BUILDING ACCORD BETWEEN MUSEUMS AND TRIBES: NAGPRA IN PRACTICE

James Breckenridge*

I. INTRODUCTION

The 1990 approval of the Native American Graves Protection and Repatriation Act (NAGPRA), brought sweeping changes to the legal framework that governs the control, acquisition, and study of Native American remains and artifacts. The rights and obligations concerning these changed significantly for Native American peoples, federally funded museums, and art dealers, among others. Principally, NAGPRA facilitates the repatriation of human remains and other objects of cultural heritage to Native American tribes that appropriately claim them, and it protects Native American and Native Hawaiian grave sites, including objects taken from them. NAGPRA also provided an amendment to the United States Criminal Code that lays out punitive measures for those participating in profit driven transactions involving Native American cultural items protected by NAGPRA. Correctly hailed by academicians and legislators as a cornerstone of human rights legislation in support of aboriginal peoples, NAGPRA is fulfilling the policy considerations enunciated by the legislators who backed the bill.

* BA Spanish and International Studies, University of Kansas 2002, MA Conference Interpreting, Monterey Institute of International Studies, 2009, JD anticipated in 2014, University of Missouri-Kansas City

2 Id. at § 3001(4). NAGPRA also applies to “federal agencies,” however, this study principally concerns federally funded museums dealing with artifacts. For an example of a NAGPRA case involving a federal agency in custody of Native American remains see Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207 (D. Nev. 2006).
3 Id. at § 3001(8) which provides that a museum is “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.” This study, however, focuses principally on the plain language type of museum that would exhibit artifacts to the public: See also Travis Willingham, Holding States and their Agencies Accountable under the Museum Provisions of the Native American Graves Protection and Repatriation Act, 71 UMKC L. Rev. 955 (Summer 2003) (discussing how a state or state agencies may be “museums” for purposes of NAGPRA, especially when state laws grant control over Native American human remains to the state itself).
But NAGPRA also addresses, in some fashion, the concerns of those museum professionals who fear the wholesale emptying of their collections under the Act. Indeed, this fear was addressed during legislative discussions and it was said that the Act should not produce a “raid on museum collections.” Under NAGPRA, museums may choose to assert a defense of “right of possession.” Thus, NAGPRA strikes a tenuous balance between those who advocate for the return of protected objects of cultural heritage to native peoples and those who advocate for the conservation of art and artifacts by museums for future generations. Most importantly, NAGPRA attempts to correct the large scale disenfranchisement suffered by Native American peoples who were refused equitable access to judicial remedies in claims for conversion of objects of cultural heritage in the name of archaeology. In a sense, NAGPRA seeks to apply equally common law property concepts to Native American claims for the first time. This paper will analyze NAGPRA’s background and how the statute affects the rights and obligations of museums which hold Native American artifacts in their collections; present a case study of NAGPRA application involving the Nelson-Atkins Museum of Art and the Kansas Kickapoo Tribe; and it will study two possible extra-statutory theories for resolution of disputes between tribes and museums.

II. WHY NAGPRA IS HUMAN RIGHTS LEGISLATION

NAGPRA is considered to be human rights legislation for two principal reasons. Firstly, it attempts to correct the atrocious and barbaric injuries borne by Native American peoples and caused by the United States’ government, scientific community, and free market; and secondly, it allows Native American peoples access to legal claims for converted property where that access had been previously denied to them. The British and European Americans have a long and well-documented history of grave robbing and art theft on the North American continent. Perhaps the first of these instances are memorialized in the accounts of the Mayflower
Pilgrims who afforded Native Americans little of the sanctity of the dead that their own common law espoused. Thomas Jefferson, often recognized by scholars as “America’s first scientific grave robber,” performed detached and cold study of the Native American remains and funerary objects he stole from graves and documented his findings. Over the next two hundred years, this double standard of treatment became more pronounced. Dr. Samuel Morton, who in his day was widely regarded as a foremost expert on anatomy and anthropology, collected Native American heads in order to prove the inferiority of the race in the 1840s. Dr. Morton’s theories became official US policy when the Surgeon General ordered US Army personnel to collect Native American skulls and miscellaneous body parts for inclusion in the Army Medical Museum in 1868; this lead to over four thousand (4,000) heads being stolen from graves, battlefields, hospitals, and internment camps. This theory of inferiority was logically parallel to that provided by the Marshall court in 1823 in Johnson v. M’Intosh, perhaps indicating widespread scholarly belief at the time. Indeed, “tours of savage life” were popular as entertainment by the end of the 19th century and the market for Native American cultural objects, apart from bones, saw tremendous growth as these were novel for European Americans.

Museum professionals joined suit during this time and launched “collecting expeditions” which have been described as “fervid rip-and-run operations.” Others employed deceitful tactics, one example being New York’s American Museum of Natural History which staged a fake funeral for an Eskimo man to prevent his son from learning that the museum had stolen the remains. It was not until 1981 that the archaeological community finally developed a code of ethics that recognized that the rights of those being studied should take  

---

10 One pilgrim expedition account reads “We brought sundry of the prettiest things away with us, and covered up the corpse again.” Dwight B. Heath, Mourt’s Relation: A Journal of the Pilgrims at Plymouth 28 (1986).
11 Trope Echo Hawk, supra note 6, at 38 (discussing how at common law that there can be no property interest in the dead, and how it is a right of the dead and a charge on the quick to let the buried rest); but cf. Thorpe v. Borough of Thorpe, No. 3:10–CV–01317, 2011 WL 5878377 (M.D. Pa. Nov. 23, 2011). This case relates the story of Jim Thorpe’s third wife who, before a traditional Sac and Fox burial service could be completed, ordered the removal of his casket and proceeded to “shop around” his remains looking to barter a deal with anyone she could. The court record reads: “a deal was made to bury [the remains] in the Boroughs of East Mauch Chunk and Mauch Chunk, Pennsylvania. The boroughs then consolidated under one new name, ‘Borough of Jim Thorpe. The agreement between the Borough and Jim Thorp’s widow stated that she would not ‘remove or cause to be removed the body of her said husband, Jim Thorpe from the confines of the Borough, so long as the boroughs of East Mauch Chunk and Mauch Chunk ... are officially known and designated as ‘Jim Thorpe.’” It is not clear whether these actions constituted a “sale of property” per se, but it could be argued that they did. Subsequent to the deal being made, Jim Thorpe’s lineal descendants presented a claim under NAGPRA for the repatriation of the body.
12 Yasaitis, supra note 6 at 262.
13 See Samuel George Morton, Crania Americana; or, A Comparative View of the Skulls of Various Aboriginal Nations of North and South America; To which is Prefixed An Essay on the Varieties of the Human Species (1839).
14 Yasaitis, supra note 6 at 260-61.
15 Johnson v. M’Intosh, 21 U.S. 543, 590 (1823) (discussing in dicta how Native Americans were essentially savage nomads, inferior to whites, and incapable of being incorporated into society).
16 Yasaitis, supra note 6 at 261.
17 See Trope Echo Hawk, supra note 6 at 41.
18 Id. at 41-2.
precedence over the rights of archaeological study. However, the 1980s and 1990s saw a tremendous rise in the commercial value of Native American artifacts. Looting on Native American reservations increased accordingly, the effects of which have been well documented and often include the destruction of the sole source of archaeological information associated with certain lost objects in many cases. While clearly injurious to the fields of archaeology and history, for many Native American peoples this looting is sacrilege. So extensive was the free flow of personal property from Native American peoples to European and American museums and collectors, which by roughly 1950 more cultural property was possessed by non-Native Americans than by Native Americans. Additionally, many objects of cultural heritage were and are discovered on private lands. Prior to the passage of the NAGPRA, objects of cultural heritage found on private lands were totally unregulated and thus subjugated to free market shortcomings where they had in some instances become a hot commodity

---

19 Yasaitis, supra note 6 at 263. See James A.R. Nafziger, The Protection and Repatriation of Indigenous Cultural Heritage in the United States, 14 WILLAMETTE J. INT’L L. DISP. RESOL. 175, 183 (2006) (speaking to the tradition of the scientific and museum communities in United States of having “substantial if not unlimited access to, and control over, ‘found’ or ‘discovered’ remains and cultural objects for purposes of more or less permanent study.”)


21 Mihesuah, supra note 20 at 6 (stating how contention exists between amateur and professional archaeologists, members of the former sometimes asserting that the academic community does not do a better job documenting findings than regular hobbyists; and also stating that many hobbyists, including Boy Scout troops, improperly excavate making sites useless for study); cf. Curtis M. Hinsley Jr., Digging for Identity: Reflections on the Cultural Background of Collecting, in REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 37, 38 (Devon A. Mihesuah, ed., 2000) (quoting Mark Harrington, an archeologist who in 1924 stated “It was sickening to an archeologist to see the skeletons chopped to pieces with hoes and dragged ruthlessly forth to be crushed underfoot by the vandals - who were interested only in finding something to sell, caring nothing for the history of a vanished people...What could I do? there was no way of stopping the destruction of so much that might have been of value to science - so I made the best of it and bought from the diggers, and from those who had financed them, such of the artifacts as I thought we needed;” and further quoting Harry Elrod from 1991 who stated “I know some boys that make $20,000 in the wintertime digging pots. Ain’t but just a very few diggers...they’re farmers and they drive tractors and anything else they can do. They make enough money...and they sit on their ass until next winter”).

22 Nichols et al, supra note 20 at 31.

23 Trope Echo-Hawk, supra note 6 at 43-44. “By the time it ended there was more Kwakiutl material in Milwaukee than in Mamalilikulla, more Salish pieces in Cambridge than in Comox. The City of Washington contained more Northwest Coast material than the state of Washington and New York City probably housed more British Columbia material than British Columbia itself.”

24 Nichols et al., supra note 20, at 32.

and in others, obstacles to development. A prime example is the story of the Zuni ancestral funerary site Heshoda Imk’osk’wa. A portion of the site falling directly outside reservation boundaries was sold to a developer in 1982, cleared of what were considered important artifacts, and then back-hoed, crushing graves and scattering bones while the remediless Zuni could only watch from their side of the fence.26

The Carter Administration ordered a one-year study covering Native American property transfer in 1979 which concluded that while some sacred objects were sold by their original Native owners, many sacred objects had a cloud on title; indeed most were stolen and there were many cases where religious property was converted and sold by Native Americans who had no right to do so.27 However, oftentimes when Native Americans sought legal remedy in courts they faced insurmountable obstruction to their equal access of justice.28 This wide-scale disenfranchisement made recovery of lost chattels difficult.29

The legislative debate surrounding the enactment of NAGPRA contemplated this and many other issues;30 and the Act’s design lays a roadmap about these concerns that helps to navigate the rights and obligations of museums and tribes31 that may or may not lay competing claims to NAGPRA protected items. The Act first places an affirmative duty on federally funded museums to catalogue Native American associated funerary objects and human remains, which have an intrinsic definition.32 By doing so, “museums disclose, consult, and make decisions as to cultural affiliation [and then] publish[...a] Notice of Inventory Completion of the decision[s] as to which tribes are enfranchised to request the remains” and funerary objects.33 The official inventory contains the results of the consultations with the relevant Native American tribes.34 Additionally, museums need to follow a separate process for cultural items which include intrinsically defined unassociated funerary objects, sacred objects and objects of cultural patrimony.35 This process includes providing a generalized summary to NAPGRA that describes these items; but this summary is not the result of a consultation and is not a decision document.36 A summary is merely disclosure, and tribes may then request to consult on items located by establishing contact with the museum.37 The purpose of both of these is to put tribes on notice of property that is subject to a potential claim for repatriation. For repatriation to occur, the law prescribes that the tribe establish that it is a

---

26 Nichols et al., supra note 20, at 32-33.
27 Trope Echo-Hawk, supra note 6, at 44.
28 Daniel J. Hurtado, Native American Graves Protection and Repatriation Act: Does it Subject Museums to an Unconstitutional “Taking”? , 6 Hofstra Prop. L.J. 1, 2 (Fall 1993).
29 Id.
30 See Trope Echo-Hawk, supra note 6; Yasaitis, supra note 6.
31 Per 25 U.S.C 3005(a)(5)(A-C) lineal descendants may also present NAGPRA claims although this is rare. See Interview with Sherry Hutt, Ph.D., Program Manager, National NAGPRA Program, National Park Service, in Wash. D.C. (June 1, 2012) [hereinafter Hutt Interview].
33 Hutt Interview, supra note 31.
34 Id.
36 Hutt Interview, supra note 31.
37 Id.
federally recognized tribe which can show cultural affiliation, that the item is within one of those definitions of cultural items protected under NAGPRA, and that the museum is federally funded. Then a claim may be submitted to the museum. If the museum deems this claim complete, a document called an “Intent to Repatriate” is published in The Federal Register. Thirty days later, if no other competing claims are made, the museum can transfer control to the claimant.

III. HOW NAGPRA HAS BEEN SUCCESSFUL

Through the passage of NAGPRA, for the first time Native American tribes in the United States were presented with concrete measures to help them recover lost property. Essentially, the law redefined the policy issue surrounding cultural property from the viewpoint of museums and archaeologists to that of native peoples and established rules of ownership and control of cultural property. Aside from this, NAGPRA also has successfully caused the opening of a formal dialogue between museums and tribes through placing an affirmative duty on museums to consult with tribes concerning human remains and associated funerary objects. In many instances, this has resulted in increased knowledge regarding certain artifacts’ history and tribal history as well. NAGPRA financing is available for the consultation process; this consists of furnishing grants to consultation participants who apply for them, thus defraying the cost of compliance with the law. From 1994 to 2008, over $31,000,000 in grants were provided to 260 tribes, Native Hawaiian organizations and museums. There is overwhelming anecdotal evidence from grant recipients that the results of this program are undisputedly positive. Recipient Theresa Pasqual of the Acoma Pueblo from New Mexico said the following regarding the program:

Repatriation is often a long and difficult journey; the NAGPRA Grants Program provides the resources to allow tribes, museums and other institutions to walk that journey together. The positive relationships that are fostered out of consultation allow tribes to bring closure to many of the legacy issues that remain as well as look toward the future...
Museums and historical societies too have similarly praised the program. Bridget Ambler of the Colorado Historical Society was quoted as saying:

We forged deeply meaningful community relationships that enhanced our exhibits, provided outreach opportunities and fortified our educational programming. The end result is a trust relationship built upon transparency and hard work for all the parties, and a solution that addresses tribes’ initial concerns to identify a final resting place for some of Colorado’s earliest inhabitants.\(^{46}\)

For museums with medium to large collections of Native American artifacts, the expenses of compliance can be significant and at times overwhelming. The grants program provides much needed relief to museums that appropriately seek assistance in becoming compliant with NAGPRA’s provisions, as revealed by Megon Noble, NAGPRA Coordinator for the Burke Museum of the University of Washington:

It is estimated that the Burke has dedicated in excess of $1 million of its own funding in compliance of NAGPRA. The Documentation Grants have provided a critical supplement to these funds. These funds enabled the Burke to dedicate more staff time to NAGPRA, hire graduate student assistants, and most importantly, provide travel funds to allow for in-person consultation meetings. These in-depth consultations have significantly strengthened our relationships with tribes and have led to lasting relationships that will continue to go beyond NAGPRA efforts.\(^{47}\)

Although the contributions that have been made through the grants program are significant, lack of funding was named as a main obstacle to further advancement of NAGPRA goals in the NAGPRA Review Committee’s 2011 Report to Congress.\(^{48}\)

IV. MUSEUM CONCERNS AND NAGPRA

Scholarly debate continues in support and critique of cultural nationalism and cultural internationalism.\(^{49}\) The former argues that cultural property belongs to, and in, its place of origin; the latter, that cultural property is the property of all humankind and that this should be freely transferrable to promote research and

\(^{46}\) Id.

\(^{47}\) Id.


\(^{49}\) Legislative history may indicate that NAGPRA’s intent is more nationalist than internationalist. See 136 Cong. Rec. 35,680 (1990) (statement of Sen. Domenici) (highlighting the importance of returning to tribal control sacred objects and objects of cultural patrimony).
preservation,\textsuperscript{50} and that museums are better equipped to ensure proper conservation.\textsuperscript{51} Alan Shestack, a former president of the Association of Art Museum Directors, and the former director of The National Gallery of Art in Washington D.C., wrote the following in his essay, The Museum and Cultural Property: The Transformation of Institutional Ethics:

"[I]f you read the mission statements of most art museums you will find that we claim among our highest priorities the preservation of works of art for future generations... this goal, is very hard to reconcile with turning our backs on the pillaging or destruction of significant cultural remains...It is not easy psychologically...[m]useum professionals are acquirers...[who] go into the profession because [of] the desire to accumulate and bring together objects of quality...We are personally and professionally devoted to adding to and improving our holdings - that is what makes us tick. And to consciously or intentionally turn down a highly desirable object we can afford to buy on the basis that we suspect that it might have been removed illegally...is a very hard thing to do. But those museums which do so, it seems to me, can and should apply a certain degree of moral pressure on the others."\textsuperscript{52}

This encapsulates the dichotomy which exists in the minds of many museum professionals: what is the best way to collect and preserve art and artifacts for future generations and at the same time, not support the destruction of these, wrought by pillaging, so that a museum may house them? Beyond this discourse, recent tendencies show that the vast majority of museums want to be ethical collectors, that they fear the soiling of their reputations, and that previously commonplace unethical and illegal practices have virtually disappeared.\textsuperscript{53} The enactment of NAGPRA, and museum compliance with its statutory obligations, goes hand in hand with these tendencies. By providing specific definitions for protected cultural property, right of possession, and control of cultural property, the law provides great clarity regarding what practices are forbidden, necessary, and permissible; this may help museum professionals navigate controverted situations and ethical dilemmas. Additionally, it is important to note that NAGPRA does not attribute wrongdoing

\textsuperscript{50} Peter T. Wendel, Protecting Newly Discovered Antiquities: Thinking Outside the “Fee Simple” Box, 76 Fordham L. Rev. 1015, 1027 (Nov. 2007).

\textsuperscript{51} T.J. Ferguson, Roger Anyon, Edmund J. Ladd, Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems, in Repatriation Reader: Who Owns American Indian Remains? 239, 255 (Devon A. Mihesuah, ed., 2000). Ferguson, Anyon Ladd recount the repatriation process of the Zuni War Gods and how many museums wanted to make permanent loans to Zuni museums. The Denver Art Museum, they report, said it could not repatriate the War Gods “in good conscience unless the Zuni Tribe had a commitment to ensuring that they were not stolen again.” Although the tribe and the museum worked together to build a safe place which met Zuni cultural requirements for open exposure to the weather and elements for some of the War Gods, the protection of “unsecured shrines” elsewhere on the reservation was a “law enforcement problem.” In 1990 four War Gods were stolen from an “unprotected shrine,” and upon investigation it was revealed that the Zuni had no photographs or other documentation of the stolen artifacts.


\textsuperscript{53} Id. at 98.
to museums, and National NAGPRA staff members do not initiate civil penalties investigations.\textsuperscript{54} Museums that repatriate in good faith are not liable for claims by an aggrieved party that lays a competing claim, or for violations of state law.\textsuperscript{55}

Notwithstanding all of this, NAGPRA has also been criticized by some museum professionals who feel that it has “created a confrontational climate,”\textsuperscript{56} and because it provides no statute of limitations which might safeguard museum collections from repatriation claims.\textsuperscript{57} In some situations, it may be difficult for museums to be able to predict what their collections will ultimately contain; naturally this has implications for museum planning. The idea of imposing a statute of limitations may allay these concerns, but it has its detractors within the museum world, too. The proposed Cultural Property Repose Act of the 1980s included provisions for a generous five-year statute of limitations where an object would have had to be on public display, listed in prominent publications, and included in a national database.\textsuperscript{58} This proposed law was overwhelmingly opposed by the Association of Art Museum Directors who felt that this would incentivize thieves and pillagers,\textsuperscript{29} and it failed to become law. Notwithstanding, Native American tribes are not subject to state statutes of limitations and it may be argued that they are also exempt from the federal statute of limitations.\textsuperscript{60} The theory of a statute of limitations rests upon adequacy of opportunity to assert a claim. With Native American tribes disenfranchisement was widespread and ongoing; and until NAGPRA, virtually no legal redress was available for property conversion. Perhaps Congress recognized this when it explicitly chose to leave the concept of a statute of limitations out of NAGPRA when the act was drafted and enacted.

Ultimately, if a cultural internationalist-cum-museum professional believes that an artwork should remain in a collection for proper conservation, public display, and scientific study, an appropriately constructed NAGPRA claim for repatriation may be defeated by an assertion of the defense of “right of possession.”\textsuperscript{61} Right of possession “means possession obtained with the voluntary consent of an individual or group that had authority of alienation.”\textsuperscript{62} If a claimed unassociated funerary object, sacred object, or object of cultural patrimony was alienated from a tribe or individual by voluntary consent of someone who had the authority to alienate that object at the time it was alienated, a museum may assert right of possession.\textsuperscript{63} Records of provenance are thus even more important and can be the deciding factor in a case of disputed right of possession. In such a dispute three tracks are possible. First, claims can be brought to the NAGPRA Review Committee and a hearing held to evaluate

\textsuperscript{54} Hutt Interview, supra note 31.
\textsuperscript{56} Nafziger, supra note 19, at 220
\textsuperscript{57} Interview with Gaylord Torrence, Senior Curator of American Indian Art at the Nelson-Atkins Museum of Art, in Kan. City (May 15, 2012) [hereinafter Torrence Interview].
\textsuperscript{58} Shestack, supra note 52 at 94.
\textsuperscript{59} Id. at 95.
\textsuperscript{60} Walter R. Echo-Hawk, Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources, 14 N.Y.U. REV. L. SOC. CHANGE 437, 444 1986).
\textsuperscript{62} Id.
\textsuperscript{63} Id. (The statute does not specify that authority of alienation is analyzed at the moment of initial alienation, but Sherry Hutt confirmed this is the case. Hutt Interview, supra note 31.)
competing evidence after which a recommendation may be made for the informal disposition of the claim; second, either party can bring suit against the other, as US District Courts have jurisdiction over NAGPRA claims; or third, both of these can occur simultaneously or consecutively. In such a lawsuit, the question of right of possession would be a question of fact for the jury; however, to date, no such suits have been brought.

V. THE KICKAPOO PRAYER STICK AND THE NELSON-ATKINS MUSEUM OF ART OF KANSAS CITY

A Kickapoo prayer stick is a small, flat, wooden carving, longer than it is wide, configured with design cutouts and iconography. Oftentimes these were made and consecrated by Kenekuk (c. 1790–1852), the Kickapoo prophet, whose adherents purchased, owned, and used these objects for prayer. In 2002, Gaylord Torrence, The Senior Curator of American Indian Art at The Nelson-Atkins Museum of Art, acquired one of these prayer sticks from the collection of Mr. and Mrs. Larry Frank in Lawrence, Kansas where it had remained for some thirty years. The prayer stick was eventually included in the museum’s permanent collection and placed on ongoing display until sometime in 2007, when a group of schoolchildren on field trip from the Kickapoo Nation recognized it as having originated from their tribe. The students reported back to the tribal elders and the tribe decided to initiate a claim under NAGPRA for repatriation of the sacred object. This is the background of the only NAGPRA claim that the Nelson-Atkins has ever addressed to date.

Many curiosities regarding this particular claim came to light over the course of the repatriation process. It would seem that few, if any, NAGPRA claims begin by a tribe being put on notice by schoolchildren who spot an object of cultural heritage on display in museums. Generally, the NAGPRA provisions requiring museums to catalogue or summarize cultural property serve to put tribes on notice of potential claims they might bring. Additionally, in this case the Nelson-Atkins Museum had conducted a thorough investigation of the prayer

---

64 See Nafziger, supra note 19, at 200 (stating how cases are rare in which the Review Committee’s findings are disputed, but that in any event, after an official Review Committee’s recommendation is issued, the committee’s work is over).
65 Hutt Interview, supra note 31.
67 Hutt Interview, supra note 31.
68 This article references the Kansas Kickapoo Tribe, residing on a reservation ceded to the Kickapoo by the United States government under the Treaty of Castor Hill. The Kansas reservation combined individuals from a Missouri Kickapoo band with others who had relocated from Illinois and who were followers of Kenekuk, who was known as the “Kickapoo Prophet.” Kenekuk’s teachings borrowed elements from Christianity and included prohibitions on alcohol, polygyny, and warfare; he and his followers won converts from the neighboring Potawatomi tribe who joined the Kickapoo tribe in 1851. Charles Callender, Richard K. Pope, Susan M. Pope, Kickapoo, Handbook of North American Indians, Volume 15: Northeast, 656, 657, 662-63 (Bruce G. Trigger, vol. ed., 1978).
69 Torrence Interview, supra note 57.
70 Id.
72 Torrence Interview, supra note 57.
stick before acquiring it. Curator Gaylord Torrence had checked to see if the prayer stick had been claimed or listed through NAGPRA, spoken with other museums which held prayer sticks in their collections, and discovered that all of the piece’s provenance was well documented\textsuperscript{73} - including the initial act of alienation when a Kickapoo woman named Martha Jackson sold the prayer stick in 1939 to a gentleman archaeologist named Floyd Schultz from Clay Center, Kansas.\textsuperscript{74} When the Kansas Kickapoo Tribe decided to claim the object, the tribal representative simply requested over the phone that the prayer stick be returned to the tribe under NAGPRA.\textsuperscript{75} This the museum could not do were it to remain compliant with the NAGPRA provisions requiring publication of a notice in The Federal Register and the consultation process. Desirous of adhering to prescribed practices, and of keeping the prayer stick in its collection, the already NAGPRA compliant Nelson-Atkins Museum sought legal advice by hosting a working afternoon and luncheon, inviting about fifteen members of the Kansas Kickapoo Tribe.\textsuperscript{76}

The goal of the Nelson-Atkins Museum was to show the Kickapoo people how the prayer stick, as well as other Native American cultural objects, were properly kept and handled, and to try to persuade the tribe to permit the museum to continue to display the artifact and retain possession of it.\textsuperscript{77} When over thirty individuals showed up at the museum on the day consultations began it became apparent that the museum was, in fact, dealing with two overlapping interest groups: those who represented the tribe and those who represented the church of Kenekuk.\textsuperscript{78} Throughout the afternoon, several representatives from the tribe and the museum spoke about the importance of the prayer stick.\textsuperscript{79} Some tribal participants cried openly for the duration of the meeting.\textsuperscript{80} It was a tense process, charged with emotion, and ultimately, after protracted negotiations, the parties amicably decided that repatriation would occur with an agreement that the museum be allowed to occasionally display the object in future.\textsuperscript{81} Following this, the NAGPRA Notice of Intent to Repatriate was published in The Federal Register. This publication was drawn up after it was decided that the tribe was federally recognized by the Bureau of Indian Affairs, the prayer stick was within the definition of sacred object as defined by NAGPRA, appropriate cultural affiliation was established by the claimant, and the museum would not assert right of possession. After publication, the mandatory waiting period passed to see if any other claimants would step forward and the prayer stick was personally delivered to the Kickapoo Nation by the curator.\textsuperscript{82} This entire process took over a year.

\textbf{VI. LEGAL ANALYSIS AND COUNTERFACTUAL HISTORY}

\textsuperscript{73} Id.
\textsuperscript{74} Notice, supra note 71.
\textsuperscript{75} Torrence Interview, supra note 57.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Interview with John R. Phillips, Partner at Husch Blackwell LLP and Counsel to the Nelson Gallery Foundation Board of Directors, in Kan. City (Feb. 15, 2012).
\textsuperscript{82} Torrence Interview, supra note 57
From the outset of negotiations it appeared that the claim presented to the Nelson-Atkins Museum of Art was complete regarding NAGPRA requirements. It was easily established that the Nelson-Atkins Museum of Art was a federally funded museum and that the Kansas Kickapoo Tribe was a federally recognized tribe. The questions of cultural affiliation, and whether the prayer stick fit into a category of cultural objects under NAGPRA required more analysis, but were also clearly answered.

Cultural affiliation is described in NAGPRA as “[A] relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe...and an identifiable earlier group.”83 Evidence that reasonably establishes this “shared group identity” can include archaeological, linguistic, historical evidence or expert opinion, among others.84 Clearly, from the language inscribed on the prayer stick, and from historical evidence offered by experts, including the Curator of American Indian Art at the Nelson-Atkins, the prayer stick was indubitably Kickapoo in origin. Indeed, these are still used by present day adherents of the church of Kenekuk within the tribe, and this was undisputed.

Because of this present day use, the prayer stick also falls within the category of “sacred objects,” fulfilling the criteria for the NAGPRA claim for repatriation; sacred objects are defined in the statute as ceremonial objects needed for the practice of traditional religions by present day adherents.85 What is interesting about the Kenekuk Church is that at some point, its religious adherents lost the ability to consecrate newly made prayer sticks.86 Consequently, existing prayer sticks are dwindling in supply now, even though they were once made, consecrated, sold, and oftentimes buried with the individuals who used them for prayer.87 Kickapoo prayer sticks have also been reported to be included in the collections of other United States museums.88 These facts helped to solidify the position that the Nelson-Atkins prayer stick was firmly within the sacred objects category. Unable to source more of these, the members of the Kenekuk Church showed they did need the prayer stick for the practice of their traditional religion.

Based on records of provenance, assertion of the defense of right of possession might have been possible. The initial act of alienation occurred during a time when these prayer sticks were freely alienable by their individual owners.89 The provenance indicates an apparent sale, but there is no sale’s receipt included that would confirm this.90 What is certain from the documented chain of custody is that the piece was obtained from Martha Jackson, purportedly a Kickapoo woman91 who married into the Potawatomi tribe, in 1939.92 The transfer itself occurred on the Potawatomi Indian Reservation and, while the man

---

86 Torrence Interview, supra note 57.
87 Id.
88 Id.
89 Id.
90 Id.
91 Neither the Kickapoo nor the Potawatomi census nor official blood quantum registries included a Martha Jackson in the immediate years preceding and following 1939.
92 Notice, supra note 71.
who took control of the prayer stick was well reputed as an ethical collector,\textsuperscript{93} there is little precise evidence regarding the nature of this transfer and the circumstances under which it occurred. Were the right of possession defense to have been asserted, the Nelson-Atkins Museum might have strengthened its ownership position by undertaking additional research.

In the end, the process of repatriation of the Kickapoo prayer stick turned on the goodwill negotiations that both the tribe and museum were willing to hold; these kept with the spirit and guidelines of NAGPRA. What was agreed to may perhaps best be described as a mutually beneficial repatriation agreement. Both parties were able to emerge from the process with perhaps more than would have been possible had either of the extreme scenarios played out, i.e. complete repatriation with no possibility of museum display in future, or total denial of the sacred object to the Kickapoo people had right of possession been successfully asserted. Mutually beneficial repatriation agreements such as this have become highly regarded and often studied in other realms of the museum and art world as a means of reducing international legal struggles and curbing trade in illicit artworks and antiquities,\textsuperscript{94} however their application within the framework of NAGPRA is rather limited. Essentially, under NAGPRA, museums have little to bargain with in the negotiation process. Unless a museum can assert right of possession; or there are multiple claimants for the same cultural object; or unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States\textsuperscript{95} the object must be “expeditiously returned” once cultural affiliation to the item is shown by the federally recognized tribe.\textsuperscript{96} Therefore, museums really have very little bargaining power should they decide to engage in negotiations regarding the ultimate disposition of a NAGPRA protected article. Tribes may desist in their claims should they be convinced for any reason that an item is better off in a museum, however it remains to be seen whether establishing necessary elements for repatriation on the part of the tribe creates an affirmative duty on the museum that would otherwise be punishable if not complied with, were a tribe to withhold its claim. To date, no cases speak to this occurrence.

Nothing within NAGPRA would prevent the Nelson-Atkins or any museum from complying with transfer of control of a NAGPRA protected cultural item to a tribe and then negotiating a term of years so that it be able to continue to use the item. Indeed, in the case of items of questionable provenance, this would give good, albeit limited title to a museum so that the item in question would be freely transferrable. The concept of long term loans may also help to defeat the idea that cultural nationalism is diametrically opposed

\textsuperscript{93} Id.
\textsuperscript{95} 25 U.S.C. 3005(b).
\textsuperscript{96} 25 U.S.C. 3005(a)(2).
to cultural internationalism. By participating in loans, tribes disseminate information about their culture and history and further the agenda of cultural internationalists. Cultural nationalists may rest assured that any cloud on title is cleared and the tribal ownership position is fully restored. Additionally, there are economic considerations which support the idea of negotiating leases for repatriated cultural objects. Neoclassical economic theory asserts that when goods are freely transferrable utility is maximized. If the market for Native American cultural objects continues to increase, it is feasible that a museum could actually offset costs of initial acquisition through selling its present possessory interest. Tribes whose cultural objects are in demand could theoretically sell terms of years for revenue generation. Cultural palatability of such a proposal would, of course, vary with each tribe and in every circumstance.

Although currently unlikely to prevail against a NAGPRA repatriation claim, the equitable defense of laches would be theoretically possible to assert. Central to laches are the questions of how reasonable or excusable a delay in taking action might be, injury borne by the asserting party because of the delay, and a balancing of all the equities involved in a particular claim. The doctrine of laches applies where no statute of limitations governs, as would be the case with NAGPRA.

Due to the requirements that museums catalogue or summarize Native American cultural items within their collections and make this information public, it is possible to envisage a situation in which certain tribes may be on notice regarding potential claims, and delay for whatever reason in presenting them. Because at common law there can be no property interest in the dead, this would be particularly applicable in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony, perhaps where tribes have already consulted regarding initiating a NAGPRA claim and then delayed. Were museums to detrimentally rely on that delay, perhaps interpreting delay as desistance, a court might entertain a laches claim. However, as it is the duty of the court to conduct a balancing of all equities, it seems hardly possible that the entire history of human rights violations borne by Native Americans (and well documented and commented on by legislators and scholars in light of NAGPRA), would not outweigh the claim of a museum that it need a particular object of cultural heritage for ongoing study, to honor loan agreements, or any other detriment the museum could articulate.

---

97 See Falkoff, supra note 94, at 286.
98 Id.
99 Wendel, supra note 50, at 1019.
100 See Ferguson et al., supra note 51, at 252 (explaining how most Zunis are deeply saddened when they see personal religious objects curated in museums, and repulsed by curation of ceremonial objects).
102 Id.
VII. CONCLUSION

Although NAGPRA remains controversial in many circles, the legislation has wrought much good in terms of making redress for human rights violations committed against native peoples through the equitable application of existing common law property concepts. By clearly defining the rights and obligations of competing claimants of Native American cultural property, NAGPRA frees museums and tribes from complex legal battles over contested property rights and fosters dialogue between parties. Additionally, it allows for creative solutions, such as long term leases of artworks, which may forge a path through traditional arguments made by cultural nationalists and cultural internationalists so that the United States and its institutions may legitimize their collections and Native Americans may move past their pain.
Appendix

Table of NAGPRA Protected Items

<table>
<thead>
<tr>
<th>NAGPRA Item</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human Remains</td>
<td>Physical remains of the body of a person of Native American ancestry. 43 C.F. R. § 10.2(d)(1).</td>
</tr>
<tr>
<td>Associated funerary objects</td>
<td>Objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. 25 U.S.C. § 3001(3)(A).</td>
</tr>
<tr>
<td>Unassociated funerary objects</td>
<td>Objects that, as part of the death right or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the federal agency or museum and the objects can be identified by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. 25 U.S.C. § 3001(3)(B).</td>
</tr>
<tr>
<td>Sacred objects</td>
<td>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. 25 U.S.C. § 3001(3)(C).</td>
</tr>
<tr>
<td>Objects of cultural patrimony</td>
<td>Objects 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. 25 U.S.C. § 3001(3)(D).</td>
</tr>
</tbody>
</table>

103 NATIVE AMERICAN GRAVES AND REPATRIATION, 5 (Kathy J. Bergmann, ed., 2011).