

A, Chahta sia: Reevaluating the Native American Graves Protection and Repatriation Act

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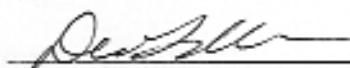
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A MASTER'S CAPSTONE

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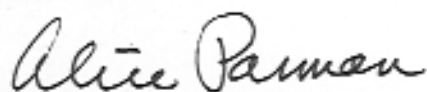


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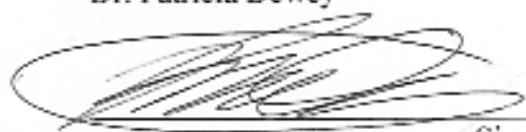


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Abstract: Passed in 1990, the Native American Graves Protection and Repatriation Act (NAGPRA) is a federal law that requires museum and federal agencies to comply with a complex set of regulations stipulating the return of Native American sacred objects, objects of cultural patrimony, funerary objects, and human remains. Using two different courses, Art Law and Anthropology Museum, this capstone examines the events leading up to NAGPRA's passage, the issues that continue to persist in completing repatriations two decades after its passage, and presents possible solutions to assist future repatriations. In hopes of also shedding light on the relationships built between museums and Native American communities while completing repatriations, this capstone will briefly examine whether said relationships can contribute to future collaborations and interactions. The goal of this capstone is to offer a condensed historical examination of NAGPRA as well as its most prevalent issues in order to provide a resource for both museums and Native American communities attempting to complete repatriations with which they could prevent extensive delays or confusion.

A, *Chahta sia*: Reevaluating the Native American Graves Protection and Repatriation Act

“The law, which was designed to redress longstanding wrongs, has been nothing less than a nightmare for many of its participants, even as it stands as one of the most powerful human rights mechanisms in United States history” (Fine-Dare, 2002, p. 7).

This is an accurately expressed sentiment that encompasses the complex, emotional, and sometimes unclear nature of the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, a federal law that requires museum and federal agencies to comply with a complex set of regulations stipulating the return of Native American sacred objects, objects of cultural patrimony, funerary objects, and human remains. However, much to the frustration of Native American communities, museums, and federal agencies, the repatriation process can be extremely complex and time-consuming. This capstone project will seek to identify and analyze the pervasive issues that complicate completion of NAGPRA repatriations in order to provide tribal representatives and institutions with a better understanding of the Act. For further development, a brief examination of the possibility of future collaborations developing out of NAGPRA interactions will be presented. The conclusion of this paper will present a number of recommendations that may help to mitigate delays.

To present the massive scale in which collecting in the nineteenth and twentieth centuries filled museums in the United States with Native American objects and human remains, which will be discussed in depth later, please consider the following: in February 1987, the Smithsonian Institution reported to Congress that its collection contained 18,584 remains of Native Americans (Gunn, 2009/2010). Conservatively, it was estimated that 200,000 Native American human remains were in the collections of museums, agencies, universities, historical societies, and other institutions in the United States and worldwide. As of 2010, museums and federal agencies had repatriated, or identified for repatriation, the remains of 31,995 Native Americans; 669,554 associated funerary objects; 118,227 unassociated funerary objects; and 4,629 sacred objects and objects of cultural patrimony (Gunn, 2009/2010). As of September 2014, museums and federal agencies have repatriated 50,518 individuals; 1,405,904 associated and

unassociated funerary objects; 4,914 sacred objects; and 8,118 objects of cultural patrimony (National NAGPRA website).

Introduction

Acquisition of Native American remains and cultural objects has a long-standing and somewhat grotesque history in the United States. In the nineteenth and early twentieth centuries, there was a strong link between collecting Native American cultural property and American identity building. Possession of a people's material culture, essential to cultural identity and history, indicates both power and control, the basis for which lies in the fusion of material wealth and interpretive authority associated with the possession of material culture (McLaughlin, 1996). As Euro-Americans sought to create an identity distinct from and equal to their European origins, anthropologists, professional, and amateur collectors felt justified in appropriating and displaying Native American objects and human remains (Nafziger and Dobkins, 1999). Before becoming the third president of the United States, Thomas Jefferson excavated a Native burial mound near his estate in order to answer some of his questions surrounding Native burial practice even though he knew living Natives occasionally visited the mound (Daehnke and Lonetree, 2011). He did not ask for permission to excavate or think to simply ask these groups about their burial practices.

Early anthropology in the United States was heavily involved in the collecting process for study and analysis of Native American culture due to the assumption and understanding of the times that Native American culture was quickly dying out under the brunt of western expansion and Manifest Destiny. As the U.S. government slowly forced assimilation onto Native peoples, collectors aggressively searched for the most "authentic" artifacts: those that testified to a pre-contact culture, untainted by interactions with white culture (Glass, 2011). Anthropology of the time, and thus collecting techniques, reflected the notion of social evolution, which began with savagery (Native Americans) and culminated in the high civilization of Victorian America (Jenkins, 1994). The Smithsonian Institution, a bastion of knowledge and history, was part of the general trend to objectify and dominate the world on a massive scale to prove the intellectual and

political dominance of the United States and greatly fueled the demand for Native American remains and objects.

...museums and expositions linked science with the concerns of American imperialism. In this way, ethnological displays validated the utopian projections of many late-nineteenth-century elites- those who, in concert with federal funding, supported by government surveys, and backed by the prestige of science, produced an interpretation of social reality dependent upon theories of racial development, national progress, and, in some instances, the ultimate disappearance of native peoples. (Jenkins, 1994, p. 257)

In addition, nineteenth century museum audiences rarely, if ever, knew how a particular object was obtained and, in all likelihood, cared very little. After all, it was unnecessary information for museum audiences. What was critical, argues Jenkins (1994), was the representation, the “evolutionary sequence” (p. 269) of objects not the manner of their acquisition.

Under the administration of John Wesley Powell, the Bureau of American Ethnology (BAE) practiced research in the late nineteenth century under the guiding assumption that Native Americans were representatives of a distinctive level of socio-cultural development: that of savagery (McLaughlin, 1996). Powell further justified the activity of collectors by stressing that Native American cultures were changing and disappearing, mostly in response to treatment under encroaching colonial powers, and urged the ethnologists working for the BAE to collect as much material as possible by any means necessary (Jenkins, 1994). Under the auspices of ethnographic research, Powell’s administration managed to color Native Americans as lacking any history of their own, thus providing a point of departure for writing the history of Western civilization. Franz Boas, considered to be the father of modern anthropology, robbed graves on the Northwest Coast at night to collect remains, noting that “it is most unpleasant work to steal bones from a grave, but what is the use, someone has to do it” (Daehnke and Lonetree, p. 89, 2011).

In truth, many US governmental policies and activities supported the destruction of Native lives and cultures. For example, one governmental policy centering on the suppression of religious activities was linked to the nation’s mission to civilize, Christianize, and deculturalize American Indians (Fine-Dare, 2002). Another government-mandated policy that brought on the overwhelming tide of collecting bodies

and body parts was a new surge in “scientific research,” mostly driven by institutions such as the Army Medical Museum. Soldiers were instructed to harvest Native American bodies for study at various institutions, including those institutions across Europe. One fourth of the Smithsonian’s collection of Native human remains is “made up of 4,500 crania, half of them obtained from the Army between 1898 and 1904” (Fine-Dare, p. 33, 2002). The lasting effect of this treatment and attitudes towards Native Americans and the context in which remains and cultural objects were collected has everything to do with the discussions of their return. To reiterate, as of September 2014, museums and federal agencies have repatriated 50,518 individuals; 1,405,904 associated and unassociated funerary objects; 4,914 sacred objects; and 8,118 objects of cultural patrimony (National NAGPRA website).

LITERATURE REVIEW

1. Setting the Stage: NAGPRA’s Prehistory

In 1906, in an attempt to rein in the rampant looting and destruction of Native American graves on federal and tribal land, the US government passed the Antiquities Act to protect archaeological sites. “Dead Indians and their associated objects buried on these lands were thereby declared ‘archaeological resources,’ ‘objects of historic of scientific interest,’ and ‘federal property’ that could be excavated, disinterred, sent to museums, and otherwise ‘managed’ only with the proper federal permits in hand” (Fine-Dare, p. 62, 2002). While the Antiquities Act reduced amateur archaeological looting on public and tribal lands, it still reinforced the idea that the Native American past belonged to scientists, not Native Americans.

According to Fine-Dare (2002), the National Historic Preservation Act (NHPA) of 1966 acted as the “philosophical and administrative structure” (p. 71) of today’s cultural resource management. Additions to NHPA in 1986 stipulated that Native American tribes and their traditional cultural leaders be given the opportunity to participate if traditional cultural properties were being affected on federal lands (Fine-Dare, 2002). There are various issues with the NHPA, the central one being that “it places the burden of proof for cultural relevance or sacredness on the tribes, who often consider this information not for public consumption” (Fine-Dare, p. 72, 2002). Koehler (2007)

argues that the NHPA focuses on historical resources as trappings of US culture, not on the rights of indigenous peoples or their interests in protecting their own culture and “Native American values are to be ‘taken into account to the extent feasible’ ” (p. 112).

Interestingly, both preservation laws and Native American civil rights struggles became central to the creation and passage of NAGPRA. By 1968 the Indian Civil Rights Act was passed to make Native governments a functional part of the federal system (Fine-Dare, 2002). Not until 1978, however, were Native American religious freedoms, which relate to sacred objects, objects of cultural patrimony, and human remains in the possession of museums, addressed directly by the federal government. The 1960s also saw an increase in US legislation designed to address environmental, historic, and cultural preservation. The Archaeological Resources Protection Act (ARPA) of 1979 can be seen as an updated version of the Antiquities Act but with key differences. First, ARPA specifically requires that regulations congruent with the American Indian Religious Freedom Act be considered when excavating on public land. Second, ARPA penalties are much more severe than those under the Antiquities Act. Another important piece of legislation that preceded NAGPRA and established the centrality of the National Park Service in federal preservation activities was the Historic Sites Act of 1935.

Repatriation issues played a much bigger role in Native American cultural and political struggles during the 1980s than in any previous decade. It is apparent, therefore, that Indian activism and U.S. federal legislation through the 1970s laid the groundwork for the intense political activity of the 1980s that would lead to the “decade of NAGPRA” (Fine-Dare, 2002). During this “decade of NAGPRA”, the critiques of anthropologists, archaeologists, historians, and museum specialists on “...practices relating to the possession, treatment, curating, and representation of Native American materials objects became an important new subfield...” (Fine-Dare, p. 90, 2002). NAGPRA was also prompted, in part, by the revelations in the late 1980s that federally funded museums and government agencies were in possession of millions of Native American objects and human remains that had been stolen or improperly acquired.

While every state has laws against grave robbing and tampering with corpses, Native American remains seem to be completely exempt even if such action violates the treaty rights of sovereign nations. According to Fine-Dare (2002), most states have

statutes that prohibit opening graves and removing dead bodies, but when the remains are completely decomposed and residing in unmarked graves, an almost universal trait for early Native American graves, the laws are often unclear. Very little consideration is given to Native American cultural, spiritual, and emotional concerns. Most states mandate preservation of archaeological resources but very few address repatriation.

As of 2002, California has one of the most severe burial laws of any state, with legislation that applies to public and private property (Fine-Dare, 2002). When human remains are discovered outside of a cemetery, the county coroner is notified, who then notifies the Native American Heritage Commission (NAHC) if the remains are of Native American origin. If the NAHC cannot locate likely living descendants, the remains must be reburied by the landowner (Fine-Dare, 2002). Violation of this law is a felony. In contrast, Colorado, with a plethora of state antiquities and preservation laws and a strong amateur archaeological community, does not have laws that govern the discovery of remains on private property, of which there are many. In 1989, Nebraska passed a landmark law, the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act. This law was the “first in the country to require public museums to return all tribally identifiable skeletal remains and burial offerings to Indian tribes that requested them for reburial” (Fine-Dare, p. 102, 2002). It also forced the Nebraska State Historical Society to repatriate the remains of more than four hundred Pawnees (Daehnke and Lonetree, 2011).

2. What is NAGPRA?

Prior to its passage, the statute that most resembled NAGPRA was the National Museum of the American Indian Act of 1989 (NMAIA), which applies only to the Smithsonian. According to Koehler (2007), “it is really the only legislation to deal effectively with both the protection and repatriation of Native American human remains and cultural objects” (p. 114). After various state burial laws and NMAIA were passed, however, a coalition of representatives from the National Congress of American Indians, the Native American Rights Fund, the Association for American Indian Affairs, and the National American Indian Council was formed to lobby for federal repatriation legislation (Fine-Dare, 2002). Their lobbying effort resulted in several proposed bills in

the House and Senate, including the Native American Grave and Burial Protection Act, and Native American Repatriation of Cultural Patrimony Act. Shortly after, on November 16th, 1990, the Native American Graves Protection and Repatriation Act was passed by the 101st Congress of the United States and signed into law by President George H.W. Bush (Fine-Dare, 2002), making the United States the first nation to pass comprehensive repatriation legislation at the federal level.

NAGPRA is, first and foremost, human rights legislation, not property legislation.

It can be fairly described as an instrument of decolonization, self-determination and reparation; as a vindication of Native American religious and other cultural freedoms; as a means of enhancing cultural revival and transmission of cultural knowledge among tribes and Native Hawaiian groups; as a contributor to self-identity and community solidarity; and as a means for restoring Native American control over pertinent culture. (Nafziger, p. 38, 2009)

One could argue that NAGPRA is an attempt at addressing the cultural genocide and forced assimilation experienced by Native Americans at the hands of the United States government. In more literal terms, NAGPRA is a federal law that requires of and provides a process for museums and federal agencies to return certain Native American cultural items to lineal descendants and culturally affiliated federally recognized Indian tribes and Native Hawaiian organizations (National NAGPRA website). The items that qualify for repatriation are human ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony. It is important, therefore, to define each item in order to facilitate an understanding of the law's requirements. NAGPRA and 43 CFR Part 10 (NAGPRA Final Rule) define each item and type of human remains that qualify for repatriation as follows, with subsequent definitions for unidentified items and remains as well as associated and unassociated funerary objects:

- a. Human remains: "...the physical remains of a human body of a person of Native American ancestry. The term does not include remains or portions of the body 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 part of that item" (Native

American Graves Protection and Repatriation Act, Public Law 101-601, 104 Stat. 3048 (1990)).

- b. 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” (43 FCR Part 10, NAGPRA Final Rule, (1995)).
- c. Sacred objects: “...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...” (Native American Graves Protection and Repatriation Act, Public Law 101-601, 104 Stat. 3048 (1990)).
- d. Objects of cultural patrimony: “...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 any 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” (Native American Graves Protection and Repatriation Act, Public Law 101-601, 104 Stat. 3048 (1990)).

NAGPRA also includes provisions for unclaimed and culturally unidentifiable Native American cultural items (which includes human remains), intentional and inadvertent discovery of Native American cultural items on federal and tribal lands, and penalties for noncompliance and illegal trafficking in the above items (National NAGPRA website).

Chartered in 1991, the NAGPRA Review Committee is an advisory group appointed by the U.S. Secretary of the Interior. Established to "to monitor and review the implementation of the inventory and identification process and repatriation activities," the Review Committee hears disputes on factual matters to resolve repatriation issues between Indian tribes, Alaska Native villages and corporations, Native Hawaiian organizations, and museums and Federal agencies (National NAGPRA website). In

facilitating dispute resolution, the committee may make recommendations and findings related to four general topics: the applicability of a definition of human remains and cultural items to a particular object, its cultural affiliation, its ownership, and its appropriate disposition (Nafziger and Dobkins, 1999). The committee is composed of three members nominated by the indigenous community, three members nominated by national museums and scientific organizations, and a seventh member chosen by those six (Nafziger and Dobkins, 1999).

NAGPRA also contains provisions for criminal penalties. The Secretary of the Interior may assess a criminal penalty against any museum that fails to comply with the requirements of NAGPRA or its applicable regulations (Iraola, 2003/2004). NAGPRA's criminal provisions forbid the "knowing sale, purchase, use for profit, or transportation for sale or profit of two categories of Native American objects: human remains and cultural items" (Iraola, p. 435, 2003/2004). The trafficking provision for human remains may be applied retroactively, but for criminal conduct relating to cultural objects, provisions only cover conduct after the passage of NAGPRA. A first offense is a misdemeanor and a second offense is considered a felony. The fines in the case of an individual are set at \$100,000 and \$250,000 for misdemeanor and felony offenses, respectively (Iraola, 2003/2004). Since 2003, there have been three reported appellate cases addressing NAGPRA's criminal penalty provisions and all have been for trafficking in cultural items.

3. Complicating NAGPRA: Pervasive Issues in Completing Repatriations

While no federal law is without its flaws, NAGPRA is prone to the following issues that not only cause delays in completing repatriations but also cause museum professionals and tribal communities to question its efficacy.

1. *Funding*: Initially, the passage of NAGPRA created a massive surplus of work for museums, federal agencies, and tribes as they began the process of complying with NAGPRA provisions. Museums struggled to fund staff to complete summaries and inventories in the federally allotted timeline, and tribes struggled to allocate resources for consultation-related expenses and assess the influx of notices from museums and federal agencies. While the initial passage of NAGPRA included the disbursement of federal

funds to support the transition into compliance, the projected financial need was nowhere close to the overwhelming cost to museums, federal agencies, and tribes. “Although the National Park Service has awarded millions of dollars in grant monies since the early 1990s to assist tribes and museums in implementing the law, the process is still incomplete, and the funding level is still well below the estimated \$10 million per year needed to support tribal repatriation offices” (Fine-Dare, p.142, 2002). Some institutions are guilty of receiving grant money without completing the required work. Tribes, arguably even more so than institutions and agencies, struggle with the funding necessary to support a successful repatriation which can range from travel expenses to maintaining a cultural heritage department. Between fiscal years 1994 and 2004, the federal government gave approximately \$16.5 million to federally recognized tribes. When distributed among 562 federally recognized tribes, this amount is negligible (Gunn, 2009/2010).

Museums tend to fare no better when it comes to the dearth of funding. According to Gunn (2009/2010), between 1994 and 2008, the federal government provided roughly \$9.8 million to federally funded museums to assist in their repatriation efforts, another negligible amount considering the number of museums required to comply with NAGPRA. From 2003 to 2008, federal NAGPRA grants to museums and tribes decreased radically, and an assessment of grants made between 1994 and 2007 indicates that proportionately fewer of the funds appropriated for this purpose are actually being allocated for grants (NATHPO report, 2008). The pronounced lack of funding causes delays that ripple into extended periods of time as tribes and museums struggle to provide the staff, resources, and financial support to the people on the ground attempting to complete repatriations.

2. *Legal language problems*: Human remains and objects are both classified under cultural items. According to Fine-Dare (2002), NAGPRA does not separate nature (human remains) from culture (created objects) but instead considers them to both be within the realm of human cultural meaning and interpretation. It is important to note that meaning attached to human remains of Native Americans comes from indigenous cultural systems not singularly, but as they intersect with dominant systems of power. In other words, “...as ‘cultural items’ human remains carry the history of attempted genocide and

ethnocide...They are symbols of what and who were destroyed and taken and what and who want them back..." (Fine-Dare, 2002). Cross-cultural application of a Western law to indigenous ways of knowing become apparent in the notion of ownership under NAGPRA. Are stewardship and caretaking, both important concepts in the relationship between Native Americans and their cultural objects and ancestral remains, the equivalent of ownership under NAGPRA?

Another example of the extreme difficulties the language in NAGPRA can cause is demonstrated by the *Bonnichsen v. United States* case. The case involves human remains discovered on federal land in Washington state under the control of the U.S. Army Corps of Engineers. The bones of an individual, who became known as Kennewick Man/Ancient One, were removed from the site at the request of the county coroner for analysis by an anthropologist. Using radio carbon dating, the anthropologist determined that the remains were between 8,340 and 9,200 years old, dating further back than any existing Native American tribe is known to have existed in the U.S., not taking into account oral history (Koehler, 2007). Four local tribes collectively filed a claim for repatriation. A group of scientists, however, argued that Kennewick Man/Ancient One's features were unlike those of modern tribes and that further study was required to discover more about the origin of humanity in the Americas (Koehler, 2007). The real issue in this case was whether or not NAGPRA applied to remains that were so ancient and so outside of the predicted historical scope of NAGPRA provisions.

The Ninth Circuit Court of Appeals held that NAGPRA did not apply in this case based upon an extremely literal reading of the statute's definition of Native American. NAGPRA defines Native American as "of, or relating to, a tribe, people, or culture that is indigenous to the United States" (Native American Graves Protection and Repatriation Act, Public Law 101-601, 104 Stat. 3048 (1990)). The court argued that it was important that the definition was written in the present tense and that the statute requires that human remains bear some relationship to presently existing tribes to be considered Native American (Koehler, 2007). Also, the court stated that NAGPRA was not intended to give Native American status to any remains found within the United States regardless of age and regardless of lack of connection to any tribe (Koehler, 2007). In 2005, Sen. John McCain introduced a bill that included a section to amend the definition of Native

American used in NAGPRA by adding “or was” after “is.” While this revision may assist in defining ancient remains found in the future, it does not address the final fate of those ancient remains. Kennewick Man/Ancient One currently resides at the Burke Museum in Seattle, WA, with no apparent resolution.

3. *Determining cultural affiliation*: Perhaps the most difficult to solve is the determination of an object’s or ancestral human remains’ cultural affiliation. NAGPRA’s requirement of establishing cultural affiliation rests on the anthropological understanding of the concept of culture. When relocation, displacement, or widespread decimation of a population has been part of a patrimonial history, establishing cultural affiliation becomes a complex trial. Cultural affiliation may be impossible to determine if museum collections are largely or entirely undocumented. The lack of documentation reflects professional practice of early anthropologists and archaeologists as well as directly reflecting the paternalistic attitude of the U.S. towards Native Americans. As mentioned earlier, a majority of the collected human remains were merely snatched by soldiers following orders not concerned with making detailed observations and taking notes. At best, professionals can determine cultural affiliation based upon a preponderance of evidence test that relies on a highly subjective process of interpretation (Nafziger and Dobkins, 1999).

If a tribe is not federally recognized, they have no legal power to make NAGPRA claims and therefore, even if a museum determines cultural affiliation to an unrecognized tribe, they cannot repatriate under NAGPRA. According to Nafziger and Dobkins (1999), the issue of establishing cultural affiliation “captures the significance of the entire NAGPRA process, for it is very much a process of identity establishment” (p.88). Within cultural affiliation determinations lies a paradox, however. Under NAGPRA, it is often tribes alone who can effectively establish or explain cultural affiliation data, asking tribes to fix their identities in scientific terms while also asking for the establishment of identity based on oral traditions and non-Western notions of evidence (Nafziger and Dobkins, 1999). “This dimension of NAGPRA highlights the tension within the law between a socially constructed and historically situated concept of cultural identity and the reification of a fixed definition of identity” (Nafziger and Dobkins, 1999). This issue is also directly related to funding. If a museum or federal agency cannot provide the time

and staff to complete accurate research based on historical documentation of a collection, then the repatriation process cannot be successful and has the potential to be delayed exponentially.

4. *Culturally unidentifiable human remains*: Between 1990 and March of 2011, approximately 52,488 Native American human remains were affiliated under NAGPRA leaving more than 116,000 in collections waiting to be repatriated or even affiliated (Birkhold, 2011). Only nineteen percent of human remains have been repatriated using NAGPRA's cultural affiliation process. A 2010 evaluation conducted by the U.S. Government Accountability Office found that agencies would erroneously find a lack of cultural affiliation in a considerable frequency of cases. The Review Committee substantiated this fear, estimating that eighty percent of remains listed as culturally unidentifiable could reasonably be culturally affiliated but museums and agencies had not taken the time or made the effort to correctly affiliate the remains (Birkhold, 2011). Native Americans, however, feel that institutions used NAGPRA's unaffiliated category, prior to the 2010 rule, to block repatriations. According to Birkhold (2011), as of March 2011, 125,762 Native American human remains have been inventoried by museums and federal agencies as unidentified. Of those, 8,640 have been affiliated or transferred since first being inventoried as culturally unidentifiable, thus reinforcing the allegation that museums and agencies misidentify remains as unaffiliated, and thus unidentifiable, in many cases.

The new rule addressing culturally unidentifiable human remains was published on March 15, 2010. The primary changes with the new rule include "transforming the process of determining how to handle remains from a voluntary practice into a legal requirement, and tasking museums and tribes with formulating disposition plans without having to go before the Review Committee" (Birkhold, p. 3, 2011). But because no cultural affiliation is legally recognized for these remains, disposition takes a very different form under the new rule. If a Native American tribe or organization requests control of a culturally unidentified human remain, a museum must initiate consultation of its disposition within ninety days. Even if no request is made, museums must initiate consultations before offering to transfer control of culturally unidentifiable remains to any group. Museums cannot, therefore, retain unidentified remains in perpetuity. If a

museum is unable to prove that it has a right of possession to the culturally unidentified human remains, they must arrange for their disposition, which made the rule immediately effective (Birkhold, 2011). The rule, however, is potentially damaging to the Native American community. Only federally recognized tribes can request control of unidentified remains, impairing non-federally recognized tribes from controlling their own ancestral remains and potentially encouraging infighting among tribes.

5. *Education*: According to a research project conducted by the Makah Indian Tribe and the National Association of Tribal Historic Preservation Officers, a survey of federal agencies indicated that those officials who are charged with carrying out NAGPRA responsibilities are often new or reassigned and training has not been available to them (NATHPO, 2008). The same dynamic appears to be prevalent in Native communities. While the survey conducted by the Makah Tribe focused on federal agencies, it can be argued that museum staff in the majority of museums also face this issue. With few to no resources dedicated to education and training, new staff members may have no knowledge of NAGPRA processes, which makes completing a repatriation nearly impossible.

Some delays, however, are inherent in NAGPRA. Museums and federal agencies may delay repatriation for up to 90 days when cultural items are “indispensable for completion of a specific scientific study” (Gunn, p.517, 2009/2010). Also, if more than one tribe claims or can establish cultural affiliation to a particular item or human remains, the federal agency or museum may retain the item or human remains until the tribes can agree upon its disposition or the dispute is otherwise resolved. Also, a claimant tribe must present evidence that the museum or federal agency did not have the right of possession to an unassociated funerary object, sacred object, or object of cultural patrimony at the time of collection. In response, the museum or federal agency is given the opportunity to prove its right of possession to the item with no stipulation as to timeline to make this determination (Nafziger and Dobkins, 1999).

4. Benefits of NAGPRA

Even with existing delays and other issues, NAGPRA remains a landmark federal law, for both Native Americans and the museum world. The most obvious benefit of

NAGPRA is its "...systematic promotion of human rights, self-determination, and distributed justice on behalf of Indian tribes and Native Hawaiians" (Nafziger and Dobkins, 1999). Repatriation serves vital Native American community needs such as the practice of religion and the survival of traditional life ways. The repatriation of cultural objects can also support the development of tribal museums, which enhances education and the "avowed national policy of tribal economic development" (Nafziger and Dobkins, p. 82, 1999). It can also be argued that NAGPRA, as an expression of civil rights and ethnic reconciliation, promotes the redress of historical grievances. Requirements for museums and federal agencies under NAGPRA help to characterize the physical manifestation of colonialism in the US, revealing the ugliness of this legacy while reshaping the power dynamics between tribes and collecting institutions.

For museums, the benefits of NAGPRA are so great that it has caused an entire paradigm shift in the museum profession. Historically, most museums did not actively pursue collaborations with Native American communities in any aspect. With the passage of NAGPRA, required consultations between museums and Native communities promoted a domino effect: museums learned, and continue to learn, extensive amounts of information about their collections from Native consultants, which inspired exhibition and program development based on intensive collaborations. It has become the norm in exhibition development related to Native Americans for museums to approach Native communities for support, thus creating professional relationships based on trust and respect. It is testament to the power of NAGPRA as federal legislation that most museums now include traditional care practices in their collections management policies; professional organizations such as the American Alliance of Museums and the International Council of Museums include provisions in their code of ethics related to interactions with indigenous communities and ethical collection standards; and emerging museum professionals are expected to have some knowledge of NAGPRA and its effects.

METHOD

This examination of NAGPRA, its current shortcomings and possible solutions, is the product of a capstone research project for the Arts Administration program (AAD). This paper's development was informed by the materials presented in the following two

courses: Anthropology Museum (ANTH 510) in Spring 2014, and Art Law (LAW 600) in Winter and Spring 2014. Both courses influenced the process and structure of this paper by providing resources for the expansive literature review, in-depth class discussions, and support from professors that helped guide the tone. By using a capstone and its combination of two distinct courses to present this particular view of NAGPRA, it is hoped that museums and Native communities will use it to better inform their combined repatriation efforts.

Anthropology Museum: A Shifting Paradigm

Reflecting the dramatic changes in the nature and mission of anthropological museums and their collections within in the last three decades, the Anthropology Museum course allowed students to explore the social, ethical, and practical ways a museum and its collections engage and affect the perspective of a diverse constituency and the resulting ripples this has on museum professionals and practice. The course also follows the shifting paradigm of museology from a purely research-based, white male, colonial Euro-American dominated field to a collaboratively built, diversely understood, and multi-voiced discipline that celebrates rather than suffocates the cultures it represents. Beginning with an historical introduction of the evolution of the anthropological museums as *wunderkammer*, “cabinets of curiosity”, to the public institutions more familiar today, course discussions, course materials, and the attitude of the involved students was also a direct product and reflection of the shifting paradigm of museums.

Based upon weekly topics and supplemented with guest speakers, this course had two very important themes that worked together to influence this paper: representation and collaboration as well as repatriation focusing on NAGPRA. In its own way, NAGPRA as a federally enforced mode of consultation tends to open up the possibility of future collaborations by compelling tribal representatives and museum professionals to come together. While this consultation process does not always result in the creation of positive working relationships, it begins a very important conversation and simply gets Natives inside museums. In some cases, however, successful NAGPRA repatriation

interactions can be the catalyst for extensive collaborative projects that embody the new museum paradigm.

Focusing on the decolonizing potential of museums and museum professionals, Amy Lonetree was a resource heavily utilized in the Anthropology Museum course. From her perspective on colonialism in museums, she questioned whether NAGPRA “actually represents a moment of decolonization in practice or a modified continuation of the status quo” (Daehnke and Lonetree, 2011), the status quo being the treatment of Native peoples within museums before the paradigm shift to inclusiveness and collaboration. Daehnke and Lonetree (2011) further argue that the current status of culturally unidentifiable human remains illustrates that NAGPRA, as it stands today, does not represent an act of decolonization. A fatal flaw that prevents NAGPRA from acting as a tool of decolonization is that museums and federal agencies are ultimately empowered to make the final determination of cultural affiliation rather than tribal organizations, meaning that cultural affiliation is principally based on scientific rather than tribal cultural views (Daehnke and Lonetree, 2011). “Repatriation...is the most important aspect of collaboration” (Daehnke and Lonetree, p. 96, 2011), but if museums, federal agencies, and archaeologists cannot support that collaboration by standing up for tribal primacy in determining what happens to all Native American human remains, then other forms of collaboration become much less relevant. Native communities can also contribute to the effort to decolonize NAGPRA. Lonetree (2012) argues that Native peoples must “understand and acquire traditional knowledge of their own respective tribe’s burial practice, understand the history of past collection practices and how it relates the colonization process, comprehend the intricacies of NAGPRA implementation to ensure that the spirit and intent of the law as a human rights legislation are achieved, and collaborate with other Native nations and organizations to establish coalitions to work cooperatively to reclaim objects and ancestors” (p. 159).

Eric Hemenway, the NAGPRA coordinator for the Little Traverse Bay Band of Odawa Indians, succinctly outlines the issues inherent in NAGPRA as they affect tribal repatriation programs. The most outstanding obstacle, argues Hemenway (2010), is funding. “Without the direct funds to create positions for people to carry out the work, nothing can be accomplished” (p. 172). As a direct result, a museum may become

frustrated when its attempts to arrange for consultations elicits no response because there are no individuals at that tribe to do NAGPRA work. In addition to lack of funding, the lack of formal NAGPRA training also greatly impedes tribal repatriation attempts. Hemenway (2010) laments the lack of formalized training, stating “when I started, there was little training and only one manual (that I knew of at the time) to take notes from” (p. 174). With no formal training, implementing NAGPRA for tribal representatives can be nearly impossible due to the law’s complexity and dense legal language and becomes equally frustrating as they fight for the return of ancestors and objects integral to the cultural health of their people.

While Hemenway (2010) focuses on the frustrations of running a tribal repatriation program, he also highlights the similar struggles that both museum professionals and tribal representatives experience, which again surrounds the issue of funding.

Many times staff from both handle multiple jobs, and NAGPRA is only part of their daily duties. It’s hard to designate large amounts of time to NAGPRA because, sadly, it’s often not a high priority. People recognize its importance, but when it comes to funding and resources, tribes and museum are forced to make it work with what resources they currently have. (Hemenway, 2010, p. 176)

Hemenway (2010) also highlights an issue that become more and more obvious as NAGPRA repatriations were completed: tribal communities have no ceremonies for reburial and had previously never needed them. “This is something new to our people; we never had this problem of foreign people desecrating our burials, so we had to adjust to this issue of having hundreds of ancestors returned to us...” (Hemenway, 2010, p. 177). In addition to the necessity of creating reburial ceremonies and procedures, tribes must be cognizant of another issue: contamination. Museums, in the past, used heavy metals and poisons, such as arsenic, to treat objects to kill pests and prevent infestations. Currently, objects remain contaminated and the cleaning process is prohibitively expensive. Objects that are poison cannot be handled in ceremonies and are difficult to store safely, creating yet another hurdle for tribes to overcome.

Art Law: *De Jure* NAGPRA

Art Law is a course designed to give law and non-law students a brief but comprehensive overview of laws, cases, and legal interpretations related to visual art and museums, which was supplemented with guest speakers, field trips, and heavily involved in-class discussions. In addition, the course informed students about art, artists, the experience of the art world, and art business. Each week, students discussed assigned cases, legislation, and art-related articles that focused around a theme. As a semester rather than term course, Art Law covered an extensive amount of themes ranging from copyright law to Nazi-era art looting. Most salient to this paper, however, were the three weeks dedicated to discussing and dissecting NAGPRA and a field trip to the Portland Art Museum (PAM) to meet with the Curator of Native American Art, Dr. Deana Dartt, who is also responsible for the PAM's NAGPRA claims and compliance.

From 1990 to 2007, there have been fewer than twenty cases to interpret the provisions of NAGPRA, none of which have been handed down from the Supreme Court (Koehler, 2007). Some courts have provided support in the interpretation of the provisions while others have defended its constitutionality. Courts have determined that NAGPRA is constitutional in spite of claims that it is “overbroad or violates the Equal Protection Clause” (Koehler, p. 115, 2007). The argument of vagueness has mostly been used by those charged with criminal acts, focusing on the term and definition of cultural patrimony. According to Koehler (2007), the Federal District Court for the District of Oregon held that Congress has a special obligation to protect Native Americans with legislation because “there is no significant market in cultural objects and remains stolen from predominantly Caucasian graveyards” (p. 115).

Koehler (2007) also highlights the most controversial issues that surface in court cases, such as the use and standing of oral history as evidence of a tribal connection to human remains or sacred objects. Of the eleven lines of evidence that tribes can reference in determining cultural affiliation under NAGPRA, one is oral traditions and history. In a court, however, oral history as evidence is considered hearsay. The US District Court for the District of Oregon did weigh evidence provided by oral tradition in the *Bonnichsen v. United States*. The Secretary of the Interior had examined expert testimonies with regard to oral tradition evidence and concluded that the tribe's oral histories put them in the

location in question (Koehler, 2007). The court, however, called reliance on oral history highly problematic and took note that hundreds of intermediaries must have taken part in relaying this oral history.

There are many arguments among Canadian and American scholars as to the impact and effectiveness of federal legislation as compared to provincial or institutional policy. In Canada, national legislation may not be the ideal way to address repatriation. The lack of depth and breadth of repatriation policy in only two provinces and one territory has led to a heavy reliance on negotiation. “Although negotiation has been employed somewhat effectively in Canada, one drawback appears to be that negotiation’s usefulness in repatriation cultural objects is largely limited to circumstances in which those objects repatriated are incidental to the negotiation of comprehensive land claims agreements” (Koehler, p. 124, 2007). This effect has led to the growth of negotiation and regulation at the provincial and territorial levels but has prevented much national cohesion regarding repatriation. The U.S. has the advantage of a national policy and federal regulation. However, the lack of national cohesiveness in Canada seems to allow for a higher level of flexibility in adopting indigenous values and perspectives into the process of determining ownership and control (Koehler, 2007). For example, Canadian courts more readily accept oral history as evidence.

It was very interesting to compare my understanding of NAGPRA as a Native student with an anthropology background to the opinions of the law students who admittedly did not have previous exposure to NAGPRA. Initial reactions to NAGPRA in class were startlingly similar to the initial reaction of museum professionals and the scientific community to NAGPRA’s passage in 1990. Most students did not understand the overwhelming need, and inherent right, of Native peoples to demand the return of their ancestral remains and sacred objects which was finally validated by NAGPRA. It was an excellent opportunity for me to share my experience with NAGPRA as a Native student and help to enlighten and inspire the law students to understand the human rights behind the legislation.

The field trip to the PAM and the subsequent presentation by Dr. Dartt took class discussions and case analyses and presented them as the real struggle that NAGPRA can be in an institutional (museum) setting (Field Trip, April 4th, 2014). Dr. Dartt explained

that NAGPRA would be playing an essential role in her extensive five to seven year plan as she and her team worked to overhaul the Native American galleries and collections. The final product of her extensive planning was to be a debut exhibit focusing on the Northwest Coast Native peoples, including the Tlingit and Haida tribes. But, in order to foster a collaborative working relationship and reciprocal knowledge network between the PAM and Tlingit/Haida that would support a successful exhibit, 18 outstanding NAGPRA repatriation claims had to be addressed.

Formally put forth by the Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA), a collective corporation representing several different clans, addressing the 18 claims, as Dr. Dartt explained, would be seen as a goodwill effort on the part of the PAM in addition to ensuring continued federal compliance by the museum. Without building a foundation of trust stemming from the return of the sacred objects and objects of cultural patrimony currently in the possession of the museum, the tribes would see no reason to participate in an exhibit. Without their endorsement, an exhibit celebrating their culture would be moot. Dr. Dartt, herself a member of the Chumash tribe, explained that it was her imperative as a Native person and museum professional to dedicate her time to completing all the outstanding NAGPRA claims at the PAM because of the influence they could have on future collaborations between the PAM and tribes.

Conclusion

The following recommendations, in conclusion, are made in hopes that they may be applied to address the previously highlighted issues in NAGPRA as well as increase the active participation of Native groups in museum practice.

1. *Increased federal funding:* Because of NAGPRA's status as human rights legislation, federal funding is the highest priority recommendation. The National NAGPRA program under the National Park Service has been under-funded to the point of uselessness. Most museums and tribes argue that the biggest impediment to NAGPRA compliance is lack of funding. Limited grants are available to museums and tribes, but the small pool of funding makes the process extremely competitive. I suggest an increase in the amount of federally allotted funds to support repatriations and demonstrate to tribes the government's commitment to the return of tribal ancestors and sacred objects. In

addition to an increase in grants, a portion of the funding would have to be dedicated to revamping the entire National NAGPRA website. The National NAGPRA website hosts incredibly important databases that are inaccessible due to broken and non-functioning links, among other issues. As the only national resource for tribal and museum employees attempting to complete repatriations, this is unacceptable and further increases frustration and confusion.

2. *Transparency*: While there are no provisions currently built into NAGPRA to require museums and federal agencies to employ any level of transparency to their repatriations, I suggest that NAGPRA be amended to require museums and federal agencies to make public and easily accessible all non-sensitive or non-confidential information relating to repatriations. Ideally, this means museums that are actively repatriating would have documentation readily available on their websites and/or in their exhibitions. Offering such a level of transparency to the public, which a museum serves, would educate and possibly inspire them to become repatriation advocates. The effect of negative publicity based upon the public's consumption of repatriation proceedings would greatly impact most museums' daily practice and would hold them more accountable. If museums cannot meet the needs of their visitors, I believe they would take corrective measures. In regards to repatriation, museums might adopt a more effective protocol that reduces the time between initial consultation and physical repatriation to the best of their abilities.

3. *Increased enforcement and penalties*: In order to address noncompliance within museums, NAGPRA needs to have much stronger enforcement provisions. I suggest tasking the Review Committee with developing an extensive report addressing compliance within museums. In addition, the Review Committee should be responsible for determining a course of action to penalize those museums proven to be engaged in willful noncompliance.

4. *Professional standards for NAGPRA compliance*: Professional organizations set the standards for all aspects of museums, from daily operations to ethical codes of conduct. It stands to reason that compliance with federal laws is an essential part of these standards. I suggest that NAGPRA compliance become an explicit standard of professional practice. In regards to the American Alliance of Museums, NAGPRA

compliance should be a requirement of accreditation. The Association of Art Museum Directors (AAMD), in fact, published a statement in 2006 that encouraged all members:

to consider cases where it may be important to go beyond the law [NAGPRA] and adopt special stewardship or interpretive responsibilities for sacred objects that are not covered by NAGPRA and are not subject to specific national or international laws or treaties. Such works include those of non-federally recognized tribes, First Nation cultures in Canada, indigenous Mexican cultures, as well as other groups worldwide (Associated of Art Museum Directors, p. 1, 2006).

Following the lead of AAMD, all professional museum associations should speak to NAGPRA compliance as an essential obligation of all federally funded museums.

5. *Increased participation of Native communities*: While NAGPRA remains groundbreaking legislation regarding human rights, there are still inroads to be made. Native communities must be given avenues to participate in museum practice and the authority to determine their own representation. NAGPRA is just a single, federally mandated route of consultation but cultivating professional working relationships between museums and tribes will continue to positively affect the museum field by giving voice to multiple world views as well as taking sometimes painful steps toward addressing the legacy of colonialism within museums.

6. *Federal training initiative*: As expressed by Hemenway (2010), the lack of any formalized training can prevent tribal communities from pursuing NAGPRA repatriations. I argue that implementing a federally funded, nationally available, and easily understood NAGPRA training program is essential to the continued success of NAGPRA. With the support of a web-based, interactive training module, for example, tribal representatives as well as museum professionals would have a resource that was immediately accessible to help them navigate the entire NAGPRA process. The training module should be paired with a network of professionals, Native and non-Native, with experience in completing NAGPRA repatriations, to act as mentors, traveling trainers, and consultants. With the foundation of a training module and network of professionals, those people pursuing NAGPRA repatriations would be more confident in having questions answered immediately by a program endorsed by the federal government.

Afterword

This capstone project did not originate as such, and, in the interest of examining my experience attempting to pursue first a thesis then a research project, I decided to include this afterword. This is not meant as an attack on museums but rather as an examination of my research experience as being related to the continued attitude of museums/museum professionals to NAGPRA.

Beginning almost a year ago, based upon department recommendations for those students interested in pursuing a PhD. as well as my own interest in the intellectual challenge presented, I declared as a thesis student. I wanted to explore the various intricacies of NAGPRA but with a strong focus on the overall duration of completing a physical repatriation. Strictly speaking, I wanted to know why NAGPRA repatriations took so long. Based upon experiences I had with various museums during my academic career and as a Native student, I was stunned that the return of sacred objects and ancestral remains could take up to ten years. The focus of my research was not to criticize museum practice but rather to compare and analyze repatriation policies in order to provide some solutions.

At the outset of my thesis proposal and research development, I wanted to develop a comparative case study analysis between a museum in the U.S. and a museum in Canada, focusing specifically on the duration between initial consultation and physical repatriation. It was also my intention to compare any internal museum policies regarding repatriation in addition to federal or provincial legislation. I reached out to four different institutions, and, for various reasons, all four declined despite being research and educational institutions. At this juncture, I began to realize that, despite being passed by the federal government over 20 years ago, very few museums were willing to discuss their NAGPRA compliance or experiences. Zero, actually, in the case of my failed thesis attempts.

Because my timeline was quickly shortening, with the support of my research advisor, I decided to step down from pursuing a thesis and instead pursue a research project, a less intensive final research option that did not require an oral defense. Instead of a detailed comparative case study augmented by interviews, I instead opted to use semi-structured interviews only to collect data. Again, I encountered the same difficulties

with an almost identical research topic: museums did not want to discuss their NAGPRA experiences. After contacting over 40 museums in Oregon, I also discovered that many museums had no idea what NAGPRA was even if they had Native American collections. The tribes in Oregon, however willing to participate in interviews regarding their NAGPRA experiences, never approved my research proposal. But, NAGPRA repatriations are not always a high priority in tribal communities.

Thus I found myself pursuing a capstone project, focusing solely on published literature and including no original data collection, due to my timeline constraints and the almost absolute refusal of museums to participate in a research project about NAGPRA. I had hoped that a thesis would have shed some new light on and possibly presented some solutions to commonly encountered NAGPRA delays. Unfortunately, the pervasive negative reaction to the initial passage of NAGPRA still has, apparently, a lingering effect. It is, perhaps, also a direct reflection of the issues in NAGPRA I outlined above: lack of funding, lack of training, legal complexity, and the historical nature of Native American collections in U.S. museums.

It is my hope that upon reading this brief afterword, another student will attempt to address this topic prepared with the knowledge that, while NAGPRA is in its second decade, it is still perceived as radical enough to be intimidating. So, dear future student, take this information and use it to do what I could not: re-envision NAGPRA as legislation to be celebrated for its clarity and effectiveness.

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Researcher's Biography

Mattie Reynolds is a member of the Choctaw Nation of Oklahoma and has extensive experience in museums as well as working with Native communities.

While pursuing her Master's degree in the Arts Administration program at the University of Oregon (UO), Mattie acted as the Steward's Assistant for the UO Many Nations Longhouse. As the Steward's Assistant, she was responsible for ensuring that Native students and community members as well as campus organizations that used the Longhouse followed the policy developed to respect traditional use practices. In addition to opening and closing the Longhouse for events, Mattie also worked closely with the Steward to develop several programs celebrating Native students and the local Native community. Mattie co-curated two community art shows, "Gatherings" and "First Frost", which included selecting artwork, developing event collateral, organizing opening events, and developing loan agreements through the UO. Mattie also organized and hosted a traditional story telling night with three local tribal elders.

Mattie's experience working in museums is also extensive. In 2012, she did extensive visitor data collection for the UO Museum of Natural and Cultural History, Eugene, OR, for an evaluation of a prototype exhibit. In addition, she and a team analyzed and submitted for review a report regarding visitor experience. In the summer of 2013, she was the repatriation intern at the Harvard Peabody Museum of Archaeology and Ethnology in Cambridge, MA, where she was responsible for conducting research related to several NAGPRA claims. In March 2014, with a team of four other graduate students, Mattie co-curated an exhibition entitled "Object/Subject: Femininity in Contemporary Culture". The exhibition was hosted by The Feminist Museum, an organization that she co-founded. Currently, she interns as the repatriation assistant at the Portland Art Museum, Portland, OR, addressing several existing NAGPRA claims.