes continue to consent, museums and federal agencies have the authority to maintain



physical possession of such collections. This outcome is consistent with the authority of next-of-kin to make decisions regarding the disposition of deceased relatives, and it is consistent with the sovereign authority of a tribe to regulate disposition of the remains of its citizens.

A problem presents itself, however, if the original acquisition of human remains and associated funerary objects occurred with knowledge and consent of a culturally affiliated tribe or lineal descendant, but they now wish to repatriate. As specified by section 7 (a)(1) of the law, when a museum or federal agency has completed its inventory of human remains and associated funerary objects required under section 5 of NAGPRA, any identified lineal descendants and culturally affiliated Native American communities can then enter into repatriation discussions regarding the place and manner of delivery. Claimants need not raise any *prima facie* challenge to a museum's right of possession for human remains and associated funerary objects. Issues of title are not raised as a condition of repatriation in this section of NAGPRA. Moreover, the categories of human remains and associated funerary objects are not included in the NAGPRA repatriation standard on right of possession (section 7 [c]).

It would be inconsistent with American common law if a museum or federal agency could rely on right of possession as a basis for refusing to repatriate human remains. The preamble to the federal NAGPRA regulations recognizes this situation and advises that “[t]he right of possession basis for retaining cultural items in an existing collection does not apply to human remains or associated funerary objects, only to unassociated funerary objects, sacred objects, and objects of cultural patrimony” (p. 62153). This interpretation does not offer an explanation for the statutory definition established in section 2 (13) of the law, which explicitly subjects associated funerary objects and human remains to right of possession, but the preamble explains:

American law generally recognizes that human remains can not be “owned.” This interpretation is consistent with the second sentence of section 2 (13) of the Act that specifically refers to unassociated funerary objects, sacred objects, and



objects of cultural patrimony, and with section 7 (a)(1) and (a)(2) of the Act in which no right of possession to human remains or associated funerary objects is inferred.

Unlike human remains, funerary objects *are* owned under American law. In accordance with legal canons of construction, regulatory language cannot overturn explicit statutory language, and the statutory language regarding an institution's potential right of possession for associated funerary objects is unambiguous, as well as consistent with American common law. It is also fair that if a party holding right of possession to such items knowingly consented to conveyance of title to a museum, then the museum should not be required to repatriate. This would grant a special property right to lineal descendants of Native Americans and Native American sovereign communities not available to other Americans.

Museums might be fairly warned, however, that taking action to defend any right of possession they may hold for associated funerary objects would doubtless encounter determined opposition from tribes. It may also be challenging to explain to an interested press and doubtful public why a dead body legally must be returned, but not the person's clothing, jewelry, and other accoutrements. Tribes, Native Hawaiian organizations, Alaska Native Corporations, and lineal descendants should give careful consideration to making decisions that appear to give consent to a museum or federal agency to acquire associated funerary objects.

Given the appearance of conflicting congressional intent in the statute regarding right of possession for associated funerary objects, the regulations make a reasonable choice in attempting to ensure repatriation of associated funerary objects in those rare instances where a museum or federal agency may hold a potential right of possession as set forth in section 2 (13) of the law. It is proper for the preamble to the federal regulations to advise parties to refrain from operating contrary to well-established common law with regard to human remains. It also seems prudent to advise that associated funerary objects be handled in a manner consistent with human remains, since authority for this exists in the statute, however confusingly presented.





# spotlight on the summit springs battlefield

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In chapter 2, information is provided concerning the history of a Cheyenne ledger book that was picked up by an American soldier in 1869 from the battlefield at Summit Springs, Colorado, and which ultimately made its way into the collections of the Colorado Historical Society. Was this ledger book lawful “booty” or unlawful “pillage”?

There is a specific code of U.S. military conduct that may apply here. In April 1863, the U.S. War Department issued what is known as the Lieber Code (Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, originally issued as General Orders No. 100 [Washington: Government Printing Office, 1898]). At least eight articles may be applicable to the ledger book (31, 35, 36, 37, 38, 44, 45, and 72). Additional specific U.S. military rules of engagement or orders may also apply to the battle at Summit Springs.

In crafting a *prima facie* argument on right of possession, a claimant would first want to evaluate whether the ledger book would have been reasonably classed as booty or pillage under applicable U.S. military standards. An important clue is that the book is presumed by CHS to have been picked up from the battlefield by an American soldier, but it was not used by the U.S. military in any known manner as a means of prosecuting the war against the Cheyennes.

If a claimant successfully argues that the book was pillaged, then CHS would have the burden to prove that it was not pillage, but rather lawful booty taken by the U.S. government, and that the ledger’s title then flowed in some manner from the government to the soldier and eventually to CHS. Both claimant and institution would need to conduct research—the claimant in order to establish the *prima facie* challenge, and the institution to overcome it, if possible.

The U.S. troops attacked the Dog Soldier camp

at Summit Springs in alliance with the Pawnee Nation. A Skidi Pawnee named Knife Chief was a Pawnee Scout in 1869, and, according to one Pawnee oral tradition, he picked up a blanket as a war trophy from a destroyed Cheyenne camp—probably a reference to Summit Springs.

In accordance with Pawnee warfare practices, a successful soldier was expected to acquire such trophies for the purpose of garnering war honors. Certain property captured in war, such as horses, might have temporary status as communal property, but only until the war expedition leader made his decisions about who should get to keep them. The blanket, however, would have been a personal war trophy belonging to Knife Chief. The fact that later in life he referred to this incident in a public manner as a war honor indicated his right of possession to the blanket in accordance with Pawnee traditional law.

In terms of right of possession, an item picked up by an American soldier at Summit Springs might have a different status from a similar item picked up by a Pawnee soldier. This could explain another incident that occurred at the Summit Springs battlefield.

According to some accounts, the Pawnee Scouts went through the destroyed camp, gathered up all the cash, and gave it to an American woman who had been held captive by the Cheyennes. According to the Lieber Code (see articles 31 and 72), cash taken from an enemy in combat may be kept for the benefit of the victor, particularly if it is found in large sums. In this case, had the American soldiers collected the money, it would have become federal government property and not available to give to the liberated woman. For the Pawnee Scouts, however, their code of military conduct transformed this cash into legitimate war honors, and they could then give away the money while keeping the honors.

**7. The right of possession for items taken in warfare can be determined by consulting U.S. military rules of engagement and evidence pertaining to customary warfare practices of tribes.**

Warfare wreaks havoc on both lives and property. Many American museums with Native American collections have objects from battlefields and massacre sites. Who holds right of possession to this material under NAGPRA?

As defined in the statute, right of possession to an item is transmitted from a party with authority to alienate to a recipient owner, and then to any subsequent owners. For objects picked up from warfare sites, few, if any, were willingly handed over by parties having this authority. It would therefore seem possible for a claimant to sustain a *prima facie* argument by showing that the party holding authority to alienate was not involved, but actually the question of right of possession to items confiscated in time of war requires special study.

Objects taken in warfare by American soldiers are lawfully acquired “booty” if the items are needed for the prosecution of the war. The capture of stock-piled weapons might be an example of this situation.

Such lawfully acquired material is typically considered to become government property and not the private property of the soldier who captured it. Other guidelines may also be available to shed light on the rights of soldiers to confiscate property, such as formal rules of engagement and orders issued through the military hierarchy for specific actions.

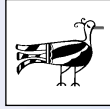
“Pillage,” unlike booty, is unlawfully taken private property that has no relevance to mounting a war effort. Pillage would include removing a gold ring from the finger of a dead soldier and pocketing it. In warfare among tribes, the study of typical warfare practices may yield comparable information that can determine the rightful owner of an item taken in battle.



A Pawnee delegation and DAM staff review items that originated from the Knife Chief family. (See the Spotlight on the opposite page for mention of a Knife Chief family ancestor.)







# Chapter nine

## Lineal Descendants



## under the family tree

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**A**mong the River Crows during the 1840s, a boy named Big Crane was born to Strikes At Different Camps and her husband, No Wife. Soon after, No Wife died in a tragic accident, and a few years later, Strikes At Different Camps also died. An older brother raised the orphaned boy.

Later in life, as an adult, Big Crane became known as Two Leggings—a version of a nickname acquired in the course of a war expedition. Throughout his life, Two Leggings aspired to fulfill the expectations of Crow manhood. He learned to hunt, joined war expeditions, married, and sought spiritual gifts. A Montana businessman named William Wildschut interviewed him extensively in the years before his death. He died in his sweat-lodge in 1923.

Two Leggings never had children of his own, but he and his spouse, Ties Up Her Bundle, adopted a daughter born to her sister. When this daughter gave birth to a son, Two Leggings and Ties Up Her Bundle also adopted him. This boy, Amos Two Leggings or Amos Dawes, grew up and had eight children by three wives: Hubert, Norman, Irma Jean, Warlene, Ramona, Dean, Perry, and Rosemary.

In 1993, soon after the passage of NAGPRA, a notice of intent to repatriate appeared in the Federal Register. This notice stated that the Heard Museum in Arizona planned to return a hoop to the Crow Tribe as a sacred object under NAGPRA. This hoop had once belonged to Two Leggings, and the Crow Tribe turned it over to Norman Dawes, a grandson.

Norman's brother, Hubert, had four children: Hubert Jr., Ken, Marjean, and Ranonne. In the mid-1990s, Ken Dawes learned that the Denver Art Museum held a Sun Dance doll once owned by Two Leggings, and he began to visit the museum to open discussions about the possible applicability of NAGPRA. In 2001, his brother, Hubert Two Leggings, also visited the museum to meet with museum staff regarding the Sun Dance doll. All of the children, grandchildren, great-grandchildren, and other descendants of Two Leggings qualify as lineal descendants under NAGPRA.

## Lineal Descendants

NAGPRA permits two broad categories of claimants to assert repatriation claims: federally recognized Native American communities and lineal descendants. The empowerment of lineal descendants to make claims under NAGPRA does not create a class of people with special rights, because it simply reflects the status of next-of-kin in American law. Next-of-kin, for example, have the right to determine the disposition of the remains of close relatives. Tribes, museums, and federal agencies have specific responsibilities under NAGPRA toward lineal descendants.

### **1. NAGPRA does not define the term “lineal descendant,” but the federal NAGPRA regulations provide guidelines as to the usage of the term.**

The concept of “lineal descendant” does not have a statutory definition in the language of NAGPRA, but it is addressed in the federal regulations for NAGPRA:

Lineal descendant means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe . . . or by the common law system of descentance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.  
(section 10.2 [a][b][1])

In addition, the preamble to the federal regulations contains the following discussion justifying the regulatory language on lineal descendants:

One commenter [to an earlier draft of the regulations] identified the criteria for determining lineal descendants in [section] 10.14 (b) as being overly restrictive and recommended broadening them to allow for both individual and Indian tribe and Native Hawaiian claims. One commenter



requested including a procedure “for independent verification of claimed descent.” Criteria for determining lineal descent have been narrowly defined to reflect the priority given these claims under section 3 and section 7 of the Act. One commenter requested that the section include procedures for independent verification of any claims of lineal descent based upon traditional kinship systems. Museum or Federal agency officials are responsible for evaluating claims of lineal descent. (p. 62155)

**2. Lineal descendants must show an unbroken descent from the deceased person (human remains) or from the owner of the claimed item, and lineal descent includes biological descent, descent from adopted children, and descent according to traditional kinship systems.**

It's important for potential claimants to understand how museums and federal

## Important Points

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### Lineal Descendants

- 1 **NAGPRA does not define the term “lineal descendant,” but the federal NAGPRA regulations provide guidelines as to the usage of the term.**
- 2 **Lineal descendants must show an unbroken descent from the deceased person (human remains) or from the owner of the claimed item, and lineal descent includes biological descent, descent from adopted children, and descent according to traditional kinship systems.**
- 3 **Lineal descendants have standing to claim human remains, funerary objects, and sacred objects, and they have priority over tribes for these items and do not need to have tribal citizenship. Lineal descendants cannot claim objects of cultural patrimony.**
- 4 **All lineal descendants have equal rights under NAGPRA. Tribal governments can help identify lineal descendants and provide technical assistance to them, and museums must provide information to lineal descendants upon request, whether or not tribal authorities are involved.**

agencies evaluate assertions of lineal descent. Federal regulations require that lineal descendants provide evidence showing that an unbroken lineage exists in order for an individual to have standing to make a claim for any object attributed to a named person. This unbroken lineage includes all persons descended from any biological children or adopted children of an object's Native American owner as well as persons descended from anyone else whom the traditional kinship system of the tribal community would classify as a son or daughter with rights to inherit property.

An unbroken lineage should identify specific persons back to the ancestor who owned the claimed item. If exact names are unavailable, it may be permissible to substitute "son" or "daughter," particularly if other identifying information is available to personalize the individuals lacking known names. Claimants should work with the museum or agency holding the object to determine an appropriate level of information. If the information is vague enough to raise reasonable suspicion about the accuracy of the lineage, an institution should reject the asserted status as a lineal descendant. It's not enough for a claimant to simply state that he or she is a relative of some kind.

The federal NAGPRA regulations contain the following discussion in the preamble regarding types of evidence that can be presented to show lineal descent:

One commenter noted that the types of evidence listed in § 10.14 (e) were originally derived from section 7 (a) (4) of the Act—which deals exclusively with the determination of cultural affiliation—and recommends that lineal descent should be established through normally accepted methods of evidence. Section 7 (a) of the Act, of which section 7 (a) (4) is a subpart, deals with both determinations of lineal descent and cultural affiliation. It is the opinion of the drafters [at the National Park Service] that each of the types of evidence listed ["geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion"] could





potentially be used to support a claim of lineal descent and should be available for use by potential claimants. (p. 62156)

NAGPRA intends that lineal descendants base their asserted connection to a known person on presented evidence. In accordance with the parallel NAGPRA requirement on establishing cultural affiliation, museums and federal agencies should review all submitted evidence pertaining to the asserted lineal descent and determine whether a preponderance of the evidence is in favor of or against the argument. Keep in mind that this determination doesn't depend upon the amount of information, but rather upon how credible and convincing it is.

NAGPRA lists lineal descendants before tribes when it comes to repatriation. Because NAGPRA sets this order of priority, museums and federal agencies must deal with lineal descendants whether or not they have the support or endorsement of

any tribe. The law and regulations do not give priority to any lineal descendant on the basis of age, sex, or tribal citizenship—all living lineal descendants have equal standing under the law to assert claims.

Lineal descendants who rely only upon traditional kinship systems should provide evidence substantiating the existence of such systems where they differ from U.S.

common law with respect to the kinship of biological and adopted children.

It would be helpful for the claimant to clarify whether the alleged kinship system involves rights to inherit property, especially the kind of property being claimed. If not, then it is doubtful that a party would qualify as a lineal descendant with standing to claim the property of an alleged ancestor.

*Two Crow Brothers  
Waiting to Hot Dance,*  
1981, oil and acrylic  
painting by Crow artist  
Kevin Red Star.



**3. Lineal descendants have standing to claim human remains, funerary objects, and sacred objects, and they have priority over tribes for these items and do not need to have tribal citizenship. Lineal descendants cannot claim objects of cultural patrimony.**

Claims made by lineal descendants must meet the same general criteria as claims made by tribes. First, the lineal descendant must show an unbroken lineage back to the known Native American owner in order to establish his or her standing as a lineal descendant—a process comparable to the requirement for tribes to show cultural affiliation. Second, the lineal descendant claimant must provide evidence to support arguments that the item meets the definition for a NAGPRA category. Finally, the lineal descendant claimant must provide evidence that the museum or federal agency lacks right of possession to the claimed object.

Nothing in NAGPRA requires museums and federal agencies to return to lineal descendants objects owned by their ancestors unless the repatriation standards of the law are fully met. In other words, unless a claimed item can be shown to fit under a NAGPRA category (human remains, funerary object, sacred object), and unless the institution can be shown to lack a proper right of possession to the funerary object or sacred object, then no legal obligation exists to return the item to a lineal descendant.

If a museum receives claims from a lineal descendant and from a culturally affiliated tribe for a sacred object that was improperly alienated (that is, it was conveyed by someone who didn't have authority to do so), the item must be returned to the lineal descendant. Under the ownership (section 3 [a]) and repatriation provisions of NAGPRA (sections 7 [a][1] and 7 [a][5]), lineal descendants have priority over tribes in claiming human remains, funerary objects, and sacred objects.

If two or more lineal descendants submit competing claims, museums and federal agencies have the authority to make a reasonable determination as to which claimant is “the most appropriate claimant” (section 7 [e]). No guidelines are given for making this determination, but it should be done in consultation with the claimants, and a record of the basis for the decision should be created. If this determination is too close to call, then the same provision of the law permits



## spotlight on adoption and race

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Two Leggings formally adopted Amos Two Leggings as his son, if not according to American law, then in accordance with traditional Crow adoption practices. In either event, the adoption established Amos Two Leggings as the legitimate heir of Two Leggings. Under NAGPRA, therefore, Amos and his heirs all qualify as lineal descendants of Two Leggings even though they have no biological connection. Any lineal descendants of Two Leggings who are not citizens of the Crow Tribe (or of any other tribe) still qualify as lineal descendants under NAGPRA.

The concept of lineal descent is not based upon race. A lineal descendant need not meet any arbitrary blood quantum level, have a Bureau of Indian Affairs Certificate of Degree of Indian Blood, self-identify as Native American, or pass any similar test of racial

qualification. NAGPRA does not include any such requirement for lineal descendants, and anthropologists have increasingly questioned race as a biological reality. For these reasons, museums, federal agencies, and tribes should refrain from defining lineal descendants according to the doubtful precepts of race.

The cultural use of anachronistic racial terms has widespread usage in the United States not only because most Americans incorrectly assume that race reflects biology, but also because the concept of race continues to enjoy great popularity throughout American society. The term “Native American” is defined in NAGPRA as “of, or relating to, a tribe, people, or culture that is indigenous to the United States” (section 2 [9]). Nothing in the law requires that lineal descendants meet a racial definition.

institutions to retain custody of the disputed item until the claimants themselves reach some form of resolution.

Lineal descendants cannot claim objects of cultural patrimony, since such items are by definition communal property and were not the private property of any known ancestor of a lineal descendant. It is possible, nevertheless, for a tribe to claim an item as cultural patrimony and a lineal descendant to claim it as a sacred object. In such a situation, the lineal descendant would have to prove that the claimed item was not communal property, but was instead the private property of a known ancestor. If the lineal descendant cannot overcome the communal ownership argument of the tribe, then the tribe would be the most appropriate recipient of the item.



**4. All lineal descendants have equal rights under NAGPRA. Tribal governments can help identify lineal descendants and provide technical assistance to them, and museums must provide information to lineal descendants upon request, whether or not tribal authorities are involved.**

It's advisable, but not required, that lineal descendants work in partnership with culturally affiliated tribes and other lineal descendants, since all these parties have standing to assert claims for items covered by NAGPRA. A major point of discussion among these parties would be not only who would take the lead in working with a museum and preparing a claim, but also who would be the most appropriate recipient of the item.

Tribal governments can't require lineal descendants to obtain approval from tribal officials in pursuing claims under NAGPRA, but as a practical matter, tribes will often have the resources, technical expertise, and experience to help lineal descendants prepare claims that meet the NAGPRA standards. Moreover, if all parties with standing to make a claim for an item have agreed to support a claim, then this ensures that disputes and competing claims will not arise to impede the return of the item.

Tribes cannot require that museums and federal agencies work only through tribal officials on matters relating to lineal descendants, although tribal officials should be invited to express preferences as to how contact with lineal descendants should be initiated. If approached by a lineal descendant, museum and federal agency officials must deal with that individual even when a tribe objects. Museum or federal agency officials may want to notify culturally affiliated tribes of contacts from lineal descendants who express an intent to claim items. Finally, lineal descendants who intend to assert claims should seek to open a dialogue with museum or federal agency officials regarding the process to be followed in having lineal descent verified.

Tribes who argue that an item fits the category of sacred object must meet the NAGPRA requirement to "show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the



lineal descendants, upon notice, have failed to make a claim for the object under this Act” (section 7 [a][5][C]). This provision of NAGPRA has been interpreted by legal scholars to impose a particular responsibility upon claimant tribes: “If a tribe . . . is making a claim based upon prior ownership or control by a tribal member, as opposed to the tribe, the claimant must show that no identifiable lineal descendants exist or that the lineal descendants have been notified and have failed to make a claim” (Jack Trope and Walter Echo-Hawk, “The Native American Graves Protection and Repatriation Act Background and Legislative History,” in *Repatriation Reader: Who Owns American Indian Remains?* edited by Devon Mihesuah [Lincoln: University of Nebraska Press, 2000], p. 144).

This means that an institution can look for some evidence of efforts by the claimant tribe to identify and contact lineal descendants of named original owners of claimed sacred objects. Tribes can seek to identify lineal descendants in a variety of ways, such as by publishing a notice in a tribal newsletter or by consulting with knowledgeable elders. If any lineal descendants are identified, tribal officials can notify them by letter or consult with them in some other manner and summarize the results of such efforts in the claim. If a claimant tribe makes no effort whatsoever to identify and notify lineal descendants of any named original owners of sacred objects, then it runs the risk of encountering reluctance from a museum to honor a claim.





# Chapter ten

## Preparing Repatriation Claims

## the art of paperwork

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*In the years before NAGPRA, the Zuni Tribe initiated a national effort to locate and repatriate stolen Ahayu:da. The first museum they contacted was the Denver Art Museum in 1978. In planning their initial meeting with museum officials, the Zunis expected to leave DAM with the Ahayu:da in hand, but matters did not proceed to so swift a conclusion. Instead, it took several years of dialogue and planning for the repatriation to occur. The Zunis learned from this experience, and in subsequent years were greatly effective in arranging the return of many Ahayu:da.*

*DAM also remembered this experience in later years. After the passage of NAGPRA, the museum endorsed the idea of holding extended consultations as a means of promoting a broad interface of mutual interests and concerns with tribes. DAM and the Colorado Historical Society agreed to ask the Zunis to help create a pilot project with both museums. In the course of this project, tribal officials and religious leaders identified a small number of items with potential for falling under NAGPRA.*

*When DAM came up with the idea for Keepers of Culture, the museum contacted the Zunis to suggest a follow-up in which more definite plans for applying NAGPRA would be formed and implemented. As this project unfolded, DAM learned that two Ahayu:da were included in a bequest to the museum. DAM offered to expedite repatriation of these Ahayu:da, but the Zunis suggested that the bequest presented an opportunity for the Zuni Tribe and DAM to create a model assessment of NAGPRA applicability.*

*DAM staff and Zuni representatives worked closely together on this project. The ultimate result was joint authorship of both the tribe's claim and the museum's assessment. These products of partnership are both included in the appendixes of Keepers of Culture as examples of what DAM and the Zuni Tribe consider an ideal model for applying NAGPRA to specific objects. The preparation of claims under NAGPRA need not be adversarial—it is possible and preferable for tribes and museums to pool resources to focus more effectively upon a common goal.*

## Preparing Repatriation Claims

NAGPRA provides a systematic means for Native American communities and lineal descendants to repatriate human remains and objects from federal agencies and from museums like the Denver Art Museum. Under the law, claimants are responsible for doing the research needed to sustain repatriation requests for unassociated funerary objects, sacred objects, and objects of cultural patrimony. Museums must then evaluate whether submitted claims conform to the requirements of the law, and through a fiduciary duty to care for collections, museums are obligated to make certain that claims made under NAGPRA adhere to the law.

Although this process of claim preparation, submission, and evaluation ensures that the interests of all potential parties can be protected and asserted, claimants and institutions can work together at every step of the claims process and seek joint clarification of NAGPRA through dialogue and joint inquiry. Of course, while cooperative interaction is the ideal, claimants aren't obligated to engage in an open dialogue or to conduct joint investigations with museums and federal agencies. Ultimately, under NAGPRA, the claimant makes the final decisions about what goes into a claim, while the museum or federal agency is responsible for assessing whether the claim successfully addresses the various standards set forth in the law and issuing findings as to NAGPRA applicability.

**1. Claimants must prepare written claims that address cultural affiliation or lineal descent, fit of the claimed item to one or more of the NAGPRA categories, and right of possession.**

A successful claim must satisfy the requirements of the law and the federal regulations. Claimants may find it useful to imagine that the claim is being written for the scrutiny of a neutral third party with knowledge of NAGPRA and no vested interest in the outcome of a claim. If claimants ignore the letter of NAGPRA or deliberately aim at a minimal claim with minimal information, the risk exists that an institution will deny the claim and an impartial party sitting in judgment of this action will support the denial. If museums and federal agencies depart from the





letter of NAGPRA in the standards they use to judge claims, they risk an expensive and inconvenient visit to court or the NAGPRA Review Committee, where their conclusion may be overturned.

Successful claimants under NAGPRA must address three primary issues in preparing claims for unassociated funerary objects, sacred objects, and objects of cultural patrimony. Claims need to be prepared in written form for submission to the museum or federal agency. The information below offers a convenient summary of these issues.

First, if the claimant is a tribe, Alaska Native Corporation, or Native Hawaiian organization, evidence must show that the claimed item originated from a group that is culturally affiliated with the claimant. If the claimant is a lineal descendant, evidence must show an unbroken descent from the last owner of the item.

Second, evidence must establish that the claimed item meets the statutory definition for one or more of the NAGPRA categories of unassociated funerary objects, sacred objects, and objects of cultural patrimony. Claims for human remains and associated funerary objects follow different standards, as briefly discussed in chapter 2 of *Keepers of Culture*.

## Important Points

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### Preparing Repatriation Claims

- 1 **Claimants must prepare written claims that address cultural affiliation or lineal descent, fit of the claimed item to one or more of the NAGPRA categories, and right of possession.**
- 2 **Museums and federal agencies must evaluate claims according to NAGPRA standards and issue administrative decisions regarding the success of the claimant in addressing cultural affiliation or lineal descent, fit of the claimed item to one or more of the NAGPRA categories, and right of possession.**
- 3 **If a claim is denied, claimants can pursue a variety of options.**
- 4 **In the event of a successful claim, each party assumes specific responsibilities.**

Third, in claims for unassociated funerary objects, sacred objects, and objects of cultural patrimony, evidence must be submitted that raises a reasonable challenge to a museum's right of possession to the item. Claims for human remains have no obligation to address right of possession, and claims for associated funerary objects should assume that right of possession will not be raised as an issue by the museum or federal agency.

In summary, a claim should include evidence and discussion on the following topics, with each claimed item receiving individual attention: a) *collection history*, showing how the item came to be part of a museum collection); b) *cultural affiliation*, showing that the earlier group from whom the cultural item originated is ancestral to the claimant community; c) *fit to NAGPRA categories of cultural items*, showing that the claimed item meets the NAGPRA definition for unassociated funerary object, sacred object, or object of cultural patrimony; and d) *right of possession*, showing that the item was originally separated from the group improperly. In addition to these primary issues, if a claim by a tribe, Native Hawaiian organization, or Native Alaska Corporation argues that the item fits only the definition of sacred object, then the claim must include discussion of the tribe's efforts to identify and notify any lineal descendants.

A model claim prepared by the Zuni Tribe and the Denver Art Museum appears as appendix A of *Keepers of Culture*. Although museums and federal agencies have no obligation to assist in the writing of claims, claimants may want to support collaborative partnerships in claim research and preparation, particularly when the mutual goal is impartial analysis of NAGPRA applicability.

**2. Museums and federal agencies must evaluate claims according to NAGPRA standards and issue administrative decisions regarding the success of the claimant in addressing cultural affiliation or lineal descent, fit of the claimed item to one or more of the NAGPRA categories, and right of possession.**

Submission of a claim does not guarantee repatriation, since museums and federal agencies must evaluate all claims to make certain that NAGPRA standards have been met. Museums and federal agencies have the authority to make determinations of cultural affiliation and, in cases where a claimant has assembled evidence





Eldrick Seoutewa and Wilton Niiha of the Zuni Tribe assist with the preparation of a claim and a claim assessment for Zuni items at the Denver Art Museum.

in favor of a certain cultural affiliation, decide whether they agree with the asserted affiliation.

With some exceptions, museums and federal agencies can independently evaluate whether an item fits the NAGPRA category of unassociated funerary object, since this determination is typically dependent upon institutional documentation. For sacred objects and objects of cultural patrimony, however, museums and federal agencies must necessarily judge whether or not a claimant has

successfully met the NAGPRA definitions. Museums and federal agencies can also form preliminary opinions as to potential fit of an item to these categories as a means of advancing consultation and information-sharing.

Museums and federal agencies should review the claim to evaluate whether it includes evidence and arguments regarding right of possession. Toward this end, it may be useful to imagine how an impartial third party might read such information and whether such a party might conclude, “Well, it seems that the institution’s right of possession is in doubt.” If a successful argument has been made in the claim, then it is up to museums and federal agencies to consider whether any evidence exists that might reasonably overcome the challenge raised by the claimant.

Museums and federal agencies should create a record of their decisions in response to claims in the form of a written assessment. An assessment can simply respond to the claim content, or it can go further and include additional information pertaining to the issues. Since NAGPRA imposes consultation and information-sharing requirements upon museums and federal agencies, the assessment can also include a record of interactions with the claimant, such as an incident-by-incident report of the consultations that led up to the submission of the claim.

A model claim assessment prepared by the Denver Art Museum and the Zuni Tribe appears as appendix B of *Keepers of Culture*. Although museums and federal agencies have no obligation to involve claimants in formal assessment of claims, collaborative partnership is the ideal when the mutual goal is impartial analysis of NAGPRA applicability. In cases where a museum or federal agency disagrees with a



claimant, the assessment should provide a detailed discussion documenting the reasons for the difference of opinion.

### **3. If a claim is denied, claimants can pursue a variety of options.**

When museums and federal agencies issue an assessment that denies a repatriation claim, claimants can respond in several ways beyond simply dropping an unsuccessful claim. The following choices of action should be considered.

*Option One: Administrative Review.* The federal NAGPRA regulations encourage parties to seek informal means of resolving disputes (section 10.17 [a]). There are several ways to go about this.

Is further review of the claim by the museum or federal agency desirable? In general, the answer is no unless the claimant knows that some shortcoming in the institution's assessment process occurred and can be addressed in a concrete manner.

Some form of arbitration may help resolve the situation. Claimants can work with the museum or federal agency to select a neutral mediator to help find a resolution. Such efforts may be most useful when little common ground exists in understanding how NAGPRA functions, and a greater degree of dialogue on the applicability of NAGPRA may help.

If the claimant believes that the claim denial is credible and there is little chance of overcoming it by new research, the claimant may wish to explore whether the institution is willing to make a gift of the requested item. Such action would occur wholly at the discretion of the institution.

Claimants should keep in mind that according to the federal NAGPRA regulations, once a museum or federal agency has formally issued its official determination in response to a written claim, then the "administrative remedy" is considered to be exhausted (section 10.15 [c]). This means that a claimant can seek other legal recourse and will receive a hearing rather than being sent back for further talks with the institution in question.



*Option Two: Resubmission of Claim.* A claim denial should point to specific aspects of the claim that cause it to fall short of the NAGPRA repatriation requirement in the view of the museum or federal agency. If the denial gives clear guidance on this point, it may be possible for the claimant to revisit the claim, conduct additional research, and perhaps identify new information that can be used to revise the claim. If the claimant believes that an improper standard was employed, or that the denial is too vague to be useful, then claim resubmission may not be possible or attractive.

*Option Three: NAGPRA Review Committee.* NAGPRA established a review committee empowered to convene hearings between parties in dispute and issue findings and recommendations regarding the identity, cultural affiliation, and disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony (section 8; see regulations sections 10.16 and 10.17). The NAGPRA Review Committee has seven members selected by the Secretary of the Interior. Three are nominated by tribes, Native Hawaiian organizations, and traditional Native American religious leaders; three are nominated by national museum and science organizations; and one is appointed by the Secretary of the Interior from a list of candidates submitted by the other six committee members. The committee conducts its business in public, and disputes among parties are heard during its regular meetings.

The committee has adopted formal “Dispute Resolution Procedures,” which are periodically updated by consensus (the most recent version is available at [www.cast.uark.edu/other/nps/nagpra/DOCS/rcdp.html](http://www.cast.uark.edu/other/nps/nagpra/DOCS/rcdp.html)). These procedures specify that the committee can issue findings and recommendations in four areas:

- A.) Whether cultural items fit the definitions of human remains and other cultural items as specified in 25 U.S.C. 3001;
- B.) Determination of the cultural affiliation of particular human remains or other cultural items;
- C.) Determination of the ownership of particular human



- remains or other cultural items; and
- D.) Appropriate disposition of particular human remains or other cultural items. (20 February 2002)

The process begins when a party contacts the committee's Designated Federal Official (also known as Designated Federal Officer) with a request to hear a dispute. As of February 2002 this person is: Robert Stearns, Program Manager, National NAGPRA Program, National Park Service, 1849 C Street, NW, Room NC350, Washington, D.C., 20240. This official consults with the NAGPRA Review Committee Chair, and if together they decide to further review the request they will ask the parties to each submit various informational statements to the committee as a whole.

If a dispute is accepted, a public hearing is scheduled at a regular meeting of the committee. Representatives of the parties in dispute make presentations before the committee and are questioned. The committee then develops findings and recommendations in the course of the meeting. Following this meeting, the Designated Federal Official issues the findings and recommendations in written form. These findings and recommendations do not have the force of law; instead, they represent informal, nonbinding advisory recommendations that can be adopted or ignored by the parties.

*Option Four: Court.* Claimants can choose to bypass the NAGPRA Review Committee entirely and proceed directly to court with a dispute over a claim. The federal regulations state that "the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act" (section 10.17 [a]).

**4. In the event of a successful claim, each party assumes specific responsibilities.**

Museums and federal agencies typically come up with a standardized way to



This Western Apache woven basketry jar was possibly made around 1900.



process claims. At the Denver Art Museum, Native Arts Department staff evaluates NAGPRA claims. DAM's director reviews the department's assessment and recommendation. Next, DAM's acquisitions group (a standing staff committee that reviews all proposed acquisitions and deaccessions) meets to hear the Native Arts Department deaccession proposal. Finally, the proposal goes to the collections committee of the Board of Trustees and eventually to the full board, where a final vote is taken. Institutional claim review procedures are subject to change at any time.

Following approval by the Board of Trustees, the DAM Native Arts Department drafts a notice of intent to repatriate, using National Park Service guidelines. This is submitted to NPS staff, who offer editorial suggestions based upon their extensive experience in publishing such notices and in order to ensure proper and consistent formatting. Since the notice reflects determinations made by a museum or federal agency as to NAGPRA applicability, the final wording of the notice is the responsibility of the museum or federal agency, not NPS. NPS then schedules publication of the notice in the *Federal Register*.

Thirty days after publication of the notice, the interested parties can begin discussing the place and manner of the repatriation (section 10.10 [d]). Museums and federal agencies must consult with the claimant on these matters, but make the final decisions themselves. NPS regulations require that successfully claimed objects be made available for repatriation within ninety days of the date of receipt of the written claim (sections 10.10 [a][3] and 10.10 [b][2]). Museums and federal agencies must create a permanent record of the repatriation that includes a description of the items returned and the recipients (section 10.10 [f]).

Museums and federal agencies have no obligation under NAGPRA to pay costs of repatriation, but claimants may inquire as to possible assistance on specific costs. Grants to tribes and museums to cover repatriation expenses are also available from the National Park Service NAGPRA grant program. In addition, it's possible for museums and tribes to reassign funds from other NPS NAGPRA grants to assist with repatriation costs. Museums should consult with NPS prior to taking any such action.



NAGPRA permits museums and federal agencies to retain custody of successfully



claimed cultural items under special circumstances (section 7 [b][e]). The federal NAGPRA regulations list four exceptions in section 10.10 (c), with the fourth one referring to additional “repatriation limitations and remedies” in section 10.15.

The first exception in the regulations repeats language in the statute itself (section 7 [b]), and states that repatriated items can be temporarily withheld from return when they are indispensable for completion of a scientific study with an outcome of major benefit to the United States. Items must be repatriated within ninety days of the completion of any such study.

The preamble to the regulations (pp. 62153–4) explains that a planned scientific study can begin even after a claim is received, and no effort has been made to define “major benefit.” In the absence of regulatory guidance defining such terms as “scientific study” and “major benefit,” museums and federal agencies should tread carefully before choosing to pursue this option. It is advisable to treat any proposed scientific study as an idea to raise with claimants, rather than as a plan to impose upon them. Since many claimants may be hostile to such projects, this could provide a useful test to help ascertain whether the scientific study really has merit—can it win the support of an unfriendly audience? Sherry Hutt and Tim McKeown suggest that since the major benefit is to the United States, this determination might best be made by the Secretary of the Interior rather than by a museum official or other federal official (“Control of Cultural Property as Human Rights Law,” in *Implementing the Native American Graves Protection and Repatriation Act*, edited by Roxana Adams [Washington, D.C.: American Association of Museums Technical Information Service, 2001], p. 208 fn. 59). They point out that any alleged major benefit should be comparable to that needed to deny next-of-kin control over a relative’s corpse, as in a murder investigation.

The second exception in the regulations also draws from the statute (section 7 [e]). Publication of a notice of intent to repatriate, as discussed above, is intended to provide any interested potential claimant with an opportunity to intervene with a competing claim. If a museum or federal agency receives a credible written competing claim, then the institution has the authority to attempt to ascertain “by a preponderance of the evidence which requesting party is the most appropriate claimant” (section 10.10 [c][2]). If no resolution is possible, institutions must retain





the cultural items until the competing claims are resolved in some other manner.

Some competing claims will have a straightforward solution, such as a claim for a sacred object by a tribe and a lineal descendant. Since lineal descendants have priority in the statute (section 7 [a][5][A]), they will be the most appropriate recipients. In other, less clear situations, the institution could encourage a dialogue on the following topic: What evidence can be presented to clarify which party is the most appropriate claimant? Institutions also have the option to inform the claimants that no action will be taken until they have reached a mutual resolution or until presented with a NAGPRA Review Committee determination or a court decision.

The third exception in the federal regulations concerns a Fifth Amendment taking (see discussion on takings in chapter 8). If a museum believes that such a situation has arisen in a claim, it must bring the matter before a court with jurisdiction to hear a Fifth Amendment taking matter. The court will then make an appropriate determination. The preamble to the regulations specifies that museums cannot independently refuse to repatriate because a taking has occurred; instead, this determination must be made by “a court of competent jurisdiction” (p. 62154).

The fourth exception to repatriation in the federal regulations refers to situations “where the repatriation is not consistent with other repatriation limitations identified in § 10.15 of these regulations” (section 10.10 [c][4]). Section 10.15 repeats the requirement for a museum or federal agency to retain custody in the event of an unresolved competing claim situation. It also emphasizes the need for potential claimants to assert any rights they may have by submitting a written competing claim prior to the occurrence of repatriation to another party:

Any person who fails to make a timely claim prior to the repatriation or transfer of human remains, funerary objects, sacred objects, or objects of cultural patrimony is deemed to have irrevocably waived any right to claim such items pursuant to these regulations or the Act. For these purposes, a “timely claim” means the filing of a written claim with a responsible museum or Federal agency official prior to the time the particular human remains, funerary objects,



sacred objects, or objects of cultural patrimony at issue are duly repatriated or disposed of to a claimant by a museum or Federal agency pursuant to these regulations. (section 10.15 [a][1]).

Two important observations need emphasis here. First, if a claimant has failed to take timely action, as defined above, a museum or federal agency cannot be held liable in any future complaint. By following the letter of NAGPRA and the regulations (and documenting this process), museums and federal agencies ensure protection from future liability.

Second, if a museum or federal agency has not followed the procedures pursuant to these regulations in agreeing to repatriate under NAGPRA, it may still have potential liability in any cases brought by a future party with a claim that would have been viable. Taking expedient measures that do not conform to the law or regulations—even when done at the request of a claimant—could have long-term negative consequences for museums. When a museum agrees to negotiate with one tribe on cultural affiliation, fit to category, and right of possession, it risks leaving the door open for future lawsuits by other parties.



## spotlight on Pesticides

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Implementation of NAGPRA has been accompanied in recent years by increasing recognition of contamination of objects in museum collections by pesticides. The federal regulations impose a requirement for museums and federal agencies to notify claimants of any known chemical treatment of cultural items being returned: “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 present a potential hazard to the objects or to persons handling the objects” (section 10.10 [e]).

Through the nineteenth and twentieth centuries, museums and private collectors have used a wide variety of potentially hazardous substances to protect organic materials from insect infestation. This is especially true of natural history collections. Throughout American society, owners of baskets, objects with feathers, and other fragile items have made casual use of arsenic, mercuric chloride, and other substances now recognized as hazardous to human health. With widespread access to such substances—and little or no awareness of any potential risk to human health—even some original Indian owners of items may have used these insecticides. Pesticides have been widely used by many parties over time, and few records were kept of what was considered a routine activity.

Experts are beginning to recognize the extent of the problem. The most cautious approach is for museums and tribes to assume objects are contaminated until proven otherwise. For tribes who hope to use repatriated items, it is important for tribal repatriation officials to gather useful information about any

known history of pesticide use and potential health risks. Likewise, no museum staff member wants to be ignorant about the possibility that collections may carry residual arsenic. Such objects can emit polluted particulates, and this makes them potentially hazardous to handle even while wearing cotton gloves.

Because the Denver Art Museum is not a natural history museum, it, like many other museums, has assumed that little risk exists from chemical contamination. When the Denver Museum of Nature and Science initiated an arsenic testing project in 1998, DAM sent twenty masks and headdresses for testing. Results showed the presence of arsenic on one Blackfoot Confederacy headdress and one Iroquois Confederacy mask. According to the Rocky Mountain Poison Control Center, the measured level found on the Blackfoot headdress and Iroquois mask (approximately 0.1 mg/l) is less than that typically found in ground water. DAM has no record of utilizing arsenic to control insects. In processing a 2001 repatriation claim from the Zuni Tribe, DAM initiated a special arsenic testing procedure for NAGPRA repatriations and applied it to five items. No evidence of contamination was found.

Arsenic has a variety of known health effects and potential risks and can be absorbed through skin contact, inhalation, and oral ingestion. Although its presence can be detected and measured, it is unclear what levels pose a threat to human health. Washing objects with soap and water has been recommended by some experts to remove arsenic, but DAM has been informed that such efforts by the Hopi Tribe have proven unsuccessful. Other methods for removing or reducing contaminants may be available.

DAM records are not comprehensive for the use

of pesticides. During the 1930s and 1940s, DAM curatorial efforts included the use of the Spradlin process for moth-proofing. This involved a chemical spray of some sort that was periodically applied to textiles and objects vulnerable to moth infestation. One departmental report for the mid-1930s refers to the construction of a “large gas poison box” which was used in an unknown manner, presumably for some form of insect control. This may have involved use of paradichlorobenzene or, at a later date, Vapona; empty cartridges of Vapona were found by DAM staff in the course of a DAM collections rehousing project from 1997 through 1999. Correspondence in May 1963 mentions the use of Raid to control a silverfish infestation on one occasion and the regular use of diazinon (diluted to “1 to 50 parts water and spray”) upon baskets, furs, textiles, and other items. DAM currently utilizes non-invasive freezing to eliminate insects.

These records confirm that DAM has used various pesticides over the years. Raid, diazinon, and Vapona are usually based upon organophosphates that break down soon after application. It is unlikely that residues exist, but if they do, DAM conservation staff is presently unaware of techniques to measure them. Although DAM lacks the expertise to reliably ascertain health risks posed by handling and using items treated many years ago with organophosphates, the dangers seem low.

DAM does not believe that the known history of insect control practices at DAM would indicate significant health risks to staff, visitors, or to recipients of repatriated items. Some caution is nevertheless prudent since it remains possible that toxic substances could have been applied to objects before they entered the stewardship of the Denver Art Museum.





# Chapter eleven

Partnership between Tribes & Museums

## The art of partnership

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***I**n the fall of 1999, on a pleasant morning in early November, representatives of the Zuni Tribe took control of the office of the Denver Art Museum repatriation coordinator. It was an extraordinary moment. The museum officials had dealt with dozens of tribes over the years, but had never experienced anything quite like this!*

*Unlike the confrontational takeover of the Bureau of Indian Affairs by Indian activists during the early 1970s, this takeover really just involved control of an office chair and computer, and it symbolized a sharing of intellectual space—a practical way to pool knowledge and resources to accomplish a common goal. The Zuni Tribe and the Denver Art Museum had agreed to operate as partners in applying NAGPRA to items under DAM control. Tribal and museum representatives wished to work together, but no one had any clear idea as to how best to proceed.*

*Meeting in the DAM repatriation coordinator's office, the parties immediately agreed that discussion of NAGPRA applicability should lead to joint authorship of a claim. Seated at a computer workstation, the repatriation coordinator started a new document, and the group launched into the various issues that need to be considered. Pretty soon, a Zuni tribal official was sitting at the computer composing the document. It ultimately took many months, several drafts, research, and another face-to-face visit to complete the claim.*



In the office of the Denver Art Museum repatriation coordinator, Zuni representative Loren Panteah writes a claim for Zuni objects in DAM's collection.

## Partnership between Tribes & Museums

Partnership can take many forms under NAGPRA. The DAM/Zuni case included a variety of steps that unfolded over a five-year period, underscoring the fact that partnership most ideally refers to the mutual fostering of relationships through time, rather than coming up with expedient solutions at the convenience of one party.

Legal processes are typically adversarial in nature, with parties lined up in opposition to one another, but this scenario need not provide the dominant model for implementing NAGPRA accurately and effectively. This final chapter of *Keepers of Culture* explores various facets of partnership as a means of encouraging museums, federal agencies, and Native American communities to find creative ways to work together on issues of mutual concern.

### 1. Partnership means designing projects that bring people together.

The implementation of NAGPRA will proceed more smoothly and with greater accuracy when all of the interested parties have a commitment to dialogue. For this reason, a partnership approach can bring meaningful results. Partnership essentially calls for museums, federal agencies, and Native American communities to pool resources, exchange information, compare perspectives on the law and other issues, and build a workable relationship. Specific projects may be developed to bring parties together to jointly consider important issues.

The goal of NAGPRA implementation projects should be to accurately apply the law to collections. Tribes may typically be inclined to aim at repatriation, but an ideal joint project should not aim at either repatriation or retention. "Success" means that a fair outcome has been jointly achieved in accordance with the law and regulations, whether this outcome requires repatriation or confirms a museum's ownership.





Once NAGPRA has been addressed, a museum and tribe can continue dialogue on issues of mutual interest, such as whether any items not covered by the law could be gifted to the tribe. Such matters are less likely to be raised or addressed if the parties have declined to take a partnership approach to investigating NAGPRA applicability.

Grant money can be used to fund projects created to promote dialogue on NAGPRA. In 1994, the first year that Congress made funds available to museums and tribes to implement NAGPRA, the Denver Art Museum and the Colorado Historical Society designed a joint eighteen-month program to hire a shared repatriation coordinator and sponsor consultations with seven tribes. Over the next two years, delegations from a number of tribes came and went. These consultations offered valuable opportunities for reviewing collections, sharing information, and promoting dialogue on NAGPRA.

The federal NAGPRA grant program, operated by the National Park Service, provides funds that can bring tribes, museums, and federal agencies together. The funding can pay expenses for travel, consultant fees, and some equipment purchases. The grant requirements—compared to other government funding sources—are not particularly complex, but they do emphasize the creation of opportunities for interaction and partnership. Museums and tribes across the nation have used this money, as well as their own internal funds, to conduct important NAGPRA compliance activities and to experiment with consultation and partnership arrangements.

## Important Points

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### Partnership between Tribes and Museums

- 1 Partnership means designing projects that bring people together.
- 2 Partnership means identifying and discussing issues of mutual importance.
- 3 Partnership means maintaining a two-way dialogue on difficult issues and finding creative solutions.

The DAM/CHS programs, which evolved into two independent programs in 1997, were sustained through the year 2000 by a total of ten NPS NAGPRA grants. These grants funded a variety of projects, including collection review consultations (also known informally as “whirlwind tours” because of their emphasis on a quick review of objects), extended consultations, NAGPRA workshops, and special symposia. Some of these activities have been mentioned in the pages of *Keepers of Culture*. On occasion, as with the DAM/CHS symposium entitled “The Art of History,” these projects have served to bring together representatives from diverse tribes, experts in various technical fields, museum representatives from across the region, federal agency officials, and local community leaders.

## **2. Partnership means identifying and discussing issues of mutual importance.**

Partnership on NAGPRA necessarily means that the involved parties will focus on how to apply the law to museum collections. Conscientious attention to this focus will lend itself to the creation of an environment in which all parties feel free to bring up matters of interest beyond the scope of NAGPRA.

In the course of holding NAGPRA collection reviews with tribal delegations in 1995, it became apparent to the DAM/CHS repatriation coordinator (the author of *Keepers of Culture*) that a need existed for a broader format for consultation. The repatriation coordinator proposed an alternative to the existing consultation process and designed a special pilot project for an “extended consultation” with the Zuni Tribe.

With Zuni support and NPS funding, the project eventually included two visits by Zuni representatives and the opening of an extended conversation on a variety of issues. As with the whirlwind tours, collection reviews were held at each museum, objects were videotaped, and copies of catalog cards for each item were shared.

The first Zuni consultation included an initial meeting of the delegation with the joint staffs of DAM and CHS to set the agenda and begin discussion on NAGPRA. This was followed by a tour of the CHS Office of Archaeology and Historic Preservation. One of the Zuni delegates then served as Museum Technician at the



A Zuni ceramic jar, possibly made around 1900.



A:shiwi A:wan Museum and Heritage Center, and he spent time during the week working in various departments at the two museums. The visit concluded with an

afternoon discussion of intellectual property rights with members of the DAM/CHS American Indian Task Force.

The second visit focused on the applicability of NAGPRA to several items at DAM and CHS. A special presentation was made to CHS and DAM staff on the A:shiwi A:wan

Museum and Heritage Center. The Zuni Bow Priest transported several items from CHS to the DAM to be stored in a high-security area with other related objects.

Both consultations were important for implementation of NAGPRA. The visits also served to create opportunities for the Zuni Tribe, DAM, and CHS to explore a range of topics of mutual interest.

### **3. Partnership means maintaining a two-way dialogue on difficult issues and finding creative solutions.**

NAGPRA raises issues of deep cultural sensitivity, and these issues are often accompanied by a historical context of cultures in collision. It is no wonder that powerful emotions surface at times during consultations. Tribal delegations visiting even the most cooperative museums may still view the experience as an encounter with a legacy of cultural oppression and dispossession. Museums take pride in their accomplishments in collecting important objects for posterity and may at times suspect tribes of harboring intentions to exploit NAGPRA to force the return of rightfully obtained collections along with improperly alienated cultural items.

Both tribes and museums may sometimes think of themselves in the most self-interested, exaggerated light, with museums seeing themselves as always engaged in the most ennobling and idealistic pursuits, and with tribes portraying themselves as helplessly victimized by insensitive museums on every occasion. Federal agencies



must necessarily indulge a more complex self-image, since they are needed by everyone and despised by many, and every exercise of federal power can be both greatly beneficial and fraught with unintended consequences. The spotlight of NAGPRA ignites wildfires as often as it highlights a great performance. The qualities of commitment, courage, and integrity are not incidental to doing NAGPRA.

Partnership does not mean avoiding wildfires, nor does it always entail a great performance. It really means figuring out the daily details of having a meaningful relationship that is mostly mundane and uneventful but occasionally has dramatic moments. To make partnerships work, tribal representatives, museum personnel, and federal agency officials should be prepared to maintain a commitment to honest dialogue even in the face of great adversity. These words are always easy to impart as advice, but they are not always easy to practice.

For the Blood Tribe of Alberta, Canada, and for the Denver Art Museum, maintaining partnership on NAGPRA was challenging. Working through the Blackfoot Nation of Montana (as a member tribe of the Blackfoot Confederacy), the Blood Tribe agreed to support a DAM proposal to create a special NAGPRA implementation project to investigate the status of confederacy ritual objects under NAGPRA. DAM held a substantial and extensively documented collection of Blood ritual objects.

In the course of a second visit to DAM in 1997, several Blood representatives briefly examined collections and expressed interest in seeking the repatriation of certain bundles. DAM indicated a willingness to work with the Blackfoot Confederacy and subsequently designed a special NAGPRA project, funded by a National Park Service NAGPRA grant. Unfortunately, what the Blood officials believed they had heard from DAM was that the museum would work to repatriate the requested items, and they left the museum with the impression that DAM would readily comply with Blood wishes. The DAM repatriation coordinator was a citizen of the Pawnee Nation, and they anticipated an obliging response to their request.

DAM believed that it had communicated to the Blood representatives not just its strong support for NAGPRA, but also its willingness to work in partnership to find creative and effective ways to accurately apply the law to DAM collections. DAM was apparently not so effective in communicating its commitment to investigating evidence and following the outcome, whether it meant repatriation or retention of items.



# spotlight on collection management partnership

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Museums and federal agencies with Native American collections should cultivate relationships with Native American constituencies by soliciting input on management of collections. This can take many forms.

Tribal delegations visiting the Denver Art Museum are encouraged to select items for placement in a special high-security area with restricted access, using their own criteria to make such identifications. This special storage area adds an extra level of security and privacy for objects. Tribes can also offer handling and storage guidelines, such as indicating a directional orientation in storage or expressing a preference as to the gender of individuals who might handle the objects. As a practical matter, DAM staff treats such instructions as guidelines to respect rather than as laws to obey.

Removing items from display upon request may help foster mutual respect, so this might provide a useful short-term option for museums. Some museums may be willing to adopt formal policies of exhibiting only those items that no tribe or individual Indian would find offensive, but few museums will eagerly surrender the discretion to display items

deemed objectionable by some segment of society. Dialogue will be crucial for tribes and museums to find common ground regarding the exhibition of sensitive items.

Museums often collect items of religious significance, so it is sometimes important for museums to make such objects available to tribes for religious purposes. Visiting delegations often include religious leaders who may wish to conduct special activities, such as forms of prayer, offerings, and smudging of certain items. These activities may be discussed with the museum's conservator, when appropriate, with occasional modification of the activities made by mutual agreement.

Traditional religious leaders should be prepared to negotiate on how best to perform activities that may have an impact upon collections. Museums typically plan for long-term preservation of collections and so must consider potential impact by insects, mold, light, temperature, humidity fluctuations, and even oils and salts from human hands. Collections areas also have sensitive smoke detectors that may need to be temporarily disabled before an individual performs ritual smudging.

Over the next several years, the Blood Tribe sent tribal officials and traditional religious leaders to review collections and hold negotiations on NAGPRA applicability. They also helped to sponsor a special internship at DAM for a Blood museum studies student to help with the project. Following DAM's suggestion, the tribe prepared and submitted a draft claim for review by DAM.

The Blood Tribe believed that it was critically important to include elders and traditional religious leaders in all discussions—even those meetings in which technical questions of applicability of a complex foreign law were to be raised. It was distressing, however, to see that DAM staff would not adhere to traditional Blood protocol, which requires that people do not openly challenge statements made by elders and religious authorities.

Hoping to send the message that the museum would work with the tribe to find meaningful ways to address the concerns of the religious leaders, DAM suggested to Blood authorities in December 1997 that the museum would be willing to lend the bundles for use during the summer ceremonial season. The loan was greatly difficult for DAM to arrange, because there were eagle feathers in the bundles and U.S. laws closely regulate eagle feathers. The U.S. Fish and Wildlife Service granted DAM a special exemption, and the bundles went across the border for the summer of 1998.

DAM hoped for goodwill from this loan, but failed to anticipate the distress felt by some of the religious leaders when they had to return the bundles at the end of the loan period. In their eyes, DAM had forced them to return their children into foreign bondage. The Blood Tribe honored the loan requirements, but it left a bitter taste to go home empty-handed. Moreover, in October 2001 the Blood Tribe wrote to DAM to share the incorrect impression that DAM had been reluctant to even consider making this loan and had to be convinced by another museum to go along with the idea. DAM earned lasting resentment rather than goodwill from its offer to loan the bundles.

Following a telephone consultation in the spring of 1999 in which DAM shared its preliminary impressions of NAGPRA applicability, the Blood Tribe decided to withdraw from the project entirely. DAM urged the tribe to reconsider its decision, and the Blood officials came up with an innovative “protocol agreement” that set forth



a variety of conditions under which the project could proceed.

DAM submitted extensive research materials to the Blood Tribe by the deadline set in the protocol agreement, including a lengthy draft research paper that presented detailed historical evidence pertaining to NAGPRA applicability. DAM invited the tribe to coauthor the final research paper and also to use the information in preparing a final claim. DAM noted that this material would fulfill the NPS grant requirements and serve as a public record.

Over the next few months, the Blood Tribe reviewed this material and considered its response. In the late fall of 1999, the Blood Tribe sent a letter to DAM expressing a variety of complaints and suspicions about the DAM repatriation coordinator. DAM invited the tribe to Denver to discuss the complaints.

At that meeting, in December 1999, the Blackfoot Confederacy presented DAM with a written NAGPRA claim for twenty-two items. During the meeting, the Blood Tribe expressed its intention to use any means whatsoever to coerce DAM to return the requested bundles. The representatives believed that DAM should use its discretion to simply give the bundles to the tribe as gifts rather than engaging in a lengthy and unwanted research project on NAGPRA. The Blood Tribe stated its opposition to U.S. National Park Service funding for the position of DAM repatriation coordinator and observed that other U.S. museums had been far more willing to accommodate the Blood Tribe. The Blood Tribe also noted that the Glenbow Museum in Calgary, Canada, had offered to return several thousand ritual objects as gifts, and the confederacy had accepted the return of 257 items. From its perspective, DAM suffered greatly in comparison.

In January 2000, a DAM board member visited the Blood Tribe to underscore the importance of the project and was well received as a guest. Blood authorities emphasized the importance of the bundles and expressed their frustration with DAM. The tribal representatives found DAM's academic approach to questions of history and culture objectionable, and the tribe wished for a timely decision by DAM regarding the claim.

DAM issued its findings in February 2000. The museum agreed to return five items as objects of cultural patrimony improperly alienated from two Blood societies. Because it believed that all of the requested bundles were greatly needed



by the Blood people, DAM agreed to return seventeen additional items as gifts even though NAGPRA did not apply. The Blood Tribe neither endorsed nor contested DAM's findings. The items were formally repatriated in September 2000.

Both the Blood Tribe and DAM had started this project with high hopes, though they turned out to be very different high hopes. Pursuing partnership, DAM obtained the NPS grant, arranged for the loan of the requested items, shared detailed information at every step, and sought Blood help in accurately applying the law according to the evidence. Also pursuing partnership, the Blood Tribe sent numerous delegations to Denver, helped sponsor a Blood student as an intern at DAM, solicited DAM input on claim preparation, suggested a useful protocol agreement, and set forth its expectations for DAM. Both parties worked very hard to create a relationship.

From the Blood Tribe's perspective, although the bundles returned home again, DAM's approach to NAGPRA was disappointing. Blood Tribe officials argued that all Blood religious items had been taken improperly, and the direction taken by DAM's research proved greatly unsettling (see chapters 3 and 8 for additional discussion of this disagreement). The Blood Tribe was ultimately unimpressed by DAM's approach to partnership.

In the opinion of DAM, this project was an important learning experience in terms of how NAGPRA works in the real world. From DAM's perspective, the Blood Tribe demonstrated a strong commitment to repatriation, showed courage in standing up to what it considered to be a hostile museum, and had the integrity to seek innovative solutions to problems as they arose.

The qualities of commitment, courage, and integrity were also important for the DAM/Zuni partnership. The Zuni commitment to repatriation is underscored by a long record of successful negotiations with many museums since the late 1970s. The integrity and courtesy of Zuni negotiators set the tone for an open dialogue. They know that they will not always be welcomed in the spirit of partnership, but they have the courage to endure and persevere.

Working with the Zunis to ascertain the applicability of NAGPRA, DAM staff was comfortable in raising even the most difficult issues, knowing that conscientious attention would be given to every matter. It was a positive learning experience for





everyone. DAM found with the Zunis that mutual respect creates an ideal foundation for implementing NAGPRA through partnership.



For Native America, NAGPRA provides a new sense of empowerment under which long-lost items can be repatriated, and it means that Native Americans can be active participants in the museum community. For museums and federal agencies, implementing NAGPRA represents an important form of accountability to all Americans in carrying out the mission to care for the touchstones of our human heritage, and it means cultivating mutual respect with important constituencies. Implementing NAGPRA really aims at the creation of a shared group identity that brings museums and tribes together in partnership. In the quest for justice, everyone can win.

This is the real spirit of NAGPRA.





## appendix a

### Repatriation Claim of the Zuni Tribe at the Denver Art Museum

*This claim was prepared by the Zuni Heritage and Historic Preservation Office and the Native Arts Department of the Denver Art Museum and has been included here as an example of a model claim under NAGPRA.*

April 2001

## Repatriation Claim of the Zuni Tribe at the Denver Art Museum

With this claim, the Zuni Tribe formally and respectfully requests under the provisions of the Native American Graves Protection and Repatriation Act, P.L. 101-601 (NAGPRA, 25 USC § 3001–3013), and its implementing regulations (43 CFR Part 10), the return of two Ahayu:da (also known as “Zuni War Gods”), an Ahayu:da altar stick, and one Ko’Ko mask in the possession of the Denver Art Museum (DAM). These four cultural items originated from the Zuni Tribe and are presently under the control of DAM, listed under the following accession numbers:

<i>Current Accession</i>	<i>Original Accession</i>	<i>Description</i>
not accessioned	not accessioned	Ahayu:da figure
not accessioned	not accessioned	Ahayu:da figure
1966.398	Qzu-48-G	Ahayu:da altar stick
1948.236	NZu-3-Ex	Koyemshi Ko’Ko

The present claim provides evidence showing that the above traditional religious items hold ongoing historical and cultural importance of central significance to the Zuni community and were communally owned by the Zuni Tribe at the time they were separated from the tribe. These items are therefore culturally affiliated with the Zuni Tribe and also meet the NAGPRA definition for “objects of cultural patrimony.” Moreover, the first three items listed above are also needed by a recognized traditional Zuni religious leader for ceremonial usage and therefore qualify as “sacred objects” under NAGPRA. Finally, the present claim shows that DAM does not hold right of possession to these items.

In addition to seeking the return under NAGPRA of the above four items, the Zuni Tribe wishes to have one additional item returned to the tribe which is not covered by NAGPRA:

<i>Current Accession</i>	<i>Original Accession</i>	<i>Description</i>
1948.235	NZu-1-Ex	Salimobiya Ko’Ko



As the evidence shows, this mask represents a probable replica produced sometime around 1900, intended to duplicate a communally owned Zuni Salimobiya Ko'Ko. Although it does not fall under the repatriation requirement of NAGPRA, the Zuni Tribe has an ethical obligation to seek the return of this item as a means of preserving confidential religious knowledge and controlling protected images from improper usage.

The Denver Art Museum is required by NAGPRA to return the four items included in the claim. This legal requirement provides sufficient reason to return the requested items, but it is also supported by compelling moral and ethical reasons for honoring this request—reasons which cover all five items. The Zuni religion originated with the creation of the world, and exists to protect all beings on the earth, and to provide fertility and well-being for the Zuni people and our neighbors throughout the world. Our priests and religious leaders, after long years of preparation and training, take on the responsibility for carrying out the intricate rituals and ceremonies that form the framework of our religion. Dedication and seriousness of action are required by all involved in the Zuni religion to ensure its beneficial effects. The historical disruption of the Zuni religion first by the Spanish colonial government and later by the United States government, and by the theft and removal of sacred items, such as the Ahayu:da, by non-Zunis, has created an imbalance in the spiritual world. In order to restore harmony to all living things, this balance needs to be restored.

The present claim has been submitted by the Zuni Tribe at the request of the Zuni Cultural Resource Advisory Team (ZCRAT). The ZCRAT was established in 1991 through Zuni Tribal Council Resolution M70-91-L164 to function within the Zuni Archeological Program and subsequently, within the Zuni Heritage and Historic Preservation Office. Through the Zuni Tribal Council Resolution, ZCRAT is empowered to make recommendations regarding the protection of Zuni traditional cultural properties.

As a matter of religious tradition, legal right, and moral concern, the Zuni Tribe has chosen to prepare and submit this repatriation claim. The information provided here supports the view that justice will be served if DAM agrees to honor this request.



The Pueblo of Zuni's philosophy in working with museums has been molded by more than 20 years of experience working with museum officials, both before and after the passage of NAGPRA. Although Zuni delegations have met with mixed responses from museum representatives, the average museum response has been cooperative.

Zuni traditional religion is currently practiced much the same as it has since time immemorial. Zuni religious leaders require the return of the many objects now in the possession of museums that meet NAGPRA definitions of "cultural patrimony" and "sacred object." These objects are of central importance to the continuing conduct of religious life at Zuni Pueblo. In Zuni thought, the life of a religious object is thought of as a full circle; when such objects are alienated from the Tribe, their absence represents a break in that circle. This break cannot be restored until such objects are returned. In Zuni belief, replicas of religious objects are imbued with the same power as an original and are therefore of equal concern to Zuni religious leaders.

Communication between the Zuni people and museum officials has come a long way, but more communication will be necessary in the future. The Zuni leadership seeks to continue to work with museum personnel on the return of objects critical to the on-going practice of Zuni religion.

### Collection Histories

*Two Ahayu:da.* In the spring of 1999, the Denver Art Museum (DAM) acquired a large collection of Native American ethnographic objects in a bequest from the estate of Charles J. Norton. In reviewing this collection, DAM staff discovered two wooden carvings with tags reading: "Misc.—7, Zuni War God" and "Misc.—8, Zuni War God." An inventory among Norton's papers dated April 29, 1972 listed the two items, repeating the information on the tags. The circumstances under which Norton acquired these items sometime prior to 1972 are not known. Nancy Blomberg, DAM Curator of Native Arts, examined the figures and confirmed their identification as Zuni War Gods. DAM assigned them temporary numbers of N 0813.1 and N 0813.2.



In the summer of 1999, DAM sent photographs of the two items to Loren Panteah, Acting Director of the Zuni Heritage and Historic Preservation Office (ZHHPO). According to Panteah, after reviewing the DAM photographs, ZHHPO consulted the Zuni Cultural Resource Advisory Team (ZCRAT). The ZCRAT members examined the photographs and determined that the War Gods were authentic Ahayu:da. In the expert opinion of Perry Tsadiasi (Bow Priest), the objects in question were, in fact, authentic, and due to signs of weathering, he felt that this indicated that the items had been placed at a shrine. Among other signs of weathering, such as cracks and rotting, he noted the absence of the umbilical cord from both Ahayu:da. The other ZCRAT members, consisting of society members who have responsibilities for purifying Ahayu:da, also agreed with Tsadiasi. Panteah subsequently notified DAM that the two items in the possession of the museum were genuine Ahayu:da.

*Ahayu:da Altar Stick.* The Denver Art Museum acquired the Ahayu:da altar stick in 1966 from Vander Wagen Brothers in Gallup, New Mexico. It was accessioned as a gift on March 20, 1966, and assigned the number QZu-48-G. A new accession number, 1966.398, was later assigned to the altar stick. DAM files contain one brief letter dated September 23, 1965 from Mike Vanderwagen to Norman Feder, a DAM curator, which does not make reference to the altar stick, but probably refers to the circumstances under which it entered DAM collections:

I have a pair of Hopi women's boots @ 22.50 wholesale will send them up. for you to look over if you think the price is right. Let me know. Also about the War Gods.

Vanderwagen's vague reference to "War Gods" indicates that he had actual Ahayu:da figures in hand which he was offering to Feder. His letter may explain how Feder acquired two Ahayu:da which he donated to DAM in 1966 with no collection history information. Those Ahayu:da were given by Feder to DAM in March and December 1966, and both showed signs of weathering, indicating removal from a shrine. DAM gifted both of these Ahayu:da to the Zuni Tribe in 1980.



It is possible that the two Ahayu:da in the Charles Norton collection also came from Vanderwagen with Feder's assistance. According to Nancy Blomberg of the DAM Native Arts Department, Feder and Norton knew each other and shared common interests in Indian material culture, and both men could have had dealings with Vanderwagen. Concerning the altar stick, Vanderwagen provided additional information which appears on the DAM catalog card:

According to Vander Wagen these sticks are placed upright before the Zuni war god figures in Zuni altars. A cotton string runs from this stick to the war god.

Andrew Vanderwagen was a missionary who also operated a trading store at Zuni during the first decade of the twentieth century and was active in collecting Zuni items for sale to museum collectors (Diana Fane, Ira Jacknis, Lise Breen, *Objects of Myth and Memory: Indian Art at the Brooklyn Museum*, 1991, Brooklyn Museum of Art, p. 56). Throughout the twentieth century, the Vanderwagen family owned and operated a ranch located north of the Zuni reservation, as well as a trading store at Zuni. A known Ahayu:da shrine is located near the ranch, but the circumstances under which the Vanderwagen family acquired the altar stick are unknown. An examination of the altar stick was conducted by Roger Echo-Hawk and Nancy Blomberg on January 9, 2001, and one end of it is deteriorated, consistent with placement in an upright position at a shrine, and the entire piece is extremely weathered.

DAM held consultations with Zuni representatives in 1996 and 1997, and provided information about the altar stick. In the course of the consultations, Perry Tsadiasi (Bow Priest, ZCRAT member) and John Bowannie (medicine society leader, ZCRAT member) confirmed the identity of the altar stick as associated with an Ahayu:da shrine. Other ZCRAT members were subsequently consulted about this object, and they confirmed the identifications made by Tsadiasi and Bowannie. Based upon all of the available information, the altar stick in DAM collections was probably removed from an Ahayu:da shrine sometime prior to March 1966.



*Koyemshi Ko'Ko*. DAM acquired this Zuni *Koyemshi Ko'Ko* through trade with the Brooklyn Museum of Art in 1948. The *Koyemshi Ko'Ko* was accessioned by DAM on April 10, 1948, and given the accession number of NZu-3-Ex. It was subsequently assigned the new accession number of 1948.236. Three letters in DAM files concern the transaction under which DAM obtained this *Koyemshi Ko'Ko* from the Brooklyn Museum. Brooklyn Museum records provide additional information about this mask.

A letter written on April 16, 1948 to DAM from Nathalie Zimmern, Assistant Curator of the Department of Primitive and New World Cultures at the Brooklyn Museum, specified that the masks included in the trade were collected by Stewart Culin. A list provided by Zimmern further noted that the Zuni "Clown's mask (*Kayemashi*)" was "collected in 1904."

In November 2000, DAM contacted Diana Fane at the Brooklyn Museum to inquire about documentation associated with this mask. Assistant Curator Susan Zeller sent copies of museum records to DAM, and the catalog card for this *Koyemshi Ko'Ko* states: "oo-li-nai Bought from Horabin & McGaffey, Thoreau. Collected by George Winters." This information suggests that the *Koyemshi Ko'Ko* was originally separated from the Zuni community under unknown circumstances by a man named George Winters, and it eventually fell into the hands of Horabin & McGaffey. Stewart Culin subsequently purchased the *Koyemshi Ko'Ko* from Horabin & McGaffey in 1904.

DAM held consultations with representatives of the Zuni Tribe in 1996 and 1997 and provided information about the *Koyemshi Ko'Ko*. At that time Perry Tsadiasi (Bow Priest, ZCRAT member) and John Bowannie (medicine society leader, ZCRAT member) confirmed the identity of the *Koyemshi Ko'Ko*, noting the existence of several stains inside the mask, and that the inner and outer surfaces were noticeably dusty. After the November 1999 consultation with DAM, the ZCRAT was consulted by the Zuni Heritage and Historic Preservation Office (ZHHPO). ZCRAT members reviewed and examined consultation notes and photographs and confirmed the identification made by Perry Tsadiasi and John Bowannie of the *Koyemshi Ko'Ko*.

This *Koyemshi Ko'Ko* was inspected on October 31, 2000, by Roger





Echo-Hawk and Nancy Blomberg. Two numbers were written in ink on the mask: 5205 and 908. Both numbers represent accession numbers of the Brooklyn Museum, with “908” being a probable cataloging error for “907,” the actual number for this mask. A square tag is stapled to the mask with the following information: HA-56, 462. A second tag is attached to the first by a string with the number 3 inside a circle and B33 written below. With the exception of the Brooklyn Museum accession numbers, the significance of these designations is unknown.

*Salimobiya Ko’Ko.* The Denver Art Museum acquired a Zuni Salimobiya Ko’Ko from the Brooklyn Museum in 1948. The Salimobiya Ko’Ko was accessioned on April 10, 1948, and given the accession number of NZu-1-Ex. It was subsequently assigned the new accession number of 1948.235. Three letters in DAM files concern the transaction under which DAM obtained this Salimobiya Ko’Ko from the Brooklyn Museum.

A letter written on April 16, 1948 to DAM from Nathalie Zimmern, Assistant Curator of the Department of Primitive and New World Cultures at the Brooklyn Museum, specified that the masks included in the trade were collected by Stewart Culin. The Brooklyn Museum correspondence lists this Salimobiya Ko’Ko as “Zuni mask, no name given” with no accession number, implying that it was never formally accessioned by the museum. DAM wrote to the Brooklyn Museum on April 14, 1948 to inquire about this Salimobiya Ko’Ko and Nathalie Zimmern wrote back stating that their records were “incomplete” but the mask was “collected by Stewart Culin.” It is not clear when Stewart Culin collected it, but it is likely that he acquired it sometime shortly after 1900. This Salimobiya Ko’Ko lacked various elements when DAM obtained it, but DAM “refurbished” it in January 1951, as noted on the catalog card: “Crest added, nose made and painted, crow feather ruff made and added.”

In November 2000, DAM contacted Diana Fane at the Brooklyn Museum to inquire about documentation associated with this Salimobiya Ko’Ko. Assistant Curator Susan Zeller sent copies of museum records to DAM, but could identify no records associated with this Salimobiya Ko’Ko:



All of the masks purchased from Vanderwagon in 1904 are accounted for in our records with accession numbers so I don't think the "no number mask" belonged to the Vanderwagon group of masks. However, I have been unsuccessful in finding "no number" actually "accessioned" into BMA at any point and so far it appears to have been approved for exchange without ever doing so. Frankly we do have a mix up in numbers of several masks from Zuni and some are theoretically here but we have not been able to match mask to accession number as yet. So I would not totally rule out the possibility that your mask could be a Vanderwagon commission and someone in 1948 was not too zealous in documenting. (Zeller to Echo-Hawk, December 28, 2000 letter)

Diana Fane studied records associated with Stewart Culin's collecting activities, and she concluded that although Culin acquired a large Zuni collection for the Brooklyn Museum, "[i]n all the years Culin collected in Zuni he was not able to purchase a single mask that had actually been used in a ceremony" (Fane, "New Questions for 'Old Things': The Brooklyn Museum's Zuni Collection," in *The Early Years of Native American Art History: The Politics of Scholarship and Collecting*, edited by Janet Berlo, 1992, University of Washington Press, p. 79). Culin had little success in collecting ceremonial masks directly from Zuni people because in 1902, when Zuni authorities learned that he had obtained several masks from other parties and was attempting to purchase others, they sent the crier out to warn the people against selling such items to him, and he learned that "the sale of masks was punished by death" (Diana Fane, Ira Jacknis, Lise Breen, *Objects of Myth and Memory: Indian Art at the Brooklyn Museum*, 1991, Brooklyn Museum of Art, p. 60). Culin purchased most of his Zuni masks from Andrew Vanderwagen, who had hired several Zunis to secretly manufacture masks for sale to Culin (Diana Fane, Ira Jacknis, Lise Breen, *Objects of Myth and Memory: Indian Art at the Brooklyn Museum*, 1991, Brooklyn Museum of Art, p. 62).



DAM held consultations with representatives of the Zuni Tribe in 1996 and 1997 and provided information about the Salimobiya Ko'Ko. At that time Perry Tsadiasi, a Bow Priest, and John Bowannie, a medicine society leader and member of the ZCRAT, confirmed the identity of the Salimobiya Ko'Ko. They recognized that the beak color and the feather construction were not correct, and the inside of the Salimobiya Ko'Ko lacked any of the indications typical of masks made for ceremonial usage. After a consultation with DAM in November 1999, the ZCRAT was consulted by the Zuni Heritage and Historic Preservation Office (ZHHPO). ZCRAT members reviewed and examined consultation notes and photographs and confirmed the identification made by Perry Tsadiasi and John Bowannie of the Salimobiya Ko'Ko.

Very little is known about the history of this Salimobiya Ko'Ko. Observations by the ZCRAT members indicate its probable character as a replica made for commercial purposes. In addition, the pristine quality of the mask, as well as its incomplete construction at the time Culin acquired it, also support the view that this Salimobiya Ko'Ko probably represents a reproduction prepared under the direction of Andrew Vanderwagen or some other person for commercial sale. Since the Vanderwagen masks have generally been accounted for at the Brooklyn Museum, this mask remains a mystery. Its known history is that Stewart Culin probably collected it sometime shortly after 1900 from an unknown source, and in 1948 DAM acquired it in trade from the Brooklyn Museum.

### **Cultural Affiliation**

The Zuni Tribe is a federally recognized tribe with standing to assert claims under NAGPRA (25 USC § 3001 [2][7]) and the federal NAGPRA regulations (43 CFR Part 10.2 [b][2]). The four items claimed under NAGPRA were created within the Zuni religious system for religious purposes and are venerated by the Zuni Tribe. In consultations between DAM staff and Zuni representatives, the two sides agreed that the available documentation, as well as the physical evidence of the claimed items themselves, support the conclusion that four of the five



items included in this claim are culturally affiliated with the Zuni Tribe.

*Two Ahayu:da.* These two Ahayu:da are culturally affiliated with the Zuni Tribe. They were created within the Zuni religious system for religious purposes and are venerated only by the Zuni Tribe. The available documentation, discussed above in the collection history section, as well as the physical characteristics of the Ahayu:da, indicate that they originated from the Zuni Tribe at some time prior to 1972, possibly in 1965–1966. In consultations between DAM staff and Zuni representatives, both sides agreed that a relationship of shared group identity exists between the Zuni community of circa 1965–1972 and the present-day Zuni Tribe, in accordance with the statutory definition set forth in NAGPRA (25 USC § 3001 [2][2]).

*Ahayu:da Altar Stick.* The Ahayu:da altar stick is culturally affiliated with the Zuni Tribe. It was created within the Zuni religious system for religious purposes and is venerated only by the Zuni Tribe. The available documentation, as well as the physical characteristics of the Ahayu:da altar stick indicate that it originated from the Zuni Tribe at some time in 1965–1966. In consultations between DAM staff and Zuni representatives, both sides agreed that a relationship of shared group identity exists between the Zuni community of circa 1965–1966 and the present-day Zuni Tribe, in accordance with the statutory definition set forth in NAGPRA (25 USC § 3001 [2][2]).

*Koyemshi Ko'Ko.* This Koyemshi Ko'Ko is culturally affiliated with the Zuni Tribe. It was created within the Zuni religious system for religious purposes and is venerated only by the Zuni Tribe. The available documentation, as well as the physical characteristics of the Koyemshi Ko'Ko indicate that it originated from the Zuni Tribe at some time prior to 1904. In consultations between DAM staff and Zuni representatives, both sides agreed that a relationship of shared group identity exists between the Zuni community of circa 1904 and the present-day Zuni Tribe, in accordance with the statutory definition set forth in NAGPRA (25 USC § 3001 [2][2]).



*Salimobiya Ko'Ko*. The history of this Salimobiya Ko'Ko is unclear. As discussed above in the collection history for this item, ZCRAT members have identified this Salimobiya Ko'Ko as a reproduction. The extant documentary record permits some possibility that it was produced by Zunis working under the direction of Andrew Vanderwagen or another party soon after 1900 for commercial purposes. The pristine quality of the mask, its unfinished state, and other details of construction support the view that it was a reproduction. The available documentation is silent as to the circumstances under which this Salimobiya Ko'Ko originated and was sold, but the evidence favors the view that it is a reproduction which is not known to have ever been under the control of the Zuni Tribe. The elements added to the mask by DAM in 1951 are definitely not culturally affiliated with the Zuni Tribe.

Zuni religious leaders have confirmed that this reproduction was designed to imitate a Zuni Salimobiya Ko'Ko. The DAM mask was modeled upon a Salimobiya Ko'Ko created within the Zuni religious system for religious purposes and is venerated only by the Zuni Tribe. The Zuni Tribe has an interest in asserting control over religious items, including objects designed to replicate religious items, and hereby requests that DAM deaccession this mask and offer it as a gift to the Zuni Tribe. The Zuni Tribe regards NAGPRA, and possibly other laws, as having potential applicability to replicas, but needs to develop appropriate research and analysis on this point.

### **Fit to NAGPRA Categories**

This claim sets forth evidence and arguments below showing that the two Ahayu:da and the Ahayu:da altar stick qualify as objects of cultural patrimony and as sacred objects under NAGPRA. In addition, the Koyemshi Ko'Ko is argued to fit the definition for an object of cultural patrimony under NAGPRA. The Zuni Tribe withholds consideration in this claim as to whether the Koyemshi Ko'Ko meets the criteria for a sacred object under NAGPRA. Each of these matters is considered in detail below.



### *Objects of Cultural Patrimony Category*

The Zuni Tribe asserts that the two Ahayu:da, the Ahayu:da altar stick, and the Koyemshi Ko'Ko included in this claim qualify as objects of cultural patrimony under NAGPRA. The law provides a statutory definition for this class of cultural items (25 USC § 3001 [2][3][D]):

“[C]ultural patrimony” . . . shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

The federal regulations for NAGPRA add guidance to the meaning of the definition (§ 10.2 [d][4]), and specifically mention Ahayu:da:

*Objects of cultural patrimony* means items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War



Gods, the Confederacy Wampum belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole.

This language means that a claimant must provide specific, very limited information in order to show that a claimed item fits the criteria of the law and regulations. Three elements must be satisfied. First, the claimed item must have an “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself[.]” Second, the claimed item cannot be “property owned by an individual Native American[.]” Instead, evidence must be provided to show that the object “cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe[.]” Finally, evidence must show that the object was “considered inalienable by such Native American group at the time the object was separated from such group.”

A key concept in this legal definition is that an object of cultural patrimony must have been considered to be communal property at the time of its separation from the group. The items included in this claim can be grouped into two categories: items associated with Ahayu:da shrines and Ko’Ko, but for the purpose of showing a fit to the NAGPRA category of objects of cultural patrimony, it is most ideal to consider each item separately, since each has a distinct collection history and therefore must be considered individually.

*Ahayu:da.* The Zuni Tribe claims these two Ahayu:da as objects of cultural patrimony under NAGPRA. Ahayu:da are of central importance to the continuing religious life of the Zuni Tribe. They represent twin gods who were created by the Sun Father to help the Zuni overcome obstacles in the migrations to the Middle Place at Zuni Pueblo. They also serve as patrons of gaming and sports and can influence the weather and affect general prosperity. Ethnographic accounts of Zuni lifeways during the nineteenth and twentieth centuries contain frequent mention of Ahayu:da, pointing to their historical importance and ongoing centrality to Zuni culture over time.

Ahayu:da are created annually by specific clans for the benefit of all the Zuni



people and are communally owned. Very few items of religious significance among the Zuni people are individually owned by Zuni tribal citizens. Upon their ritual installation in shrines, Zuni Bow Priests instruct the Ahayu:da to protect the Zuni community from its enemies and to use their potentially harmful powers for beneficial purposes.

According to Charles Hustito, the Bear Clan maker of *Ma'a'sewi*—the younger brother War God—Ahayu:da become communal property when installed at a shrine: “When we turn the War God over to the Bow Priests in the morning of our stay over in the kiva, they take *Ma'a'sewi* and place him in the shrine where he belongs. From that point on, the War God becomes communal property” (Charles Hustito, “Why Zuni War Gods Need to be Returned,” *Zuni History: Victories in the 1990s*, Institute of the NorthAmerican West, Section II, 1991, p. 12).

Once the Ahayu:da are placed in a shrine, in the course of customary Zuni ceremonial practice, no one has the authority to remove them. An Ahayu:da shrine is like a church, since it is an ongoing place of worship whose integrity is maintained, and Ahayu:da placed at shrines are integral to the place of worship, rather than incidental. Zuni religious leaders believe that removing an Ahayu:da from a shrine will unleash its potentially malevolent powers.

Historical records contain confirmation that Ahayu:da taken from shrines are considered to be stolen. Research prepared by T. J. Ferguson mentions an incident in 1897 in which an American named George Wharton James “coerced Zuni men” to take him to a shrine and then he bribed “the Zunis he was with to let him take the Ahayu:da, wrapping the images in a cloth, returning to Zuni Pueblo after dark, and leaving the village with the hidden Ahayu:da before morning” (T. J. Ferguson, “Creation, Disposition, and Repatriation of Zuni War Gods: Preliminary Report to the Zuni Tribal Council,” report for the Pueblo of Zuni and the Institute of the NorthAmerican West, February 1989). The clandestine nature of this theft was acknowledged by James himself, who characterized his action as “plundering a sacred shrine.”

During the late 1940s, anthropologist John Joseph Adair conducted research at Zuni, and he described an incident in which he was accused of improperly purchasing or stealing Ahayu:da (John Joseph Adair, *A Study of Culture Resistance: The*





*Veterans of World War II at Zuni Pueblo*, Ph.D. dissertation, 1948, University of New Mexico, pp. 157–158). Adair's discussion of this incident confirms that Ahayu:da at shrines are not viewed as abandoned objects, but instead have a continuing status of public ownership which is considered to be violated when they are removed from the shrine (footnote 14, p. 158):

The background of this incident is worth telling. When I returned to the pueblo after a week's absence in Albuquerque, I heard, not more than a few hours after settling once more in the village, that the bow priest had taken the newly carved image of the Ahaiuta up to the shrine on the edge of Corn Mountain, and he missed the image that had been placed there the year before [. . .] He accused the people of stealing that image, saying, I was told, that there was some witch among the people who did that thing. Later that night, as I heard the story, \_\_\_\_\_, one of the head men of the Newekwe, in whose house I had lived at the beginning of the summer, had said that I was making a study of Zuni religion and that I had stolen the image. The matter was referred to the Governor, but he would not believe the gossip and it was never taken up with the council. (I later learned that the image was found at the shrine.) But from that time on it was very difficult to engage an informant. It was interesting to hear stories that were circulating. It was said by someone that I had been seen carrying the image down from the mesa. I knew how a Zuni felt when he was the subject of widespread gossip.

The continuing communal ownership status of the Ahayu:da at shrines is clearly implied by mention that the allegations had been "referred to the Governor" who would have taken the matter up with the Zuni tribal council had he believed the charges. In November 1978, anthropologist Triloki Nath Pandey prepared an



affidavit for the use of the Zuni Tribe, reflecting research experiences dating back to 1963, and conveying his expert opinion of the status of Ahayu:da among the Zuni:

The images of the War Gods are tribal “property.” The images live at various shrines dispersed on the sacred Corn Mountain (Towayalanne) and at other shrines in sacred spots throughout the Zuni Reservation. No individual Zuni (or non-Zuni) has the right to remove them from these abodes. Although the images of the War Gods are made by individuals from the Deer and Bear Clans, they do so under a sacred trust, and do not own them.

In December 1978, eight Zuni religious leaders wrote to DAM to share their perspective regarding ownership of Ahayu:da:

The Ahayu:da are created only through the cooperation and combined efforts of many religious leaders from many different groups. The Ahayu:da are not “owned” by any one individual, and no one individual or group of individuals has the right, power, or authority to give away or sell the Ahayu:da. The War God images which embody the Ahayu:da belong to the whole tribe; insomuch as they are property at all, they are communal property. Thus all Ahayu:da which have been removed from their shrine/home have been stolen.

This letter was accompanied by a resolution of the Zuni Tribal Council (# M70-78-1020) expressing deferential support for the Zuni religious leaders and adopting as the tribe’s official position a statement dated September 20, 1978 that had been prepared by the Zuni religious leaders. This statement originated during discussions among Zuni religious leaders in May 1978, and it was intended to synthesize extant traditional knowledge concerning the status of religious items in Zuni



society (William Merrill, Edmund Ladd, and T. J. Ferguson, "The Return of the Ahayu:da: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution," *Current Anthropology*, volume 14, # 5, December 1993, p. 532).

The statement does not specifically mention Ahayu:da, but it does assert that most Zuni religious items "have been created for the benefit of all the Zuni people, and are communally owned." It includes further discussion on the communal status for such items:

No one individual or a group(s) of individual(s) has/have the right to remove communally owned religious items/artifacts from the Zuni land for any purpose/reason whatsoever. This is illegal according to traditional Zuni Law, and to do so is tantamount to theft. Privately owned religious items/artifacts can be sold by their owners although we call this selling your life and do not condone it.

Some Zuni individuals, including Bow Priests, have been involved in the conveyance of Ahayu:da to other parties. During the late nineteenth century, a Zuni Bow Priest was allegedly involved in the conveyance of Ahayu:da from a shrine to James Stevenson, and during this same time, Frank Hamilton Cushing, a Bow Priest who was not Zuni, also retained Ahayu:da which were sold by his spouse to the Smithsonian Institution after his death (T. J. Ferguson, "Creation, Disposition, and Repatriation of Zuni War Gods: Preliminary Report to the Zuni Tribal Council," report for the Pueblo of Zuni and the Institute of the North American West, February 1989; Matilde Coxe Stevenson, *The Zuni Indians: Their Mythology, Esoteric Societies, and Ceremonies*, Twenty-Third Annual Report of the Bureau of American Ethnology, 1901–1902, Washington: Government Printing Office, 1904, p. 116 footnote b). These incidents do not constitute a widespread pattern of Zuni people treating Ahayu:da as private property; instead, it is more accurate to interpret these, and any other such incidents, as improper conveyances in contravention of Zuni tribal law.

The available evidence discussed above supports the view that throughout



the twentieth century Ahayu:da placed at shrines have been considered to be inalienable communal property of the Zuni Tribe. Although the exact particulars of the removal of the two Ahayu:da acquired by Charles Norton are not known, no circumstances exist under which any individual could have properly removed and conveyed them away, and no record exists of the Zuni Tribe taking official action to alienate items at Ahayu:da shrines. Thus, at the time that the two Ahayu:da which are the subject of this claim were taken (prior to 1972, possibly circa 1965–1966), they were communal property, inalienable by any individual, and holding central ongoing importance to the Zuni community. These Ahayu:da therefore meet the NAGPRA definition for objects of cultural patrimony.

*Ahayu:da Altar Stick.* The Zuni Tribe claims the Ahayu:da altar stick as an object of cultural patrimony under NAGPRA. Altar sticks, Ahayu:da, and other items are created as a set for the benefit of all the Zuni people and should be viewed as an integrated assemblage of items. These items, when ritually installed at a shrine, are communally owned and hold central importance to the continuing religious life of the Zuni Tribe. Very few items of religious significance among the Zuni people are individually owned by Zuni tribal members. Once the Ahayu:da figures and associated objects are installed in a shrine, no one has the authority to remove them. Zuni religious leaders believe that removing objects from an Ahayu:da shrine will unleash potentially malevolent powers.

Three photographs of Ahayu:da shrines published in 1904 show altar sticks like the one at DAM, confirming that such items have historically been placed at shrines (Matilde Coxe Stevenson, *The Zuni Indians: Their Mythology, Esoteric Societies, and Ceremonies*, Twenty-Third Annual Report of the Bureau of American Ethnology, 1901–1902, Washington: Government Printing Office, 1904, plate xxii after p. 116, plates cxxxvii and cxxxviii after p. 606). Although little information in the historical and ethnographic record directly mentions altar sticks, the literature on Ahayu:da is extensive, and altar sticks are viewed by Zuni religious authorities as holding the same character as the Ahayu:da themselves in terms of ownership status and importance to the community.

In summary, all items placed at Zuni Ahayu:da shrines are regarded under



tribal law as communal property of the Zuni Tribe, inalienable by any individual. The Zuni community maintains a continuing interest in preserving the undisturbed integrity of Ahayu:da shrines and their specific individual components, such as altar sticks. Since items at shrines require proper treatment and management for the benefit of the Zuni people and humanity at large, each item holds central ongoing importance to the Zuni community.

Available evidence for the altar stick at DAM favors the view that it was removed from a shrine during the mid-1960s, and at that time it was considered to be inalienable communal property of the Zuni Tribe. Although the exact particulars of its removal are not known, no circumstances exist under which any individual could have properly removed and conveyed away the altar stick, and no record exists of the Zuni Tribe taking official action to alienate items from Ahayu:da shrines. The DAM altar stick therefore meets the definition for objects of cultural patrimony under NAGPRA.

*Koyemshi Ko'Ko.* The Zuni Tribe claims this Koyemshi Ko'Ko as an object of cultural patrimony under NAGPRA. Very few items of religious significance among the Zuni people are individually owned by Zuni tribal members, and Ko'Ko are communally owned and hold central importance to the continuing religious life of the Zuni Tribe. A variety of evidence dating from the early twentieth century is available to support this position of the Zuni Tribe.

This Koyemshi Ko'Ko was collected by Stewart Culin in the years after 1900. In the course of his collecting activities, he encountered determined opposition from the Zuni leaders which made it difficult to collect Ko'Ko. In 1902, when Zuni authorities learned of his efforts to purchase masks, they sent the crier out to warn the people against selling such items to him, because "the sale of masks was punished by death" (Diana Fane, Ira Jacknis, Lise Breen, *Objects of Myth and Memory: Indian Art at the Brooklyn Museum*, 1991, Brooklyn Museum of Art, p. 60). This level of punishment underscores the central importance of Ko'Ko to Zuni culture during this period, as well as the fact that Zuni authorities took their regulatory responsibilities very seriously with regard to the alienation of Ko'Ko.

Culin knew that Zuni individuals lacked the authority to alienate Ko'Ko. For



this reason, he purchased most of his Zuni Ko'Ko from Andrew Vanderwagen, who had hired several Zunis to secretly manufacture replicated masks for commercial sale (Diana Fane, Ira Jacknis, Lise Breen, *Objects of Myth and Memory: Indian Art at the Brooklyn Museum*, 1991, Brooklyn Museum of Art, p. 62). The clandestine nature of Vanderwagen's operation is described in a report prepared by Culin (Stewart Culin, "Report on a Collecting Expedition Among the Indians of New Mexico and Arizona," May–September 1904, manuscript at the Brooklyn Museum of Art, p. 8). Culin noted that three Zuni men had been hired by Vanderwagen "ostensibly in sinking a well," but instead they worked in a "locked room" to produce masks and dolls which were kept "in a securely fastened box and two trunks." Culin wrote that "Just before my visit the men who had been engaged in this work had become frightened, and had left the place precipitately."

Anthropologist Ruth Bunzel also wrote of the ownership status of Ko'Ko in Zuni society during the 1920s. Noting that the sharing of esoteric knowledge regarding Ko'Ko was traditionally a capital crime, Bunzel observed that this punishment had been abandoned, but Zuni authorities nevertheless continued to discourage commercialization of masks (Ruth L. Bunzel, "Introduction to Zuni Ceremonialism," *Forty-Seventh Annual Report of the Bureau of American Ethnology, 1929–1930*, Washington: Government Printing Office, 1932, p. 479):

Flogging by masked impersonators has recently been substituted for execution. During one of the writer's visits katcinas were summoned to administer punishment to a youth found guilty of selling a mask. The accused escaped so the katcinas whipped all men in the kivas for purification.

The serious nature of improperly conveying away communally owned Ko'Ko continues in Zuni society today. During the last decade, for example, a man secretly sold a mask and other religious items, and four years later, he died. Zunis believe that this was a consequence of his action in selling the mask, particularly because four years had passed, and that number has great significance in Zuni religious ideas.



Bunzel also discussed the ownership status of Ko'Ko, distinguishing between communally owned and privately owned Ko'Ko (Ruth L. Bunzel, "Introduction to Zuni Ceremonialism," Forty-Seventh Annual Report of the Bureau of American Ethnology, 1929–1930, Washington: Government Printing Office, 1932, pp. 490–491; also comments on pp. 517, 522; Bunzel, "Zuni Kacinas: An Analytical Study," Forty-Seventh Annual Report of the Bureau of American Ethnology, 1929–1930, Washington: Government Printing Office, 1932, pp. 844–845):

Masks are with few exceptions connected with the kachina cult. Some are, like the fetishes of the rain priests, "from the beginning" and are tribal property administered in trust by self-perpetuating cult groups. Other masks are individual property which are destroyed at the death of the owner. ("Introduction to Zuni Ceremonialism," pp. 490–491)

A detailed discussion of both classes of Ko'Ko appears in another paper in the same publication (Ruth L. Bunzel, "Zuni Kacinas: An Analytical Study," Forty-Seventh Annual Report of the Bureau of American Ethnology, 1929–1930, Washington: Government Printing Office, 1932, pp. 848–849). Bunzel further asserted that the two groups were distinguished among the Zuni during the 1920s as "dancing kachinas" having the status of individually owned Ko'Ko, and as "kachina priests" considered to be handed down from antiquity and "which are tribal and not individual property" (p. 879; also see pp. 879–880). She listed the communally owned Ko'Ko in two charts (pp. 881–885, 905–906), and both include Koyemshi Ko'Ko and Salimobiya Ko'Ko.

In summary, sufficient evidence is available from the period in question to determine the status of the Koyemshi Ko'Ko at DAM. This Koyemshi Ko'Ko meets the NAGPRA definition for an object of cultural patrimony as inalienable tribal property of the Zuni Tribe at circa 1900—when it was separated from Zuni keeping—and holding ongoing central importance to the Zuni community.

*Salimobiya Ko'Ko.* Little evidence is available to clarify the exact circumstances



under which this mask originated, making it difficult to specify its status to Zunis at circa 1900 and its status under NAGPRA. The available evidence, however, favors the view that it was made as a replica for commercial purposes. Although Zuni Salimobiya Ko'Ko qualify as objects of cultural patrimony, and the very idea of a Salimobiya Ko'Ko is a matter of Zuni concern, it seems doubtful that an unauthorized replica, made by a person or persons under unknown circumstances, can be viewed as the communal property of the Zuni Tribe, particularly in cases where its material elements and manner of creation are not known to have ever been under the direct control of Zuni authorities.

In the view of Zuni religious leaders, nevertheless, replicas of communally owned Ko'Ko do hold central importance to the culture of the Zuni people, and they hold an inadvertent form of spiritual life, so it is a priority for the Zuni Tribe to seek the return of all such items. The Salimobiya Ko'Ko at DAM can be viewed as a pirated edition produced under questionable ethical and moral circumstances, but it is still an object which represents an important and greatly treasured aspect of Zuni culture which should be placed under the control of Zuni authorities.

### *Sacred Object Category*

NAGPRA provides a narrow statutory definition for the term “sacred object” (25 USC § 3001 [2][3][C]):

“[S]acred objects” . . . shall mean 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[.]

The federal regulations for NAGPRA add guidance to the meaning of the definition (§ 10.2 [d][3]):





*Sacred objects* means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term *traditional religious leader* means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization or (ii) Exercising a leadership role in an Indian tribe or organization based on the tribe or organization's cultural, ceremonial, or religious practices.

This language means that a claimant must provide specific, very limited information in order to show that a claimed item fits the criteria of the law and regulations. Three elements must be satisfied. First, the claimed item must have usage as a “ceremonial object” which is “devoted to a traditional Native American religious ceremony or ritual and which [has] religious significance or function in the continued observance or renewal of such ceremony.” Second, the item must be “needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.” Finally, the traditional religious leader must be “a person who is recognized by members of an Indian tribe or Native Hawaiian organization as . . . responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization” or must be a person holding “a leadership role in an Indian tribe or organization based on the tribe or



organization's cultural, ceremonial, or religious practices.”

In the present case, the two Ahayu:da and the Ahayu:da altar stick fit these criteria. These three items together are specifically needed by Perry Tsadiasi, a Bow Priest who is recognized by the Zuni community as responsible for duties involving the management and ritual use of Ahayu:da and associated objects. Mr. Tsadiasi requires the claimed items in order to conduct a specific set of ceremonial activities surrounding the ritual installation of these items at their permanent shrine. These rituals are standard activities applied to all Ahayu:da in the course of their formal installation at a shrine. In the present case, the claimed items have already passed through these rituals, but according to Mr. Tsadiasi, their improper removal from the shrine invalidated the original rituals, so he needs the items in order to properly reinstall them according to ongoing Zuni religious practice.

In conclusion, the three criteria for NAGPRA sacred objects are satisfied in this claim for the two Ahayu:da and the Ahayu:da altar stick. Their ritual reinstallation will serve the important purpose of restoring harmony and well-being to the Zuni community and the world.

Under NAGPRA, lineal descendants of the last known owner, as well as culturally affiliated tribes, hold rights to seek repatriation of sacred objects (25 USC § 3005 [7]). No individual in Zuni traditional practice ever has technical control or ownership of Ahayu:da and associated items. For this reason, the Zuni Tribe has no cause to identify or consult with any party who would qualify as a lineal descendant with standing to assert a claim for these items as sacred objects under NAGPRA.

The Koyemshi Ko'Ko discussed above may potentially meet the criteria for a sacred object under NAGPRA, but the Zuni Tribe wishes to conduct further review of this matter before setting forth a definitive argument on this point. For this reason, we withhold making an argument in the present claim.

### **Right of Possession**

The concept of “right of possession” has a statutory definition that is set forth in NAGPRA (25 USC § 3001 [2][13]):



“[R]ight of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object[.]

The federal NAGPRA regulations (§ 10.10 [iii–iv]) also set forth guidelines to be followed by claimants, museums, and federal agencies in considering right of possession. The regulations state that cultural items must be expeditiously returned when claimants meet various criteria, including cultural affiliation, fit to a category of cultural items, and when the following occurs:

- (iii) The known lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency does not have a right of possession to the objects as defined in § 10.10 (a)(2); and
- (iv) The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession[.]

NAGPRA ensures that cultural items which left the keeping of Native American communities under improper circumstances can be returned. This is a fair outcome of NAGPRA, and it is an outcome that is fully consistent with American property law, under which a thief has no legitimate title to convey to an innocent third party, and the innocent third party must return stolen items to the original owner with no expectation of compensation from the owner. Museums that are faced with the prospect of returning such objects under NAGPRA are not giving up items that belong to them, and they have no reason to regard any claimant or potential claimant as an adversary.



*Two Ahayu:da and an Ahayu:da Altar Stick.* Under traditional Zuni religious law and custom, no individual has the right to remove Ahayu:da and associated objects from shrines once they have been placed there. A Zuni shrine is like a church in that it is a continuing place of worship and religious activity, and the entire Zuni community has an ongoing interest in the integrity of the shrine, which includes reserving communal possession of all items placed there. All Ahayu:da and associated items not at their shrine have consequently been stolen. The Ahayu:da obtained by Charles Norton and currently at DAM, as well as the altar stick in DAM collections, display weathering consistent with placement at a shrine, and can reasonably be viewed as improperly removed by an unknown party or parties lacking authority to alienate these items from the ownership of the Zuni Tribe.

No evidence has been provided to the Zuni Tribe which would favor the view that Norton, Vanderwagen, or some other party obtained these items under circumstances that would convey a right of possession to them. The Denver Art Museum therefore lacks a right of possession, as defined in NAGPRA, to the two Ahayu:da and the altar stick.

*Koyemshi Ko'Ko.* The exact circumstances under which this Koyemshi Ko'Ko was separated from the Zuni Tribe are not known. Evidence is available, however, showing that Koyemshi Ko'Ko were considered at circa 1900 to be communal tribal property of central cultural importance, and Zuni authorities sought to retain possession of such items by discouraging individual Zuni people from selling them. Given these facts, it would be problematic to assume any level of probability or possibility that this Koyemshi Ko'Ko would have been conveyed away with the knowledge and approval of Zuni authorities.

One situation has been documented in which it was alleged that two Zuni priests prepared and alienated replicas of Ko'Ko to Matilde Coxe Stevenson during the late 1890s (Matilde Coxe Stevenson, *The Zuni Indians: Their Mythology, Esoteric Societies, and Ceremonies*, Twenty-Third Annual Report of the Bureau of American Ethnology, 1901–1902, Washington: Government Printing Office, 1904, p. 243 footnote a). Several circumstances are worthy of note, however, which explain this incident. First, Stevenson spent “years of effort” in this enterprise, and



she finally “induced” the two men to make and convey away the masks, using unknown pressures to bring this result. Finally, the masks were produced in secret “in a house about 50 miles away from Zuni” where the men felt “entirely safe from intrusion.” This situation does not lend support to any presumption that Zuni authorities openly approved of any alienation of communally owned Ko’Ko during this period. In fact, it adds evidence that the leaders of the Zuni community as a group at circa 1900 viewed Ko’Ko as inalienable.

No evidence has been provided to the Zuni Tribe which would favor the view that George Winters or some other party obtained this Koyemshi Ko’Ko under circumstances that could be said to convey a right of possession. The Denver Art Museum therefore lacks a right of possession, as defined in NAGPRA, to this Koyemshi Ko’Ko.

*Salimobiya Ko’Ko.* Since the available evidence favors the view that this Salimobiya Ko’Ko was made under unknown circumstances as a replica for commercial purposes, it is difficult for the Zuni Tribe to argue that it is a culturally affiliated object of cultural patrimony. Furthermore, since the extant record does not clarify the manner under which this Salimobiya Ko’Ko was created and conveyed into non-Zuni hands, the Zuni Tribe chooses to refrain from challenging the DAM right of possession. DAM is not required by NAGPRA to return this mask, but the Zuni Tribe still requests that it be gifted by DAM to the Zuni Tribe. Moreover, the Zuni Tribe reserves the option to pursue future research and analysis as to the status of replicas under NAGPRA, including the issue of right of possession.

## **Conclusion**

This claim contains evidence supporting the argument that two Ahayu:da, an Ahayu:da altar stick, and a Koyemshi Ko’Ko at DAM are culturally affiliated with the Zuni Tribe and were communally owned objects of cultural patrimony at the time they were separated from the Zuni community. Furthermore, the two Ahayu:da



and the Ahayu:da altar stick also meet the NAGPRA criteria for sacred objects. Finally, DAM lacks right of possession to the two Ahayu:da, an Ahayu:da altar stick, and Koyemshi Ko'Ko and no evidence is available showing a proper alienation of the four items from the ownership of the Zuni Tribe. The Zuni Tribe hereby respectfully requests that DAM return these items into the keeping of the Zuni Tribe, in accordance with the repatriation requirements of NAGPRA.

Finally, the Zuni Tribe requests that a replica of a Salimobiya Ko'Ko also be returned as a gift to the Zuni Tribe as an item created under unethical circumstances but which is nevertheless deemed of great significance by Zuni religious leaders.







## appendix b

### Assessment of a 2001 NAGPRA Repatriation Claim from the Zuni Tribe

*This claim assessment was prepared by the Native Arts Department of the Denver Art Museum and the Zuni Heritage and Historic Preservation Office and has been included here as an example of a model claim assessment under NAGPRA.*

April 2001



# Assessment of a 2001 NAGPRA Repatriation Claim from the Zuni Tribe

## Introduction

The Denver Art Museum (DAM) is fully committed to the fair and impartial application of the Native American Graves Protection and Repatriation Act (NAGPRA) to DAM collections, and has made proactive implementation of the law a major priority. The DAM NAGPRA program is based upon the philosophy that partnership with Native American communities enhances our ability to manage our extensive collections in a manner that is mutually beneficial to Indian people, the general public, and to the continuity of our mission as a museum.

This approach to NAGPRA has been sustained through the award of grants from the National Park Service—grants that have funded a variety of projects designed in partnership with numerous tribes across the nation. The idea linking all of these projects is that consultation and information-sharing provide a foundation for meaningful dialogue, and dialogue holds forth the best hope for creating common expectations of the law which can lead to fair outcomes.

In following NAGPRA processes and upholding the law, DAM meets its fiduciary duty to care for collections by honoring all successful claims and by denying claims that do not meet minimal NAGPRA standards. Either outcome, when resulting from adherence to the law, respects the sovereignty of Indian nations and conforms to the highest principles of American justice. Whatever the outcome, DAM has a commitment to working in partnership with tribes to apply NAGPRA accurately to collections.

NAGPRA grew out of dialogue between Indian leaders and the museum community, and it reflects a consensus of opinions on issues of mutual concern. Through its consultation and information-sharing provisions, NAGPRA calls for museums to adopt a partnership approach in working with Native Americans to assist with the identification and return of cultural items that were improperly alienated. Conscientious implementation of NAGPRA recognizes the importance of aiming at mutually respectful relations between the museum community and Native Americans.



NAGPRA establishes a set of processes and concepts under which Indian tribes, Native Hawaiian organizations, and lineal descendants can reassert control over certain items currently held by museums. The processes and concepts of the law are complex and must be applied to many differing situations. For this reason, NAGPRA is most successful when all parties have a shared commitment to working together to implement its provisions.

NAGPRA conforms to established precepts of American justice that aim at equitable and fair outcomes to issues of ownership. The law sets forth specific standards that must be followed by claimants in preparing repatriation requests and by museums in assessing those requests. Drawing upon the language of the law and the federal NAGPRA regulations for assessment standards, DAM has designed a special template for evaluating claims. This template is distributed to tribes during consultations as a means of helping tribes with the preparation of claims.

The assessment that follows has been prepared in response to a claim submitted by the Zuni Tribe for two Ahayu:da (also known as War Gods), an Ahayu:da altar stick (1966.398, QZu-48-G), a Salimobiya Ko'Ko (1948.235, NZu-1-Ex), and a Koyemshi Ko'Ko (1948.236, NZu-3-Ex). The first section provides the background of consultations between DAM and the Zuni Tribe, reflecting a very high level of dialogue pursued by both the museum and the tribe in recent years. The Zuni claim and this assessment were both produced as a joint project of the Zuni Tribe and DAM, with both parties contributing content. The Zuni Tribe issued the final version of the claim, and DAM produced the final version of this assessment.

In the assessment that follows, the background of consultations appears first, and this includes discussion of repatriation negotiations that occurred during the late 1970s. The background section is followed by the NAGPRA standards that govern this assessment, then by a section on collection history, and finally by an abbreviated analysis of the claim. A summary of DAM's findings appears at the end of this assessment.



## Background of the Claim

*Zuni Claim: 1978.* Zuni interest in DAM collections extends back to the 1970s, when the tribe negotiated the gifting of three Ahayu:da (War Gods) from the museum. This was the first such negotiation with a museum for the Zuni Tribe. DAM had previously returned stolen items to the Pueblo of Cochiti and to Nigeria.

The circumstances of the 1978 Zuni claim at DAM have been described in a paper published in 1993 (William Merrill, Edmund Ladd, and T. J. Ferguson, "The Return of the Ahayu:da: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution," *Current Anthropology*, volume 14, # 5, December 1993:523–567). According to this account, in 1977 the leader of the Zuni Bear Clan discovered the existence of one Ahayu:da on display at DAM. This sparked Zuni interest and ultimately led to their efforts to recover Ahayu:da from museums and private collectors across the United States (T. J. Ferguson, Roger Anyon, and Edmund Ladd, "Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems," *American Indian Quarterly*, volume 20, # 2, Spring 1996:251–273). The Zuni Tribe initiated dialogue with DAM in January 1978 regarding the Ahayu:da figure then on exhibit, and in April 1978 met with museum officials to express its concerns.

The Zuni religious leaders met in May 1978 to formulate their position regarding the status of religious artifacts in Zuni society, and they issued a statement in September 1978 identifying most such items as communally owned property of the Zuni Tribe (Merrill et al., 1993:532). With assistance from the Indian Pueblo Legal Services and the Zuni Archaeology Program, the Zuni Tribe linked the perspective of the religious leaders with a federal law that established criminal penalties for possession of stolen tribal property, and so formulated a legal theory that any Ahayu:da not at its shrine had been stolen and improperly alienated (Ferguson et al., 1996:252). The Zuni Tribe worked with a law firm in New York in the fall of 1978 to successfully apply this legal theory to an Ahayu:da up for auction at Sotheby Parke-Bernet, and soon thereafter, the U.S. attorney offices in New York and New Mexico were agreeing with the position of the Zuni Tribe that Ahayu:da represent communal tribal property (Merrill et al., 1993:536).

In late December 1978, the Zuni Tribe sent a letter to DAM expressing the



view that Ahayu:da are communal property of the tribe. This position was subsequently explained in a formal presentation by Zuni representatives to the DAM Board of Trustees on January 10, 1979.

DAM's initial response to the Zuni reflected little sympathy for their position. After the January 1979 board meeting, DAM issued a press release reporting the Zuni theory of communal ownership and setting forth the museum's views. The release stated that the circumstances of the alienation of the Ahayu:da from the Zuni community were unknown and that according to undocumented sources, Zuni religious leaders had sold Ahayu:da as recently as the 1960s. DAM then offered the opinion that the Ahayu:da figure in question was "communally owned by all the people of Denver." DAM also expressed concern for the precedent of returning the contested Ahayu:da and the potential consequences to museums worldwide. The press release concluded with a commitment to continuing discussions with the Zuni Tribe.

This press release was timed to coincide with publication of an investigative news report by the *Straight Creek Journal*. This weekly paper had learned of the Zuni negotiations several months earlier—allegedly from an unnamed DAM board member—but had not reported on it at DAM's request. Coming to believe that DAM was taking advantage of media ignorance in order to "drag out any negotiation or discussion" with the Zunis, the editor decided to proceed with a story.

Through its attorney at the Native American Rights Fund (NARF), the Zuni Tribe subsequently requested that DAM retract statements made to the press concerning alleged sales of Ahayu:da by religious leaders. In addition, noting that DAM's statements to the press indicated institutional reluctance to accept the Zuni position on Ahayu:da communal ownership status, NARF attached to its letter an affidavit by anthropologist Triloki Nath Pandey dated November 2, 1978, with the following expert opinion:

The images of the War Gods are tribal "property." The images live at various shrines dispersed on the sacred Corn Mountain (Towayalanne) and at other shrines in sacred spots throughout the Zuni Reservation. No individual Zuni



(or non-Zuni) has the right to remove them from these abodes. Although the images of the War Gods are made by individuals from the Deer and Bear Clans, they do so under a sacred trust, and do not own them.

NARF sent the letter requesting a retraction to the media and it was promptly reported upon. DAM declined to retract its statements, and instead issued a “correction” which emphasized that purported sales of Ahayu:da by Zuni persons “complicates the process of deciding what response to make to the Zuni request[.]” DAM also misrepresented the Zuni position as one of asserting that “such sales could not have taken place,” but the Zunis had actually argued that no sale by any individual Zuni could convey title to Ahayu:da.

No study exists in DAM files of any documented Ahayu:da sales by Zunis; nor is there any extant analysis of the meaning of alleged sales in terms of the ownership status of Ahayu:da within the Zuni community. The files do contain a “Confidential Memorandum” from Richard Conn, Curator of the Native Arts Department, to the DAM board in which he speculated that the Zunis selected the DAM Ahayu:da for repatriation “because our War God is much more valuable” than those at other museums, and the Zunis may wish to sell it. The DAM press release and ensuing “correction” both tend to reflect Conn’s suspicions, but the press does not appear to have taken the bait since none of the news articles in DAM files raise economic enrichment as a possible Zuni motive.

The negotiations had been kept low-key at the request of the Zunis, and the development of media interest proved distressing to the Zuni religious leaders, who hoped for “more respectful discourse” (Merrill et al., 1993:537). The *Rocky Mountain News* and the *Colorado Daily* both printed editorials urging DAM to return the Ahayu:da to the Zunis, with the latter focusing on Zuni property rights and publishing a pointed cartoon on the topic. Public attention made life interesting for Richard Conn, who later wrote—with a certain amount of colorful hyperbole—that “every idiot, flake, and professional Indian Lover in Colorado was on the loose” and “wrote us nasty letters, made obscene phone calls, and all sorts of other outrages in the name of justice.”



A special target of Conn's displeasure was the NARF attorney, Tim LaFrance, whose attitude toward DAM, in Conn's view, "was usually confrontational" and was expressed repeatedly in phone calls to Conn, the DAM director, and the chair of the DAM board. In one January 1979 letter, for example, LaFrance indicated that DAM's access to funding from the Institute of Museum Services (IMS), the National Endowment for the Arts, and the National Endowment for the Humanities might be jeopardized by continued resistance to the Zuni claim, due to provisions of the American Indian Religious Freedom Act (AIRFA) which applied to those federal agencies. DAM soon learned from the director of the American Association of Museums that another NARF lawyer was, in fact, consulting with IMS regarding compliance with AIRFA and had brought up the situation at DAM. DAM was not alone, however, in viewing these developments with alarm; the Zuni religious leaders were also apparently uneasy, on occasion, with LaFrance's negotiating style (Merrill et al., 1993:531–532).

The publicity was also viewed as an unpleasant situation by other Denver museums. According to Joyce Herold at the Denver Museum of Natural History (DMNH), the "acrimonious tone" of the media publicity "caused negative reaction among our staff" (Herold in Merrill et al., 1993:559). Perhaps for this reason, DMNH kept silent about the Ahayu:da in its collections. More than a year after the 1990 passage of NAGPRA, DMNH finally decided to notify the Zuni Tribe of the existence of six Ahayu:da in its keeping. By waiting for twelve years before informing the Zunis about the stolen Ahayu:da in its collections, DMNH (presently the Denver Museum of Nature and Science) succeeded in avoiding media controversy. Indeed, according to Herold's account, the *Denver Post* went so far as to congratulate the museum for demonstrating "proper professional conduct."

According to oral traditions of the DAM Native Arts Department, the presentation made by Zuni representatives to the DAM board in January 1979 was greatly effective in persuading the museum to return the Ahayu:da. At its next meeting on March 21, 1979, the DAM board adopted a carefully worded resolution to "authorize the presentation of the Zuni War God, Ahayu:da, to the Zuni people." This document also acknowledged the Zuni position that such items represent "communal property of a kind which cannot legally be sold or given away." Although the



resolution avoided any explicit endorsement of this view, DAM ultimately refrained from contesting the Zuni legal theory.

In planning the gifting of the stolen Ahayu:da, DAM decided in March 1980 to inform the Zunis that the museum held two additional Ahayu:da. DAM won much goodwill from the Zuni Tribe by working closely with them to help arrange security at the shrine at which the three Ahayu:da would be placed, and the figures were officially presented to the Zuni Tribe on October 29, 1980. The Zuni religious leaders have since placed many returned Ahayu:da at this secure location.

Even though the Ahayu:da were presented to the Zuni Tribe as a gift from DAM rather than as a return of stolen property, the legal argument of the tribe had some impact on DAM's decision. Writing in June 1980 to a disgruntled DAM supporter who was unhappy with the decision to gift the Ahayu:da to the Zunis, DAM board chair James Rumsey asserted that DAM had been advised by its attorneys "that the museum had no grounds on which to retain the object."

The Zuni legal theory has received acknowledgement of various kinds over the years since their dealings with DAM. In 1989, the Department of Interior's Office of the Field Solicitor began to assist the Zuni Tribe in dealing with private collectors holding stolen Ahayu:da, calling upon the Department of Justice for additional aid when needed (Ferguson et al., 1996:257). In the 1995 federal regulations implementing NAGPRA, the Zuni Ahayu:da were included as examples of items meeting the definition for communally owned objects of cultural patrimony.

*Zuni Claim: 2000.* In 1995, DAM designed a special pilot project to engage in extended consultations with the Zuni Tribe under NAGPRA. This project was funded by the National Park Service, and in October 1996, a Zuni delegation of three persons visited DAM to hold consultations and open a dialogue on matters of mutual interest: Joseph Dishta (Director, Heritage and Historic Preservation Office), Perry Tsadiasi (Zuni Cultural Resource Advisory Team), and Vernon Quam (Museum Technician, A:shiwi A:wan Museum and Heritage Center). In the course of reviewing DAM Zuni collections on October 16, 1996, the delegation identified several items as holding special interest and as appropriate for storage in DAM's high security, including an Ahayu:da altar stick and a group of masks.



On July 11, 1997, a second Zuni delegation consisting of four persons held a follow-up consultation at DAM in order to open a dialogue regarding the applicability of NAGPRA to specific items in DAM collections. The delegation consisted of Joseph Dishta (Director, Zuni Heritage and Historic Preservation Office), John Bowannie (Zuni Cultural Resource Advisory Team), Loren Panteah (Cultural Preservation Coordinator, Zuni Heritage and Historic Preservation Office), and Vernon Quam (Museum Technician, A:shiwí A:wán Museum and Heritage Center). Mr. Quam spent several additional days working with various departments at DAM and the Colorado Historical Society as a means of cultivating a museum-to-museum relationship.

The delegation identified objects associated with Ahayu:da as having the highest priority for repatriation. The delegation agreed that DAM collections include one object which is associated with the Ahayu:da altar, an “altar stick” (1966.398, QZu-48-G). It was felt that this object could be claimed under the NAGPRA categories of cultural patrimony and sacred object. In addition, the following Zuni masks, termed Ko’Ko, would be claimed under the category of sacred objects: 1948.235 (NZu-1-Ex), 1948.236 (NZu-3-Ex), 1948.237 (NZu-4-P), 1960.92 (NZu-5-P), 1960.93 (NZu-6-P), 1970.832, and 1970.833. The delegation expressed interest in working with DAM to develop claims for these items.

In the spring of 1999, the Denver Art Museum (DAM) acquired a large collection of Native American ethnographic objects in a bequest from the estate of Charles J. Norton. In reviewing this collection, DAM staff discovered two wooden carvings with tags reading “Misc.—7, Zuni War God” and “Misc.—8, Zuni War God.” An inventory among Norton’s papers dated April 29, 1972 listed the two items, repeating the information on the tags, but the circumstances under which Norton acquired these items prior to April 1972 are not known. Nancy Blomberg, DAM Curator of Native Arts, examined the objects and confirmed their identification as Zuni Ahayu:da. DAM assigned them temporary numbers of N 0813.1 and N 0813.2.

On May 4, 1999, DAM telephoned Loren Panteah, Acting Director of the Zuni Heritage and Historic Preservation Office, and notified him that DAM had acquired the two Ahayu:da. In a letter dated May 12, [1999], DAM sent photographs of the





two items to Panteah, inviting the tribe to consider their authenticity and give thought to repatriation. A second letter from DAM dated May 13, [1999], outlined what DAM would expect in a written claim under NAGPRA. After review of the DAM photographs by Zuni authorities, Panteah notified DAM that the two items in the possession of the museum were considered by the religious leaders to represent genuine Ahayu:da and that the tribe would assert a repatriation claim.

In the summer of 1999, DAM proceeded with plans to hold a consultation with Zuni representatives, and the tribe expressed a preference to repatriate the Ahayu:da during the planned visit. DAM drafted a “Notice of Intent to Repatriate” and submitted it to the National Park Service for publication in the *Federal Register*. Just prior to the scheduled publication date, however, the Zuni Tribe contacted DAM with a request to withhold publication. The tribe expressed a preference to work with DAM to craft a claim text that could serve as a training experience on NAGPRA and as a template for future claims.

During 1998–1999, DAM received a grant from NPS to develop a manual on NAGPRA processes and definitions related to repatriation of cultural items. Viewing this as an opportunity to advance the Zuni claims, DAM and the Zuni Tribe planned a consultation to discuss the applicability of NAGPRA to various items in DAM collections. The focus of this consultation included the two Ahayu:da in the Norton collection and other items in DAM collections.

The consultation was held on November 9–10, 1999, and was attended by three Zuni representatives: Loren Panteah (Acting Director, Zuni Heritage and Historic Preservation Office), Wilton Niiha (Zuni Cultural Resource Advisory Team), and Eldrick Seoutewa (Zuni Cultural Resource Advisory Team). On the first day, the group held detailed discussions regarding the project, DAM Zuni objects to be addressed by the project, and NAGPRA repatriation standards. Over the course of the two days, the group considered the documentation regarding two Ahayu:da and an altar stick, and worked together to prepare two draft claims for them.

These claims were prepared primarily by Loren Panteah and Roger Echo-Hawk, with input from Niiha and Seoutewa, and both claims contained notes for needed research and text. In addition, the group discussed documentation regarding a Zuni mask and made some preliminary notes for a draft claim. The group decided that a



follow-up visit would be desirable to ensure completion of the two claims and to give more thorough consideration to the Zuni Ko'Ko (masks) at DAM.

In the spring of 2000, DAM reinitiated contact with the Zuni Tribe and learned that the tribal NAGPRA program was being redesigned. On May 3, 2000, Roger Echo-Hawk wrote a letter to Jonathan Damp (Zuni Heritage and Historic Preservation Office) who was identified as the tribal official who would handle NAGPRA matters for the tribe. In late July and in September 2000, DAM held telephone consultations with Jonathan Damp and Suzette Homer of the Zuni Heritage and Historic Preservation Office. DAM was informed that the Zuni Cultural Resources Advisory Team had approved a claim and that it would be sent to DAM. On October 10, 2000, DAM received a fax from Suzette Homer conveying four claims for the following objects:

<i>Current Accession</i>	<i>Original Accession</i>	<i>Description</i>
not accessioned	not accessioned	Ahayu:da figure
not accessioned	not accessioned	Ahayu:da figure
1966.398	Qzu-48-G	Ahayu:da altar stick
1948.235	NZu-1-Ex	Salimobiya Ko'Ko
1948.236	NZu-3-Ex	Koyemshi Ko'Ko

Roger Echo-Hawk contacted Suzette Homer by telephone on October 17, 2000 to acknowledge receipt of the four claims. He also informed her that DAM had additional information and issues to raise regarding the content of the four claims and he suggested that DAM could either discuss those issues with her and Damp or DAM could rewrite the claims to insert the additional information and point out places that need more consideration. Homer stated that she would get back to DAM with the tribe's preferences on this process. Echo-Hawk also invited the tribe to inform DAM as to their preferred time frame for evaluating the claims. Echo-Hawk subsequently conveyed these points in a fax dated November 6, 2000, and followed up in early December 2000 with a phone message to Homer.

On November 6, 2000, Nancy Blomberg wrote to Diana Fane, Curator of Arts of the Americas at the Brooklyn Museum of Art, requesting information about the



two Ko'Ko, both of which were acquired by DAM from that museum during the 1940s. Diana Fane wrote back on November 21, 2000, promising that Susan Zeller, Assistant Curator, would send documentation. Roger Echo-Hawk wrote to Zeller on December 14, 2000, to follow up on the request, and she subsequently sent a packet of documents in a letter dated December 28, 2000.

In late December 2000, Blomberg and Echo-Hawk decided to proceed with preparation of revisions to the Zuni claims, inserting additional information and reorganizing the four claim documents into one claim. A draft of this claim was faxed to Suzette Homer on February 6, 2001 with a cover letter to Jonathan Damp. On February 13, Roger Echo-Hawk phoned Homer and was referred to Todd Howell, Project Director for the Zuni Heritage and Historic Preservation Office. Howell stated that he had just been assigned to handle the claim, and he would be in touch soon. On February 22 and 23, Homer contacted DAM to arrange a consultation in Denver to complete the claim.

On March 7, 2001, Todd Howell and Wilton Niiha visited DAM and worked with DAM staff to finalize the Zuni draft claim and discuss the DAM assessment. The claim was designed to include the two Ahayu:da, Ahayu:da altar stick, and Koyemshi Ko'Ko as objects of cultural patrimony, with the Ahayu:da and altar stick also classified as sacred objects. The Salimobiya Ko'Ko was identified as a replica not covered by NAGPRA, but which the Zuni Tribe would request as a gift from DAM. On April 3, 2001, DAM received an e-mail from Todd Howell sending an amendment finalizing the claim and notifying DAM that the Zuni Cultural Resource Advisory Team had considered both the draft claim and the draft claim assessment and had approved both documents.

### **Evaluating a NAGPRA Claim**

NAGPRA provides a systematic means for Native American communities and lineal descendants to repatriate human remains and objects from federal agencies and museums like the Denver Art Museum (DAM). Under the law, claimants are responsible for preparing the needed research to sustain repatriation requests for



unassociated funerary objects, sacred objects, and objects of cultural patrimony. Museums must then evaluate whether submitted claims conform to the requirements of the law. Moreover, through a fiduciary duty to care for collections, as well as a responsibility to apply NAGPRA fairly and consistently, museums are obligated to make certain that repatriation requests adhere to the standards and definitions set forth in the law.

Although this process of unilateral claim preparation, submission, and evaluation ensures that the interests of all potential parties can be protected and asserted, DAM and the Zuni Tribe both consider it highly desirable for the interested parties to work together to the greatest degree possible at every step of the claims process. Ultimately, whatever partnership arrangement museums and tribes may adopt, under the system set forth by NAGPRA, the claimant makes the final decisions regarding claim content, while the museum has the responsibility for the final assessment as to whether the claim successfully addresses the various standards set forth in the law.

Successful claims under NAGPRA must address three primary issues. First, did the claimed item originate from a group that is culturally affiliated with the claimant? Second, does the claimed item fit into one of the five NAGPRA categories? Third, does the museum have a proper “right of possession” to the item, as defined in NAGPRA? In addition to these primary issues, if the claim is argued to fall under the category of sacred object or object of cultural patrimony, can the “requesting Indian tribe . . . show that the object was owned or controlled by the tribe”—or, in the case of sacred objects, was the item owned or controlled by a member of the tribe?

NAGPRA defines “cultural affiliation” as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group” (25 USC § 3001 [2][2]). A “preponderance of the evidence” is required to support a finding of cultural affiliation, and this evidence can be drawn from “geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion” (25 USC § 3005 [7][a][4]).

Under federal regulations issued by the National Park Service (NPS) in



December 1995, cultural affiliation has been established when a preponderance of the above evidence “reasonably leads to such a conclusion” (§ 10.2 [e]). Three criteria have been set forth that must be met to support a finding of cultural affiliation (§ 10.14 [c]).

First, a present-day Indian tribe must have standing to make a claim. Second, evidence must support the existence of an “identifiable earlier group.” Third, both groups must have a shared group identity that can be reasonably traced and a preponderance of the evidence “must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.” This finding “should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection . . . and should not be precluded solely because of some gaps in the record.”

The present claim argues that the requested items fall under the category of objects of cultural patrimony which has a statutory definition in NAGPRA (25 USC § 3001 [2][3][D]):

“[C]ultural patrimony” . . . shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Federal NAGPRA regulations prepared by the National Park Service contain the following discussion which is designed to clarify the above definition for objects of cultural patrimony (§ 10.2 [d][4]):



*Objects of cultural patrimony* means items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole.

The present claim also argues that three of the requested items fall under the category of sacred objects which has a statutory definition in NAGPRA (25 USC § 3001 [2][3][C]):

“sacred objects” . . . shall mean 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[.]

Federal NAGPRA regulations prepared by the National Park Service contain the following discussion which is designed to clarify the above definition for sacred objects (§ 10.2 [d][3]):

*Sacred objects* means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items,



from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term traditional religious leader means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization or (ii) Exercising a leadership role in an Indian tribe or organization based on the tribe or organization's cultural, ceremonial, or religious practices.

The concept of “right of possession” also has a statutory definition that is set forth in NAGPRA (25 USC § 3001 [2][13]):

“[R]ight of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object[.]

The federal NAGPRA regulations also establish guidelines for the process to be followed by claimants, museums, and federal agencies in considering right of possession. The regulations state that cultural items must be expeditiously returned by museums (within 90 days following receipt of a claim) when claimants meet various criteria, including cultural affiliation, fit to a category of cultural items, and when the following occurs (§ 10.10 [a][1][B][iii–iv]):



The known lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency does not have a right of possession to the objects . . . and

The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession[.]

NAGPRA and the federal regulations require claimants to present evidence sufficient to raise a reasonable challenge to a museum's right of possession to a claimed object. Upon receipt of such evidence, museums then have the burden to present competing evidence which can overcome the claimant's evidence. This process assumes that museums and federal agencies hold right of possession to their collections until a claimant demonstrates otherwise.

In summary, the questions that follow must be addressed in order to properly evaluate repatriation claims under NAGPRA.

Has the claimant provided evidence in support of arguments establishing the existence of a cultural affiliation with the source of the claimed item, demonstrating a "relationship of shared group identity which can be reasonably traced" to the earlier group from whom the object originated? In the case of objects of cultural patrimony, has the claimant provided evidence in support of arguments that it formerly "owned or controlled" the object?

Has the claimant provided evidence and arguments establishing that the claimed object fits under a NAGPRA category?

Has the claimant provided evidence in support of arguments that the museum does not have a NAGPRA right of possession to the claimed object?

For the category of objects of cultural patrimony, the questions that follow must also be answered. Has the claimant provided evidence supporting arguments





that the claimed object has an “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself . . .”? Is the claimed object “property owned by an individual Native American,” or has the claimant provided evidence supporting arguments that the object “cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe”; and was the object “considered inalienable by such Native American group at the time the object was separated from such group”?

These complex issues are best clarified through open dialogue and joint investigations between claimants and the museum. DAM has actively implemented a policy of pursuing, where possible, a partnership approach to NAGPRA, working together with Native American communities on all matters of mutual concern. It is the choice of the claimant in determining the level of cooperative interaction with DAM in developing and interpreting evidence for repatriation claims.

In the present case, DAM obtained several grants to pursue consultations with the Zuni Tribe, and extensive dialogue occurred regarding the workings of NAGPRA and its applicability to Zuni objects. This led to the joint preparation of the actual text of the Zuni claim, and an agreement for DAM and the Zuni Tribe to coauthor both the claim and this claim assessment.

### **Collection Histories**

The Zuni claim provides detailed information regarding the history of the claimed items. The histories for four of the five items show that each one originated from the Zuni community between circa 1900 and circa 1972. The history for the fifth item (a mask) shows that, more likely than not, it is a reproduction prepared under unknown circumstances by an unknown party.

DAM has no further information to add to the Zuni claim collection histories.



## Analysis of the Claim

*Cultural Affiliation.* The Zuni claim presents a preponderance of the evidence to sustain arguments that the two Ahayu:da, the Ahayu:da altar stick, and the Koyemshi Ko'Ko are culturally affiliated with the Zuni Tribe under NAGPRA standards. The Salimobiya Ko'Ko is a probable reproduction prepared under unknown circumstances by an unknown party, and no evidence exists to show that it is culturally affiliated with the Zuni Tribe.

DAM agrees with these findings.

*Fit to NAGPRA Categories.* The Zuni claim presents evidence and arguments that the two Ahayu:da, the Ahayu:da altar stick, and the Koyemshi Ko'Ko meet the NAGPRA definition for objects of cultural patrimony. In addition, the Zuni claim presents arguments that the two Ahayu:da and the Ahayu:da altar stick meet the NAGPRA definition for sacred objects. The Salimobiya Ko'Ko is a reproduction prepared under unknown circumstances by an unknown party and the evidence does not show that it was ever communal property under the control of the Zuni Tribe.

DAM agrees with these findings.

*Right of Possession.* The Zuni claim argues that the two Ahayu:da, the Ahayu:da altar stick, and the Koyemshi Ko'Ko were improperly alienated, and DAM does not hold right of possession to them. The Salimobiya Ko'Ko is a reproduction prepared under unknown circumstances by an unknown party, and the Zuni Tribe has chosen to refrain from contesting DAM's right of possession.

DAM agrees with these findings.

## Recommendations

DAM agrees with the Zuni Tribe that the following four items meet the NAGPRA repatriation requirements, and DAM will make these items available to Zuni authorities following publication of the required notice by the National Park Service (NPS):



<i>Current Accession</i>	<i>Original Accession</i>	<i>Description</i>
not accessioned	not accessioned	Ahayu:da figure
not accessioned	not accessioned	Ahayu:da figure
1966.398	Qzu-48-G	Ahayu:da altar stick
1948.236	NZu-3-Ex	Koyemshi Ko'Ko

The Zuni Tribe has also requested the gifting of one item which does not fall under the repatriation requirement of NAGPRA. DAM agrees to make this item available to the Zuni Tribe as a gift, pending publication of a notice by NPS:

<i>Current Accession</i>	<i>Original Accession</i>	<i>Description</i>
1948.235	NZu-1-Ex	Salimobiya Ko'Ko

*Pesticides.* Implementation of NAGPRA has been accompanied in recent years by increasing recognition of contamination of objects in museum collections by arsenic and other pesticides. In December 1998, DAM sent twenty masks and headdresses to the Denver Museum of Nature and Science for arsenic testing, including the above Salimobiya Ko'Ko and three other Zuni Ko'Ko. Results showed the presence of arsenic on one Blackfoot Confederacy headdress and one Iroquois Confederacy mask, but none was detected on the Zuni Ko'Ko. According to the Rocky Mountain Poison Control Center, the measured level found on the Blackfoot headdress and Iroquois mask (approximately 0.1 mg/l) is less than that typically found in ground water. DAM has no record of utilizing arsenic to control insects.

Arsenic has a variety of known health effects and potential risks and can be absorbed through skin contact, inhalation, and oral ingestion. Although its presence can be detected and quantified, it is not clear what levels pose a threat to human health. Washing objects with soap and water has been recommended to remove arsenic, but DAM has been informed that such efforts by the Hopi Tribe have proven unsuccessful.

DAM records are not comprehensive for the use of pesticides. During the 1930s and 1940s, DAM curatorial efforts included the use of the "Spradlin process"



for “moth-proofing.” This involved a chemical spray of some sort which was periodically applied to textiles and objects vulnerable to moth infestation. One departmental report for the mid-1930s refers to the construction of a “large gas poison box” which was used in an unknown manner, presumably for some form of insect control. This may have involved use of paradichlorobenzene or Vapona; empty cartridges of Vapona were found by DAM staff in the course of a DAM collections rehousing project in 1997–1999, implying past usage. Correspondence in May 1963 mentions the use of Raid to control a silverfish infestation on one occasion, and the regular use of diazinon (diluted to “1 to 50 parts water and spray”) upon baskets, furs, textiles, and other items. DAM currently utilizes non-invasive freezing to eliminate insects.

These records confirm that DAM has employed various pesticides over the years, but tests to identify any extant pesticide residues on objects are not known to DAM conservation staff. Raid, diazinon, and Vapona are usually based upon organophosphates that break down soon after application. It is unlikely that residues exist, but if they do, DAM is unaware of techniques to measure them. Although DAM lacks the expertise to reliably ascertain health risks posed by handling and using items treated with organophosphates, the dangers seem low.

DAM does not believe that the known history of insect control practices at DAM indicates significant health risks, but it would nevertheless be wise to handle objects with some caution. It remains possible that toxic substances could have been applied to objects before they entered the stewardship of the Denver Art Museum.







# glossary

**associated funerary objects**

These are items found with human remains held by an institution, as well as items made only for use in a burial or as a container for human remains. NAGPRA defines “associated funerary objects” as follows: “‘associated funerary objects’ . . . shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects” (section 2 [3][A]). NAGPRA distinguishes another class of funerary objects termed “unassociated funerary objects,” which are briefly defined below. See chapter 5 for a fuller discussion of funerary objects and chapter 8 for a discussion of right of possession for funerary objects.

**cultural affiliation**

This is a connection through time between a present-day Indian tribe, Native Hawaiian organization, or Alaska Native Corporation and an ancestral group. NAGPRA contains the following definition of “cultural affiliation”: “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group” (section 2 [2]). See chapter 4 for more detailed information on cultural affiliation.

**cultural items**

This term covers the specific categories of items that can be repatriated under NAGPRA and should not be confused with the term “cultural patrimony.” As used in *Keepers of Culture*, “cultural items” is typically intended to cover unassociated funerary objects, sacred objects, and objects of cultural patrimony. See individual definitions in this glossary for each of these classes of cultural items. NAGPRA applies the term “cultural items” more generally to human remains, funerary objects, sacred objects, and objects of cultural patrimony (section 2 [3]).



**cultural patrimony, also objects of cultural patrimony**

These are items of special importance that were communally owned by a group of some kind within a Native American community at the time they were conveyed away. NAGPRA provides a statutory definition for “cultural patrimony”: “[C]ultural patrimony’ . . . shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group” (section 2 [3][D]). For detailed discussion of cultural patrimony see chapter 7.

**federal regulations**

NAGPRA authorized the Secretary of the Interior to prepare rules to help carry out the provisions of the law (section 13). The regulations were authored by Francis McManamon (National Park Service Departmental Consulting Archeologist), C. Timothy McKeown (NPS NAGPRA Program Leader), and Lars Hanslin (Office of the Solicitor). A draft was published in the *Federal Register* on May 28, 1993, and the “Final Rule” was published on December 4, 1995. Additions and revisions have occasionally been inserted since that date. The regulations are designed to provide important guidance to help with implementation of NAGPRA.

**fiduciary duty**

This concept generally refers to a museum’s obligation to preserve, exhibit, and care for its collections, and represents a duty entrusted to its board of trustees and governing officers. The exact meaning of fiduciary duty varies from institution to institution, but it generally implies a responsibility to maintain items for the benefit of the public. For a perspective on how fiduciary duty relates to NAGPRA see chapter 2.





**funerary objects**

See **associated funerary objects** and **unassociated funerary objects**.

**human remains**

NAGPRA does not define human remains, but the federal NAGPRA regulations provide the following definition: “*Human remains* means the physical remains of a human body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony . . . must be considered as part of that item” (section 10.2 [d][1]). For a fuller discussion of human remains see chapter 2.

**inventory**

NAGPRA requires federal agencies and museums that receive federal funding to compile, by November 1995, a detailed census of human remains and an inventory of associated funerary objects in consultation with tribal government officials, Native Hawaiian organization officials, and traditional religious leaders (section 5). NAGPRA terms this document an “inventory.” The term “census” is not mentioned in the statute, but it should be informally used because it reflects the fact that human remains represent people, not objects. See chapter 2 for a fuller discussion of inventories.

**lineal descendant**

A lineal descendant is anyone who can trace an unbroken lineage back in time to a specific ancestor whose remains or cultural items are in a museum collection or federal repository. The concept of “lineal descendant” is not defined in NAGPRA, but it is addressed in the federal regulations for NAGPRA (section 10.2 [b][1]): “Lineal descendant means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe . . . or by the common law system of descentance to a known



Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.” See chapter 9 for a fuller discussion of lineal descendants.

### **Native Hawaiian organizations**

Indian tribes, Alaska Native Corporations, and Native Hawaiians all have status as groups that retain sovereign authority. NAGPRA includes the following general definition for Native Hawaiian organizations: “‘Native Hawaiian organization’ means any organization which—(A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai’i Nei” (section 2 [11]). Specific definitions for two organizations are also included: “‘Office of Hawaiian Affairs’ means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii” (section 2 [12]); and “‘Hui Malama I Na Kupuna O Hawai’i Nei’ means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues” (section 2 [6]).

### **Review Committee, also NAGPRA Review Committee**

This special citizen’s advisory committee was established by NAGPRA (section 8). It consists of seven members appointed by the Secretary of the Interior and is empowered to conduct a variety of activities: to monitor the inventory and summary provisions of the law; to make findings related to cultural affiliation and repatriation of cultural items upon request of an “affected party”; to facilitate resolution of disputes among lineal descendants, tribes, museums, and federal agencies regarding repatriation of cultural items; to compile an inventory of culturally unidentifiable human remains; to consult with tribes and museums on matters under its purview that affect those groups; to consult with the Secretary of the Interior on the preparation of federal regulations; to perform functions assigned by the Secretary of the Interior; to make recommendations on the future care of



repatriated cultural items; and to prepare an annual report on implementation of the law. See chapter 2 for discussion of Review Committee recommendations on disposition of culturally unidentifiable human remains, and chapters 4 and 10 for discussion of dispute resolution.

### **right of possession**

This concept relates to property ownership and has a statutory definition in NAGPRA (section 2 [13]): “[R]ight of possession’ means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7 (c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 USC 1491 in which event the ‘right of possession’ shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.” See chapter 8 for a fuller discussion of right of possession, including a consideration of the status of human remains.

### **sacred objects**

These are objects that a traditional religious leader has identified as needed for use in a religious ceremony. NAGPRA provides the following statutory definition: “[S]acred objects’ . . . shall mean 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” (section 2 [3][C]). See chapter 6 for a more detailed discussion of sacred objects.



### **summary**

NAGPRA requires museums and federal agencies to provide tribes, by November 1993, with general information about collections (section 6). Congress intended this “summary” to “describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable” (section 6 [a]). See chapter 2 for more information about summaries.

### **traditional religious leaders**

Most typically, traditional religious leaders are responsible for conducting religious ceremonies within a Native American community. NAGPRA does not give a definition for this class of persons, but the federal NAGPRA regulations provide the following definition: “The term *traditional religious leader* means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as (i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization or (ii) Exercising a leadership role in an Indian tribe or organization based on the tribe or organization’s cultural, ceremonial, or religious practices” (section 10.2 [d][3]). For a fuller discussion see chapters 2, 3, and 6.

### **unassociated funerary objects**

These are items from graves not associated with any human remains in a museum collection. NAGPRA defines these as follows (section 2 [3][B]): “objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.” See chapter 5 for a fuller discussion of unassociated funerary objects and chapter 8 for a discussion of right of possession for funerary objects.



# More About the Photos

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Excerpts from a copy of the Baptiste Good Winter Count, made about 1888 for Maj. L. F. Spencer, Indian Agent at Rosebud Agency (Denver Art Museum, 1963.272).

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A Yavapai-Apache Nation consultation at the Science Museum of Minnesota in St. Paul, September 27, 1999, sponsored by a National Park Service grant to the Denver Art Museum. Left to right: Vincent Randall and Faith Bad Bear.

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Pawnee bear claw necklace, originally made about 1860 and remade in 1920 by William Riding In and the Pawnee Bear Society (Denver Art Museum, 1973.247).

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Cheyenne woman's boots, made by an unknown Cheyenne artist (Denver Art Museum, 1948.93).

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A consultation with nine tribes on Apache collections at DAM April 2 and 3, 1997, sponsored by an NPS grant to DAM. Left to right: Kara Kudzma, Elizabeth Rocha, Chris Coder, Rebekah Smith, and Thelma Dawdy. DAM photo by Eric Stephenson.

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Karok basket with lid, made by Elizabeth Hickox (Denver Art Museum, 1950.249ab).

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A Pawnee consultation at the Nebraska State Historical Society, August 26 and 27, 1999, sponsored by an NPS grant to DAM. Left to right: Francis Morris and John R. Bozell.

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A Southern Cheyenne consultation at the Denver Art Museum, December 13, 1995, sponsored by an NPS grant to DAM. Left to right: Nancy Blomberg, William Fletcher, and Gordon Yellowman. DAM photo by Bill O'Connor.

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Bunky Echo-Hawk III at the twelfth annual Denver Art Museum Friendship Powwow, September 8, 2001. Photo by Terri Mey.

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Zuni Salimobiya kachina figurine (Denver Art Museum, gift of C. W. Douglas, 1935.333).

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*Harvest Dance*, date unknown, watercolor by Awa Tsireh (Alfonso Roybal), San Ildefonso (Denver Art Museum, gift of Anne Evans and Mary Kent Wallace, 1932.207).

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Blood shirt made by Three Calf during the 1930s (Denver Art Museum, 1938.202).

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Blackfeet or Crow parfleche, made about 1910 (Denver Art Museum, 1937.200).

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A Pawnee consultation at the Denver Art Museum, November 9, 1996, sponsored by an NPS grant to DAM. Left to right: Kathleen Plourd, Charles Lone Chief, Nancy Blomberg, Vance Horsechief, and Joan Carpenter Troccoli. DAM photo by Bill O'Connor.

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*Two Crow Brothers Waiting to Hot Dance*, 1981, oil and acrylic painting by Kevin Red Star, Crow (Denver Art Museum, gift of the Patrick and Bernard McNulty Memorial Fund, 1981.72). © Kevin Red Star. Used by permission.

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A Zuni consultation at the Denver Art Museum, November 9, 1999, sponsored by an NPS grant to DAM. Left to right: Eldrick Seoutewa and Wilton Niiha.

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Basketry jar made by an unknown Western Apache artist (Denver Art Museum, gift of Mrs. F. C. Smith, 1954.522).

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Loren Panteah at a Zuni consultation at the Denver Art Museum, November 9, 1999, sponsored by an NPS grant to DAM.

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Ceramic jar made by an unknown Zuni artist (Denver Art Museum, 1933.187).

