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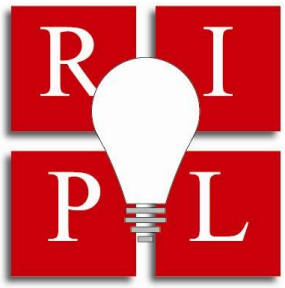

NAGPRA AND ITS LIMITATIONS: REPATRIATION OF INDIGENOUS CULTURAL HERITAGE

KEVIN P. RAY

ABSTRACT

The historical conditions under which indigenous (and specifically Native American) cultural heritage objects have been collected present tremendous difficulties, since collecting efforts were frequently influenced, or even directed, by racist or colonialist ideologies. Recent decades have seen efforts to redress past wrongs, as well as to correct misunderstandings and misrepresentations. The restitution and repatriation processes of the Native American Graves Protection and Repatriation Act of 1990, enacted as human rights legislation, provide powerful, but imperfect tools for the protection of Native American cultural heritage. The challenges are both domestic and international. Recent French auction sales of Hopi, Zuni, and Navajo sacred objects highlight the limitations of the available legal tools. But NAGPRA's limitations do not only manifest in its lack of extraterritorial effect. Even domestically, courts have often interpreted NAGPRA restrictively, with little understanding of Native American cultures.

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I. INTRODUCTION

The restitution and repatriation processes of the Native American Graves Protection and Repatriation Act of 1990[1] ("NAGPRA") provide powerful, but imperfect tools for the protection of Native American cultural heritage. The challenges are both domestic and international. Recent French auction sales of Hopi, Zuni, and Navajo sacred objects highlight the limitations of the available legal tools. But NAGPRA's limitations do not only manifest in its lack of extraterritorial effect. In several notable instances, courts have shown a tendency to interpret NAGPRA restrictively, often with little understanding of Native American cultures.

II. THE TROUBLED HISTORY OF COLLECTING NATIVE AMERICAN CULTURAL ITEMS

NAGPRA was enacted fundamentally as human rights legislation, intended to address and provide some redress for centuries of exploitation, displacement, and dispossession. Individual and institutional collecting of Native American cultural items, including, as NAGPRA recognizes, human remains, associated funerary objects, unassociated funerary objects, sacred objects, and cultural patrimony, has a long, troubled history. Collecting efforts were frequently driven by racist and colonialist ideological or political projects.

The House Report submitted in connection with NAGPRA summarized this history as follows:

> Digging and removing the contents of Native American graves for reasons of profit or curiosity has been common practice. These activities were at their peak during the last century and the early part of this century.

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[1] Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (2012).

> In 1868, the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands [of] Native American human remains and funerary objects being sold or housed in museums and educational institutions around the [country].
>
> For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them. This effort has touched off an often heated debate on the rights of the Indian versus the importance to museums of the retention of their collections and the scientific value of the items.[2]

Thomas Jefferson was perhaps the first to document the excavation of a Native American burial mound. In 1788, Jefferson opened a burial mound near Monticello, and of it wrote, "I conjectured that in this barrow might have been a thousand skeletons."[3] The ideological framework for these excavations and studies denied any affiliation between the earliest inhabitants of the Americas and modern Native Americans, who were believed to be degraded and were considered inferior latecomers. As Patty Gerstenblith has written:

> [t]he burial mounds and antiquities found on the American continent were not thought to be associated with the living Native Americans but rather the product of either a past civilization of the Old World or an extinct group of Indians who were clearly superior to the modern Indians.[4]

In the late 18th and early to mid-19th centuries, collecting of Native American culture focused primarily on human remains and burial objects. But "[i]n the post-Civil War years, the study of [the] Indian shifted in focus. In archaeology, rather than a search for Indian racial origins, the emphasis now was on early human inhabitation in the Americas and on museum collecting."[5] Many of the most prominent collecting institutions—including the Smithsonian Institution (1846), the Peabody Museum (Harvard) (1856), the American Museum of Natural History (1869), and the Field Museum (1893)—were founded in this period, and with them the disciplines of anthology and archaeology. In 1876, the Smithsonian's Bureau of American Ethnology sponsored the first large-scale collecting expedition to the pueblos of New Mexico and Arizona. It has been "commonplace for public agencies to

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[2] H.R. REP. NO. 101-877 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4367-68.

[3] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 92-96 (Harper & Row, 1964).

[4] PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW, 871 (Carolina Academic Press, 3d ed. 2012).

[5] ROBERT E. BEIDER, A BRIEF HISTORICAL SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS, 23 (1990). Typed Manuscript, April 1990, available from Native American Rights Fund, http://www.narf.org/nill/documents/narf_bieder_remains.pdf.

treat Native American dead as archaeological resources, property, pathological material, data, specimens, or library books, but not as human beings."[6]

As Janet Berlo has observed, "[o]ur constructs of what comprises Indian art was largely molded by these institutions and their collecting policies."[7] The leading figures of the period, sought out the "oldest" objects, which they interpreted as being the "most authentic." Consistent with the prevailing western expansionist belief in America's "manifest destiny," they regarded Native American cultures as vanishing, and sought to document and preserve them for science. The concept of the vanishing Indian shaped the collectors' focus.

"Most of the principal North American collections of Indian artifacts," according to Jonathan King:

> were created between 1860 and 1930, in large museums in eastern and central North America. It is inevitable, therefore, that most of the standards by which traditionalism in Indian art is judged depend upon these collections for purposes of definition and comparison. The late nineteenth and early twentieth centuries, however, saw enormous upheavals in Indian North America . . . And ironically, this was the peak period of collecting. As a result, the most traumatic period in Native American history has provided the material basis for the definition of what is traditional and what is not. Basketry, bead costume, and carving from this time exist in such large quantities that they are used as a general, though unstated, yardstick by which the unconscious standards of traditionalism are set.[8]

The collecting of Native American cultural items was later reframed, from a chiefly ethnological concern to an artistic/aesthetic one. In 1941, the Museum of Modern Art mounted an influential exhibition, "Indian Art of the United States," which drew parallels between Native American art and Modern art.

III. NAGPRA

In 1979, Congress was presented with the report of a study mandated by the American Religious Freedom Act, which identified the frequently illegitimate means by which many Native American objects had been obtained. The report stated that:

> Museum records show that some sacred objects were sold by their original Native owner or owners. In many instances, however, the chain of title does not lead to the original owners. Some religious property left the original ownership during military confrontations, was included in the spoils of war and eventually fell to the control of

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[6] Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 43 (1992).

[7] JANET C. BERLO, THE EARLY YEARS OF NATIVE AMERICAN ART HISTORY, 2 (University of British Columbia Press, 1992).

[8] *Id*.

> museums. Also in times past, sacred objects were lost by Native owners as a result of less violent pressures exerted by federally-sponsored missionaries and Indian agents.
>
> Most sacred objects were stolen from their original owners. In other cases, religious property was converted and sold by Native people who did not have ownership or title to the sacred object.
>
> Today, in many parts of the country, it is common for 'pothunters' to enter Indian and public lands for the purpose of illegally expropriating sacred objects. Interstate trafficking in and exporting of such property flourishes, with some of these sacred objects eventually entering into the possession of museums.[9]

Soon thereafter, "a number of Northern Cheyenne leaders discovered that almost 18,500 human remains were warehoused in the Smithsonian Institution. This discovery served as a catalyst for a concerted national effort by Indian tribes and organizations to obtain legislation to repatriate human remains and cultural artifacts to Indian tribes and descendants of the deceased. Between 1986 and 1990, a number of bills were introduced in the 99th, 100th, and 101st Congresses to address this issue."[10] NAGPRA was enacted in November 1990.

IV. KENNEWICK MAN AND "NATIVE AMERICAN"

In 1996, several teens found a human skull and bones along the shore of the Columbia River outside Kennewick, Washington. Since the remains, subsequently referred to as "Kennewick Man," were discovered on federal land, they were sent to an anthropologist for analysis, consistent with the provisions of the Archaeological Resources Protection Act of 1979 ("ARPA"). ARPA provides for issuance of permits before archaeological resources are excavated and removed from federal lands, and preserved after excavation or removal.[11] For purposes of ARPA, human skeletal remains are archaeological resources (and are therefore subject to ARPA's requirements) if they are (1) discovered on public land or Indian Lands,[12] (2) more than 100 years old,[13] and (3) "capable of providing scientific or humanistic understanding of past human behavior, cultural adaptation, and related topics

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[9] Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 44 (1992) (quoting Secretary of the Interior Fed. Agencies Task Force, Am. Indian Religious Freedom Act Rep. 77, Aug. 1979). The report to Congress was required by § 2 of the American Indian Religious Freedom Act. 42 U.S.C. § 1996 (2012).

[10] *Id*. at 54-55.

[11] 16 U.S.C. § 470cc(b) (2006).

[12] 16 U.S.C. § 470aa(a)(1) (2006).

[13] 16 U.S.C. § 470bb(1) (2006).

through the application of scientific or scholarly techniques."[14] Kennewick Man was excavated pursuant to a permit issued under ARPA.[15]

Because of physical characteristics—the shape of the skull and facial bones—scientists initially believed the remains were the remains of an early European settler. However, radiocarbon dating showed the remains to be ca. 9,000 years old.[16]

Five tribal groups from the area around the Columbia River opposed further scientific study of the remains and demanded, pursuant to NAGPRA, that the remains be turned over to the tribes for reburial. The U.S. Army Corps of Engineers, which controls the federal lands on which the remains were found, agreed with the tribes and seized the remains, intending to return them to the tribes for reburial.

A group of scientists, led by Robson Bonnichsen, then-Director of the Center for the Study of the First Americans at Oregon State University, requested that the U.S. Army Corps of Engineers postpone re-interment of Kennewick Man and allow qualified scientists to examine the remains. The scientists argued that:

> Human skeletons this old are extremely rare in the Western Hemisphere, and most found to date have consisted of very fragmented remains. Here, by contrast, almost 90% of this man's bones were recovered in relatively good condition, making "Kennewick Man" . . . one of the most complete early Holocene human skeletons ever recovered in the Western Hemisphere.[17]

When the scientists did not receive a response to their request, they filed suit in the United States District Court for the District of Oregon for, among other things, a finding that Kennewick Man was not "Native American" within the meaning of NAGPRA, and therefore the repatriation requirements of NAGPRA did not apply. In 2002, the District Court held in favor of the scientists, determining that:

> The physical features of the Kennewick Man appear to be dissimilar to all modern American Indians, including the Tribal Claimants. That does not preclude the possibility of a relationship between the two. However, absent a satisfactory explanation for those differences, it does make such a relationship less likely, and suggests that the Kennewick Man might have been part of a group that did not survive or whose remaining members were integrated into another group . . . NAGPRA was intended to reunite tribes with remains or cultural items whose affiliation was known, or could be reasonably ascertained. At best, we can only speculate as to the possible group affiliation of the Kennewick Man, whether his group even survived

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[14] 30 C.F.R. § 251.1 (2016) (defining "archaeological interest").

[15] *See* Bonnichsen v. United States, 217 F. Supp.2d 1116, 1166 (D. Ore. 2002).

[16] For a description of the initial analysis, *see* James C. Chatters, *Kennewick Man*, SMITHSONIAN, https://www.mnh.si.edu/arctic/html/kennewick_man.html.

[17] *Bonnichsen v. United States*, 217 F. Supp.2d at 1120-1121.

> for very long after his death, and whether that group is related to any of the Tribal Claimants.[18]

The U.S. Army Corps of Engineers and the Tribal Claimants appealed the decision, and in April 2004, the United States Court of Appeals for the Ninth Circuit issued its decision, affirming the District Court's decision. The Ninth Circuit read the plain language of NAGPRA—and particularly its definition of "Native American"—to require that discovered human remains have a relationship to a presenting existing tribe. The Court noted that:

> NAGPRA vests "ownership or control" of newly discovered Native American human remains in the decedent's lineal descendants or, if lineal descendants cannot be ascertained, in a tribe "affiliated" with the remains, . . . NAGPRA mandates a two-part analysis. The first inquiry is whether human remains are Native American within the statute's meaning. If the remains are not Native American, then NAGPRA does not apply. However, if the remains are Native American, the NAGPRA applies, triggering the second inquiry of determining which persons or tribes are most closely affiliated with the remains.[19]

The Court further observed:

> NAGPRA defines human remains as "Native American" if the remains are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." . . . The text of the relevant statutory clause is written in the present tense ("of, or relating to, a tribe, people, or culture that is indigenous"). Thus the statute unambiguously requires that human remains bear some relationship to a presently existing tribe, people, or culture to be considered Native American.[20]

The Ninth Circuit concluded:

> because Kennewick Man's remains are so old and the information about his era so limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. We thus hold that Kennewick Man's remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them.

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[18] *Id.* at 1146-1147.
[19] Bonnichsen v. United States, 367 F.3d 864, 875 (9th Cir. 2004).
[20] *Id.* citing 25 U.S.C. § 3001(9) (emphasis in original).

> Studies of the Kennewick Man's remains by Plaintiffs-scientists may proceed pursuant to ARPA.[21]

The Court contrasted the definition of "Native American" with the definition of "Native Hawaiian," which is "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." The Court reasoned that:

> The "United States" is a political entity that dates back to 1789 . . . This term supports that Congress's use of the present tense ("that is indigenous") referred to tribes, peoples, and cultures that exist in modern times, not to those that may have existed thousands of years ago but who do not exist now. By contrast, when Congress chose to harken back to earlier times, it described a geographic location ("the area that now constitutes the State of Hawaii") rather than a political entity ("the United States").[22]

In 2007, Senators Byron L. Dorgan (D-N.D.) and John McCain (R-Ariz.) introduced The Native American Omnibus Technical Corrections Act of 2007,[23] which, among other things, would have revised NAGPRA's definition of "Native American." The revised definition would have read: "'Native American' means of, or relating to, a tribe, people, or culture that is *or was* indigenous to *any geographic area that is now located within the boundaries of* the United States" (additions italicized).

The bill, however, was never enacted, and NAGPRA's original definition of "Native American" remains as it was. However, nearly two decades after Kennewick Man's discovery, facts have outstripped the evidence available to the Ninth Circuit. In June 2015, Danish geneticist Dr. Eske Willerslev and his colleagues at the University of Copenhagen published in the scientific journal "Nature" the results of their genetic sequencing of Kennewick Man's genome, concluding that the remains are more closely related to modern Native Americans than to any other living population.[24] More particularly, genetic testing shows that Kennewick Man is most closely related to the Colville Tribe, one of the original Tribal Claimants. The Kennewick Man results further support Willersley's team's 2014 study of the sole existing Clovis skeleton. The Clovis people were early inhabitants of the Americas, 13,000 years ago. They are known chiefly from their distinctive tools, which are found across the continental United States. The only skeleton to be discovered to date in association with Clovis sites is a boy discovered at the Anzick Site in Montana in 1969, and is 12,600 years old. Willersley's study shows that Clovis people are also ancestors to contemporary Native Americans.[25] Willersley's study of

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[21] *Id*. at 882.

[22] *Id*. at 878-879.

[23] S. 2087, 110th Cong. (2007-2008), *available at* https://www.congress.gov/bill/110th-congress/senate-bill/2087.

[24] Ewen Callaway, *Ancient American Genome Rekindle Legal Row*, NATURE (June 18, 2015), http://www.nature.com/news/ancient-american-genome-rekindles-legal-row-1.17797.

[25] *See, e.g.*, *America's Only Clovis Skeleton Had Its Genome Mapped*, UNIVERSITY OF COPENHAGEN (Feb. 12, 2014), http://news.ku.dk/all_news/2014/02/americas-only-clovis-skeleton-had-

the Anzick Clovis boy was undertaken in consultation with Native American tribes from the area around the Anzick Site, and, with the confirmation of affiliation that the study provides, the Anzick Clovis boy will be repatriated to the tribes for re-interment.

At the present time, the future of Kennewick Man is uncertain. He remains in the custodial care of the Burke Museum in Seattle, where he has been since 1999, under a curatorial services agreement with the U.S. Army Corps of Engineers.[26]

V. JIM THORPE—PRIVILEGING THE NUCLEAR FAMILY OVER TRIBAL ASSOCIATION

If, in the view of courts interpreting NAGPRA, Kennewick Man was too old for the statute to apply, the repatriation request made by the heirs of Olympian Jim Thorpe and by the Sac and Fox Nation proves to be too recent. Even though the appellate court acknowledged that the request fell within the plain language of the statute, it viewed the case as a dispute within a nuclear family only, erasing the complex relationship between individual, immediate family, and tribal association.

Jim Thorpe was of Sauk heritage, and an enrolled member of the Sac and Fox Nation of Oklahoma. When Thorpe died in 1953, Sac and Fox funeral and burial rites were commenced. However, those rites were interrupted when Thorpe's widow, Patricia, known as "Patsy," who was not Native American, insisted on removal of the body. In 1954, Patsy entered into an agreement with two towns in eastern Pennsylvania, for Thorpe's remains to be interred there, a memorial erected, and the combined towns renamed after Thorpe. The Sac and Fox Nation was not party to the agreement.

In 2010, Thorpe's surviving sons and the Sac and Fox Nation filed suit against the Borough of Jim Thorpe for the repatriation of Thorpe's remains to the Sac and Fox Nation under NAGPRA. The United States District Court for the Middle District of Pennsylvania held that NAGPRA applied to the claim for repatriation of Thorpe's remains, and that the Borough constituted a "museum" within the meaning of NAGPRA. The court noted that NAGPRA defines "museum" as "any institution or State or local government agency (including any institution of higher learning) that received Federal funds and has possession of, or control over, Native American cultural items."[27]

The Court concluded that the Borough is a "museum" for purposes of NAGPRA because (1) it has possession or control of Thorpe's remains, (2) Thorpe was Native American, and (3) it receives Federal funds.[28] In holding that NAGPRA applied, the District Court noted that:

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its-genome-mapped/; *see also* Richard Harris, *Ancient DNA Ties Native Americans from Two Continents to Clovis* (Feb. 13, 2014, 3:03 AM ET), NPR, http://www.npr.org/2014/02/13/276021092/ancient-dna-ties-native-americans-from-two-continents-to-clovis.

[26] Kennewick Man, The Ancient One, BURKE MUSEUM (May 2, 2015), http://www.burkemuseum.org/kennewickman.

[27] Thorpe v. Borough of Jim Thorpe, Case No. 3:CV-10-1317, 2013 WL 1703572, *8 (M.D. Pa. April 19, 2013) (quoting 25 U.S.C. § 3001(8) (2012)).

[28] *Id*. at 15.

> Given that Jim Thorpe's widow made an agreement with the municipalities to inter his body there in exchange for them naming their jointure Jim Thorpe, the result here may seem at odds with our common notions of commercial or contract law. Congress, however, recognized larger and different concerns in such circumstances, namely, the sanctity of the Native American culture's treatment of the remains of those of Native American ancestry. It did so against a history of exploitation of Native American artifacts and remains for commercial purposes. The Native American Graves Protection and Repatriation Act recognizes the importance of compliance with Native American culture and tradition where dealing with the remains of one of Native American heritage, and this is a case which fits within the reach of this congressional purpose.[29]

In a decision that privileges the concept of the nuclear family over tribal association, the United States Court of Appeals for the Third Circuit reversed the District Court's decision, while acknowledging that applying NAGPRA as written would require affirming that decision. The Third Circuit concluded:

> that Congress could not have intended the kind of patently absurd result that would follow from a court resolving a family dispute by applying NAGPRA to Thorp's burial in the Borough under the circumstances here . . . [W]e are confronted with the unusual situation in which literal application of NAGPRA 'will produce a result demonstrably at odds with the intentions of its drafters' . . . As stated in the House Report, '[t]he purpose of [NAGPRA] is to protect Native American burial sites and the removal of human remains.' H.R. Rep. (emphasis added). NAGPRA was intended as a shield against further injustices to Native Americans. It was not intended to be wielded as a sword to settle familial disputes within Native American families. Yet, that is what we would allow if we were to enforce NAGPRA's repatriation provisions as written here.[30]

The Thorpe heirs and the Sac and Fox Nation appealed the Third Circuit's decision, filing a petition for certiorari with the Supreme Court of the United States.[31] On October 5, 2015, the Supreme Court denied the petition, allowing the Third Circuit's decision to stand. The National Congress of American Indians, Sen. Ben Nighthorse Campbell (R-Colo.), Rep. Tom Cole (R-Okla.), and former New Mexico Governor Bill Richardson had all supported the petition.[32]

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[29] *Id.* at 18.

[30] Thorpe v. Borough of Jim Thorpe, 770 F.3d 255, 257-265 (3rd Cir. 2014).

[31] Sac and Fox Nation of Oklahoma v. Borough of Jim Thorpe, *Petition for a Writ of Certiorari*, 2015 WL 3486600 (No. 14-1419).

[32] Vidya Kauri, *Supreme Court Rejects Row Over Jim Thorpe's Remains*, LAW360 (Oct. 5, 2015), http://www.law360.com/articles/711167/supreme-court-rejects-row-over-jim-thorpe-s-remains.

A. Whale House Artifacts

Since NAGPRA does not reach Native American cultural items held by private individuals or entities, repatriation of such cultural items requires multiple methods of approach, both legal and non-legal. Typically, successful repatriation of Native American cultural items from private parties requires a combination of the canny use of publicity with legal and moral arguments. Where applicable, it is important to establish common tribal ownership or the non-alienability of cultural items. If a cultural item cannot be alienated, or requires the authorization of the tribe or tribal authorities before being alienated, then removal or sale of such items is wrongful and return justified. However, given the complex history of collecting and removal of Native American cultural items, establishing individual or tribal ownership is often difficult.

The removal and ultimate return of the Klukwan Whale House artifacts exemplifies this challenge. The artifacts, consisting of four intricately-carved and ornamented house posts and a rain screen, were created around 1820 in the Alaskan Chilkat Indian Village of Klukwan. The Thlingit leader Xetsuwu resolved to build a new house (Whale House) to unify existing house groups of the Ganexteidi Clan. He commissioned the house posts, which represent the four groups that were brought together to form the new Whale House. Together with the rain screen, the house posts, tell stories of the clan. The artifacts and the Whale House itself were created and dedicated in the traditional manner. The Ganexteidi hired another clan, the Eagles, to construct the original house. The Eagles were then repaid in a traditional 'payback party,' and the property was brought out in a potlatch and dedicated as clan property.[33]

The Whale House artifacts have long been identified as the finest examples of Native American art in Alaska, and collectors and museums have sought to acquire them. The University of Pennsylvania Museum of Archaeology and Anthropology offered to purchase the artifacts in 1922, but the tribe refused to sell.[34] In the mid-1970s, the Arizona art dealer Michael Johnson twice attempted to acquire the artifacts. Tribal concern over those attempts resulted in the Chilkat Indian Village Council, the governing body of the Village under the Village's IRA-authorized constitution, enacting an ordinance prohibiting the removal of artifacts from Klukwan in 1976. That ordinance provided:

> No person shall enter on to the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange the removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.

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[33] Chilkat Indian Village, IRA v. Johnson, No. 90-01, *17-18 (Chilkat Tr. Ct., Nov. 3, 1993), available at http://www.ankn.uaf.edu/curriculum/tlingit/chilkatindianvillage/.

[34] *Id*. at 18.

> No traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council. Chilkat Indian Village Council Ordinance of May 12, 1976.[35]

On April 22, 1984, several defendants removed the four posts and the rain screen from Klukwan and delivered them to defendant Michael Johnson, an Arizona art dealer. When the Village discovered that the artifacts had been removed, it notified authorities of the State of Alaska. The State began a criminal investigation, located the artifacts in a warehouse in Seattle, Washington, and took custody of the artifacts.[36]

The Village filed suit against Johnson and several tribe members who had assisted him in the United States District Court for the District of Oregon, seeking to enforce the ordinance. The District Court held that enforcement of tribal law against tribe members did not give rise to federal jurisdiction, although enforcement against Johnson, a non-tribe-member, did. It noted that:

> The court agrees with the plaintiff in that the power to pass the ordinance that is in dispute in this case was part of the retained, inherent power of the Chilkat Indian Village. In addition, it would appear that under its constitutional power, Chilkat Indian Village had the power to prevent the sale or disposition of any assets of the Village without the consent of the Council. The court further agrees that alleged acquisition by a non-Indian of the artifacts in question would constitute conduct that would have some direct effect on the welfare of the tribe. Slip op. at 13-14 (Oct. 9, 1990).[37]

The District Court "submitted all issues pending in the case, including challenges to tribal jurisdiction as well as the merits of the tribe's claims that Johnson and his corporation violated the tribal ordinance" to the Chilkat Indian Village Tribal Court.[38]

As a preliminary matter, the Tribal Court noted that "[t]he law applicable in this tribal court action is tribal law, which is comprised of both written and unwritten, custom law of the village."[39] After hearing testimony, the Tribal Court found that the Whale House artifacts were

> "clan trust property," which great spiritual significance to the Ganexteidi Clan, which has primary custodial rights over them . . . [P]roperty is confirmed as being clan trust property . . . [by] presenting it in a ceremony in which members of the opposite "tribe" (i.e., in this case members of clans of the Eagle moiety) are invited,

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[35] Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1471 (9th Cir. 1989) (quoting Chilkat Indian Village Council Ordinance (May 12, 1976)).

[36] *Id*.

[37] *Chilkat Indian Village, IRA v. Johnson*, No. 90-01, at *3, *available at* http://www.ankn.uaf.edu/curriculum/tlingit/chilkatindianvillage/.

[38] *Id*.

[39] *Id*. at *4.

> which completes the confirmation of the clan trust status of property such as the Whale House artifacts, which . . . were subject to this process . . . Under Tlingit law, such objects cannot be sold, unless for some reason (such as restitution for a crime) the entire clan decides to do so.[40]

Because the artifacts were clan trust property and could not be removed without authorization from the Chilkat Indian Village Council, the court held that the removal was illegal, and ordered that the artifacts be returned to Klukwan.

VI. HOPI KATSINAM AUCTIONS

In recent years several Parisian auctions of Native American sacred objects[41] have highlighted the challenges for repatriation claims against private parties, particularly in cross-border contexts. As with the Whale House artifacts, the Katsinam auctions were by private parties, complicated by the cross-border aspect. NAGPRA could not apply. The tribal claimants sought to halt the auctions, or at least postpone them to allow time for a more complete investigation of the circumstances of the Katsinams' ownership. Their efforts were hampered by the auction house's refusal to disclose the name of the consignor and the presumption under French law that the owner of a good is acting in good faith absent evidence to the contrary. The tribal claimants brought international public opinion to bear, and attempted to engage the United States and French governments to convince the auction house to negotiate with the tribes.

LeRoy N. Shinoitewa, Chairman, Hopi Tribe, wrote to the auction house, setting out the tribe's concerns and requesting postponement of the auction:

> These Katsinam, or friends, as the Hopi call them, represent the spirit of deceased ancestors, animals, natural features and events, and various deities. They are used by Hopis in connection with prayers and ceremonies in which Hopi religious leaders perform their trust obligation to protect the world . . . At this stage in the Hopi investigation—which is nowhere near complete—potential buyers at your auction must be informed that the Hopi Tribe suspects that the items you are offering for sale are stolen religious patrimony and may not be purchased or transferred without violating United States, international and French norms. At a minimum potential purchasers need to understand that, in purchasing these objects, they run the risk of participating in illegality.[42]

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[40] *Id*. at *7-13.

[41] Neret-Minet Tessier & Sarrou, Drouot Richelieu, Katsinam sale catalog (April 12, 2013), *available at* http://keridouglas.files.wordpress.com/2013/04/neretminet-12042013-bd.pdf.

[42] Letter from Chairman of Hopi Tribe, LeRoy N. Shingoitewa, to Gilles Neret-Minet, April 4, 2013.

The auction house refused the tribe's request, and the French *Conseil des ventes volontaires* denied the tribe's request for a temporary restraining order. The court held that it was not shown (1) that the Hopi tribal council authorized the lawsuit, (2) any French law prohibited the sale of sacred objects when held by private persons, (3) any United States law prohibits the sale of Native American sacred objects when held by private persons, or that (4) the objects were obtained by illegal means.

The auctions proceeded. At auction, the Annenberg Foundation was the successful purchaser of certain objects and repatriated the objects to the tribes. Subsequent Parisian auctions of Native American cultural items have also proceeded, and still another is presently scheduled for early December 2015.

VII. CONCLUSION

While NAGPRA represents a significant advance in addressing repatriation claims for Native American cultural items for which a federal nexus exists, it is at best moral guidance in claims asserted against private parties. The statute's lack of extraterritorial reach renders it once again merely moral support in arguments for repatriation of cultural items held outside of the United States. In both private and cross-border situations, the key elements are (1) establishing tribal ownership or non-alienability of the cultural items, (2) in the absence of tribal ownership/non-alienability, establishing the legal and moral wrongfulness of the removal (a requirement often hampered by the unavailability of information and documentation), and (3) strategic use of both public and political suasion.