FOR THE PAST, FOR THE FUTURE: NAGPRA, REPATRIATION, AND THE NATIVE AMERICAN-ARCHAEOLOGIST RELATIONSHIP

by

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Certificate of Approval

This is to certify that the accompanying thesis by Ian Edward Kretzler
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To us the ashes of our ancestors are sacred and their resting place is hallowed ground.

You wander far from the graves of your ancestors and seemingly without regret.

-Chief Seattle, 1854[1]

[1] Speech to Territorial Governor Isaac Stevens, Euro-American settlers, and local Native American tribes. The full text of the speech can be found in Turner 1989.

Introduction

Between 1962 and 1972 in Broome County, New York, construction activity associated with the building of Interstate 81 disturbed a set of historic and prehistoric graves. Following their discovery, the State of New York called in a group of archaeologists who later identified the graves of 19th century Euro-American farmers, as well as those of 18th century and prehistoric Native Americans. Undertakers eventually arrived and proceeded to disinter and immediately rebury the Euro-American individuals a safe distance from the project. The archaeologists, however, excavated the Native Americans and sent them to a local museum. To this day, they have not been studied (Dongoske 1996:293).

In the United States, respect for the dead is deeply ingrained in social and legal institutions. Every state contains numerous laws that protect burials and forbid grave robbing, regardless of the interred individual's status or ethnicity. Throughout American history, however, these laws have failed to protect the graves of Native Americans. The incident at Broome County is just one of countless incidents in which the bodies of Native Americans were unearthed and subsequently displayed at museums, government agencies, universities, and even tourist attractions. Estimates for the number of disinterred native individuals range from one hundred thousand to two million. These practices have affected practically every Native American tribe in the United States (Trope and Echo-Hawk 2000:125).

Propelled by centuries of imperialist U.S. government policies that cast them as a vanishing inferior race, Native Americans suffered displacement, massacres, and cultural extermination. Coinciding with—and often facilitating—the United States' colonialist expansion, the nascent discipline of anthropology set out to record and salvage "disappearing" Native American cultures. In doing so, sacred human remains and burial

objects left tribal lands in untold numbers, almost exclusively without tribal consent (Fine-Dare 2002). At times, artifacts were stolen not from native burials, but from the still warm bodies of the deceased. The sacred Lakota Ghost Dance Shirt, for instance, was stripped from one of the Wounded Knee dead (Curtis 2010:237). Although nominally couched in the advancement of science, scholars treated Native Americans largely as "curiosities to be collected and sold" (Fine-Dare 2002:30). This persisted for decades but was not invulnerable, and by the mid-20th century, scholarly practices came under increased scrutiny by Native Americans and archaeologists alike.

Beginning in the 1960s Native American activists drew attention to what they believed was a lack of respect toward their sacred histories. Stimulated by rising numbers of Native Americans nationwide and revivals in cultural traditions (Fine-Dare 2002:85), the American Indian Movement (AIM) [1] spurred the passage of significant pieces of legislation that sought to correct historic wrongs endured by native peoples. The American Indians Religious Freedom Act (AIRFA) of 1978 and the Archaeological Resources Protection Act (ARPA) of 1979 extended legal protection to Native American spiritual beliefs and mandated consultation with tribes if archaeological excavation could threaten sacred areas. These legislative victories in hand, AIM continued to push for respectful treatment of native histories, focusing their attention on the issue of repatriation. Powerful organizations including the Native American Rights Fund (NARF) and American Indians against Desecration (AIAD), which formed in 1970 and 1978 respectively, began to challenge archaeology's treatment of native remains and artifacts. Due to their work, repatriation became a major issue in the 1980s, eventually resulting in the passage of numerous state laws aimed at protecting Native American burials and, for the first time, mandating the return of

[1] A list of acronyms used in this thesis can be found in Appendix A.

culturally affiliated sacred objects by museums (Fine-Dare 2002). These successes set the stage for a national repatriation debate, one that culminated with the passage of the Native American Graves Protection and Repatriation Act (NAGPRA)[2].

Touted as the "most important cultural heritage law ever enacted in the United States" (Nason 2008:108), NAGPRA became law on November 16, 1990. Its passage was not without contention, as prominent museums and archaeology organizations decried the law's repatriation requirements as a serious threat to collections and the viability of archaeology as a discipline. Congress ultimately rejected these concerns, and for the first time in U.S. history, extended full legal protection to Native American burials. NAGPRA brought about fundamental shifts in the practice of archaeology in the United States and sought to level the historically one-sided relationship between tribes and scholars. Clearly, Native Americans have a stake in their own history, and with the passage of NAGPRA, this interest finally attained legal validation and protection.

At only nine pages in length, NAGPRA is a relatively simple bill, but within these pages are three crucial statutes that forever altered Native American-archaeologist relations. First, NAGPRA protects Native American burials on federal and tribal land, requiring consultation with tribes prior to excavation and ensuring the transfer of any recovered remains to lineal descendants or culturally affiliated groups. Second, NAGPRA outlines severe penalties for the purchase and illegal transport of Native American human remains and cultural items. Attempting to counteract looting of Native American artifacts, this statute cements the law's aim to redefine Native Americans as peoples meriting respect and not as curios lost to time. Finally, and most significantly, NAGPRA requires federally funded institutions to compile an inventory of their human remains and associated funerary objects

[2] The full text of NAGPRA can be found in Appendix B.

and identify, if possible, the cultural affiliation of each item. They must then, upon request, repatriate these items to affiliated tribes. This procedure is of great symbolic value, as it recognizes that in the case of sacred remains, Native Americans hold preeminence to their use, display, and ultimate disposition.

Contrary to apocalyptic prognostications, NAGPRA's passage and implementation fostered a sense of cooperation between tribes and scholars and demonstrated that a culturally conscious archaeology was possible. New opportunities in osteology (Dongoske 1996; Rose et al. 1996), the use of oral tradition in archaeology (Thomas 2000), and the creation of new partnerships (Bernstein 1991; Fine-Dare 2002) are just a few of the many positives brought about by NAGPRA. Feelings of goodwill and collaboration persisted for close to a decade, but since then, the budding Native American-archaeologist relationship has become increasingly strained. Disputes have erupted over the fate of what are termed "culturally unaffiliated" remains, items that because of their extreme age or uncertain origins, have sat in museums free from repatriation. The most notable and controversial of these "culturally unaffiliated" remains is the individual known as Kennewick Man. The six-year legal battle for control of his skeleton highlighted NAGPRA's shortcomings and reignited the debate over the treatment of Native American pasts. In response, recent regulations passed in March 2010, attempted to clarify NAGPRA's intent toward "culturally unaffiliated" remains and avoid future Kennewick Man debacles. Unfortunately, these regulations have only exacerbated the problem, inciting further debate between Native Americans and archaeologists and eroding the goodwill generated by a decade of NAGPRA successes.

In the wake of Kennewick Man and these new regulations, important questions regarding NAGPRA's applicability and viability have been left unresolved. What should be done about "culturally unaffiliated" remains? What will be NAGPRA's legacy? Will it be

remembered as a transformative law that, despite setbacks, ushered in a new era of cooperation, or as an ambitious law that never lived up to its potential? Answers to these difficult questions are legion. Some scholars posit legal alterations to the law (Bruning 2006; Seidemann 2003), emphasize shifts in archaeological ethics (Colwell-Chanthaphonh and Ferguson 2006; Groarke and Warrick 2006), or assert that state laws can close NAGPRA's loopholes (Seidemann 2010). The solutions suggested by these scholars are not without merit and are the focus of later chapters. Ultimately, though, they only address symptoms of NAGPRA's deeper issues, for they do not fully consider the cultural forces inherent to repatriation debates. That such fervor characterizes legal fights over human remains and sacred funerary objects reveals that these objects are not just items with interesting histories; they are of utmost spiritual, scientific, and cultural importance to Native Americans and archaeologists. As I argue in this thesis, an evaluation of NAGPRA's background, implementation, and future cannot focus merely on specific issues that have sprung up around the law. Instead, a truly productive overview of the law must be grounded in an approach that analyzes the degree to which the law promoted, or failed to promote, cultural understanding and respect.

With this methodology, I embark on a synthesis of the scholarly literature surrounding NAGPRA and interviews conducted among individuals involved in what I call the Vancouver case. This particular repatriation example brought together officials from Fort Vancouver, Washington (FOVA), and members of the Vancouver Inter-Tribal Council (VITC), a group the represents numerous Northwest tribes, in positive ways and underscore that, even when confronted with some of NAGPRA's most volatile issues, resolution is possible. With the NAGPRA literature in one hand and my research into the Vancouver

case in the other, I seek to understand NAGPRA's successes and failings and map a course for future Native American-archaeologist successes.

Thus, this thesis will consider the following questions: how can cultures with disparate and ostensibly irreconcilable worldviews share and learn from the past without alienation or subjugation? How can repatriation continue to generate productive dialogue and cultural understanding? In this thesis, I attempt to show that answers to these questions exist, but that developing a responsible cooperative archaeology will take more than legal statutes; it will necessitate shifts in archaeological ethics as well as fresh approaches to repatriation and the treatment of sacred human remains. NAGPRA is a germinal piece of legislation, and in order to remain as such, archaeologists and Native Americans must drop incendiary polemics and focus on what unites them: a view that the past, as a source of pride, education, and cultural significance, warrants celebration and respect. To this end, the following chapters will center on the history of archaeology and its treatment of Native Americans, the passage of NAGPRA and the successes of its first decade, the problems with NAGPRA, the Vancouver case, and, finally, two chapters devoted to legal, ethical, and attitudinal changes that would improve Native American-archaeologist relations. Within these chapters, I employ a theoretical framework that accentuates Fine-Dare's (2002) concept of double silence, Nason's (2008) view of NAGPRA as a cultural document, and Colwell-Chanthaphonh and Ferguson's (2004, 2006) theory of virtue ethics.

In her overview of Native American-archaeologist relations, Fine-Dare forwards the concept of double silence. According to Fine-Dare, "double silence…occurs when one side cannot speak the truth because it does not have the power to do so, whereas the powerful side either does not have the information it needs to speak truthfully, or it must keep from speaking in order not to spill the beans of power" (2002:4). This uneven power dynamic

adversely shaped the Native American-archaeologist relationship for decades in that it actively silenced the two groups and negated the formation of cooperative partnerships. On the one hand, the ivory tower of academia isolated and silenced archaeology. The discipline was unwilling to consider the interests of native peoples, which it cast as irrelevant to scholars' scientific examination of the archaeological record. On the other hand, decades of racist government and scholarly practices left Native Americans marginalized and without power to influence the study of their culture. Excluded from the political and academic spheres responsible for the treatment of their sacred histories, tribes were powerless to stop the mass appropriation of native artifacts and human remains from tribal land. This double silence persisted for decades primarily because the power inequity between archaeologists and native peoples lay unchallenged. In many ways, archaeology had no incentive to loosen its control over the archaeological record and validate the views of Native Americans, for doing so would require scholars to surrender a degree of control over the study of the past. Tribes, however, eventually overcame historic marginalization, called archaeological practice into question, and spurred the passage of NAGPRA, a law that granted native epistemologies legal recognition and protection.

Though Fine-Dare focuses this concept on her historical tour of Native American-archaeologist relations, I believe it applies to all discussions of repatriation. For when problems with NAGPRA come to the fore, new expressions of double silence, and the alienating effects thereof, are sure to follow. Conversely, NAGPRA's successes represent instances in which tribes and scholars effectively opened up the silence, coming together as equals and ensuring honest respectful communication. Evaluating NAGPRA's implementation within the lens of double silence allows me to isolate its triumphs as well as tribulations, providing a base upon which to construct suggestions for its future.

I also make use of Nason's (2008) view that NAGPRA is not a detached piece of legislation, but a complex cultural document imbued with the long and oftentimes messy history between Native Americans and archaeologists. This perspective allows me to filter out the political and legal rhetoric that often dominate discussions of repatriation and show how NAGPRA's history, drafting, and implementation are replete with contrasting cultural assumptions that provide fertile ground for controversy. As such, this perspective features prominently in my chapter regarding Kennewick Man and problems with NAGPRA. In many ways, disputes surrounding the law are a result of stifling double silence, but they also represent occasions in which differing worldviews are not validated or reconciled in any meaningful way. Crucially, statements forwarded as solutions to NAGPRA's problems may seem entirely reasonable, but as Nason reminds us: "of course the catch is…'reasonable to whom?'" (2008:117). NAGPRA is a cultural issue, but its future cannot be predicated on solutions that satisfy the cultural concerns of only one party; they must validate the interests of Native Americans and archaeologists alike, and failing to do so will result in an increasing number of legal battles and barbed journal articles that undermine the vision and successes of NAGPRA.

Finally, I employ the idea of virtue ethics, as described by Colwell-Chanthaphonh and Ferguson (2004, 2006). In contrast to ethic statements that list acceptable behaviors and obligations, these authors argue for an ethics code that revolves around virtues, which implore archaeologists to be individuals of character. Acting according to a set of virtues, archaeologists create and sustain "sincere relationships guided by virtuous ideals—civility, cooperativeness, tactfulness, patience, trust, honesty, thoughtfulness, tolerance, and respect" (Colwell-Chanthaphonh and Ferguson 2004:23).

The central component by which virtue ethics operates is trust, which facilitates understanding, respect, and resolution. In contrast to double silence, trust cannot exist in relationships defined by inequality. Less powerful parties cannot fully trust those with more power, because nothing prevents powerful groups from domination. In turn, these less powerful parties are less likely to enter into partnerships, thereby negating the formation of trust. By contrast, those in power have every reason to preserve unequal, and thus beneficial, relationships. In other words, "*inequalities foster mistrust,* because feelings of goodwill and a readiness to become vulnerable seem almost ridiculous in such contexts" (Colwell-Chanthaphonh and Ferguson 2006:128). Indeed, trust and equality go hand in hand and if achieved, pave the way for sustained collaborative relationships that are virtuous rather than just ethical. This idea complements Fine-Dare's notion of double silence, as both highlight the importance of equality between archaeologists and Native Americans. Virtue ethics play a particularly important role in my examination of archeology societies' current ethics statements, during which I examine whether and to what extent current ethical guidelines in archaeology promote virtue ethics and trust between tribes and scholars.

With these three perspectives in mind, I turn to U.S. history and the rampant double silence and utter lack of cultural understanding that for centuries dominated the relationship between Native Americans and archaeologists.

Silence, Skull Hunting, and Activism:

The History of Native American-Archaeologist Relations

Native Americans and archaeologists have long been suspicious of each other. For decades before, and after, the passage of NAGPRA, some archaeologists maintained that "Indians are too ignorant to know what's good for them" (Mihesuah 2000:95) and that "Indian people did not know their past, had no interest in that past, or were unable to preserve it" (McGuire 1997:64). For their part, many Native Americans considered archaeologists "rank opportunists, interested in furthering their own careers by trading in on our sacred traditions" (King 1997:115) and insisted that archaeological excavation is "hard to distinguish from the pothunter's practice" (Whitely 1997:184). Unfortunately, such derisive rhetoric was, and in some quarters continues to be, held by tribes and scholars. NAGPRA has done much to alleviate animosity on both sides, but amid repatriation's most controversial cases, well-worn stereotypes again come to the fore. This not only draws attention to unresolved issues in the Native American-archaeologist relationship, it begs the question: where did these opinions come from?

The passage of NAGPRA in November 1990 was not an isolated event. It had profound effects on American archaeology, leading to a host of legal, ethical, and practical changes in the Native American-archaeologist relationship. The literature surrounding NAGPRA largely focuses on understanding these effects and predicting how they will shape the future of American archaeology. Conspicuously absent within the repatriation literature, however, is an acknowledgement of the long and oftentimes tragic history between Native Americans and archaeologists. As a result, scholarly work on NAGPRA may be extensive, but, by not addressing why deep-seated mistrust between native peoples and archaeologists exists, it is hampered by its ahistorical approach. Understanding NAGPRA, and how it

significantly altered American archaeology, requires historical background, including the manner in which the federal government viewed and treated Native Americans, practices of early anthropology, rise of AIM, and enactment of pre-NAGPRA heritage legislation. In this chapter, I examine these historical events in an effort to provide the background that an effective and informed evaluation of NAGPRA requires, for "the contexts and the means by which Native American human remains and objects were acquired has everything to do with the discussions about their return" (Fine-Dare 2002:51).

I ground this overview in Fine-Dare's (2002) concept of double silence, the notion that archaeologists and Native Americans were unwilling and unable, respectively, to form productive dialogue, primarily due to the disparate amounts of power held by each group. Tailoring the study of human remains with respect to Native Americans' concerns would have required archaeologists to acknowledge tribal beliefs and, by extension, that the interests of archaeologists are not superior to all others. Conversely, a host of alienating racist practices and policies worked to silence and exclude native peoples from the study of their sacred pasts. Thus, a pervasive double silence separated these two groups, in turn generating many of the destructive stereotypes that still linger in the interactions between tribes and scholars.

Early Anthropology and the Historical Treatment of Native Americans

The history of American archaeology—like that of NAGPRA—does not exist within a vacuum; it is inextricably linked to various scholarly opinions and government policies throughout U.S. history. In this section, I provide a brief overview of the prevailing theories and practices that directed the treatment of Native Americans from the nation's inception up until the late-20th century. In doing so, I intend to show how vast numbers of native

artifacts wound up in museum collections and how archaeologists earned their less than stellar reputation among tribes.

Since the first colonists arrived on the shores of New England, Euro-Americans have conceptualized Native Americans in a variety of ways, almost all of which were used as a means to devalue, alter, and terminate native practices that stood as impediments to the ever-expanding Euro-American population (Nason 2008:105). Nonetheless, these diverse—though equally racist—views of Native Americans revolved around a single concept: control. Manifested through rhetoric and policies that transformed native peoples into objects of nature to be conquered, a lesser race lucky enough to have found Euro-American civilization, or outsiders in their native land, these views guided the practices of early anthropology and firmly established double silence as the norm. The study of Native American history was available only to scholars, those who jammed archaeological interpretations into ideologies that rationalized and justified Euro-Americans' colonial expansion and mistreatment of tribes.

As newcomers to the continent, 18th century Euro-American intellectuals and policymakers were intent on exploring, and eventually exploiting, the natural resources of their nation's "virgin wilderness" (Kehoe 1998:65). This view in no way acknowledged the presence of Native Americans, who, in the eyes of colonists, were weak, passive, and "hostages to environmental forces" (Bieder 2000:20). From the perspective of the American government, nature and Native Americans were entities to be controlled and thus one and the same (Bieder 2000:21). As a result, domination of Native American groups was conflated with the study and harnessing of nature, all under the banner of science and progress.

This policy, described by Fine-Dare as "Manifest Destiny disguised as natural history" (2002:43), found expression in Thomas Jefferson's purchase of the Louisiana Territory.

Jefferson's interest in this vast new tract of land was certainly in part academic, but it was also imperialistic. As Fine-Dare notes: "Jefferson's interest in the natural history of the Americas was a reflection of his belief that the physical conquest of the continent needed intellectual taming as well" (2002:20). The array of plant, animal, and geologic specimens, as well as Native American artifacts collected by Lewis and Clark's Corps of Discovery, were eventually displayed side by side at the Peale Museum and served to assert "the nation's control over the newly acquired area" (Conn 1998:34). According to Jefferson and many other 18th and 19th century scholars, nature was different, wild, and threatening, a view that extended to Native Americans, who lived in a barbaric "state of nature" (Bieder 2000:21). With this guiding principle, Euro-Americans were compelled to subdue native peoples and the land in which they lived, ensuring the spread of civilization from sea to shining sea.

As a part of nature, Native Americans were assumed to constitute a distinct race of people, one that was clearly inferior to civilized Euro-Americans. This view had profound effects on the way native peoples were treated: it justified the seizure of land, violation of treaties, criminalization of religious practices, and facilitated the destruction of native communities through battles, massacres, and forced relocations (Watkins 2004:62; Fine-Dare 2002:62). It is also important to remember that, for all the atrocities known to history, it "can be assured that…we have heard only a small fragment of what there was to tell" (Stannard 1992:116). The day's top scholars, including the esteemed founders of American anthropology, addressed this appalling treatment of Native Americans with implicit approval. Pioneering anthropologist Lewis Henry Morgan asserted that no Native American could achieve a degree of civilization equivalent to that of Euro-Americans (Kehoe 1998:90). John Wesley Powell, the founder of the Bureau of American Ethnology, celebrated the fact that

"the industries and social institutions of the pristine Indians have largely been destroyed, and [that] they are groping their way to civilized life" (1881:xxx).

Such opinions spilled over into the 20th century, as scholars continued to devalue native peoples' cultures and histories through romanticized patronizing portrayals. *Indians Before Columbus*, a popular mid-20th century archaeology textbook written by Chicago Natural History Museum curators, states: "the Indians'…culture remained more or less unchanged for thousands of years" (Martin et al. 1947:94). Radin, in his tellingly titled *The World of Primitive Man,* echoes this idea, arguing that in contrast to Euro-American society, "there have always existed other civilizations, those of aboriginal peoples, whose societies were fundamentally stable, where no basic internal social-economic crises occurred" (1953:7-8). These views, though less obviously racist than those espoused by 19th century academics, are no less harmful. These scholars assumed that essential differences existed between Native American and Euro-American peoples. Whereas the former lived in harmony with nature, unfettered by the complicating effects of progress, the latter actively conquered their environment, leading to innovations that advanced the wellbeing of humankind (Kehoe 1998:92).

Perhaps the most blatant disregard of native accomplishments hails from the 19th century and is known as the "Mound Builder Controversy." In awe of the huge earthen mounds that dot the Ohio and Mississippi Valleys, scholars argued over who could have built such structures. Assuming native peoples were incapable of such advanced construction, many postulated that a non-Native American Mound Builder race was responsible for the engineering feats. Debates raged over the Mound Builders' ancestry, with most believing they were descendent from prehistoric Mexicans, Danes, or Hindus (Watkins 2004:62). Scholars did agree, however, on the reason behind the Mound Builder's demise:

invading forces of Native Americans "destroyed North America's only 'civilized' culture" (Trigger 1980:665).

Unfortunately, the Mound Builder Controversy did more than cement the views of a select group of scholars. It justified the forcible relocation of native peoples who were seen as possessing no right to the lands of this ancient race (Watkins 2004:62). With this narrative, the ever-expanding United States acted as both oppressor and oppressed. On the one hand, Native Americans were mere primitives, whose presence did nothing but hinder the Manifest Destiny of the United States. On the other hand, tribes were also persecutors who, in the name of the Mound Builders, deserved retribution. McGuire sums up the effects of the Mound Builder controversy: "by routing the red savages, the new, civilized, White American race inherited the mantle, the heritage, of the old civilization" (1992:820). The United States was the rightful successor to the legacy of the Mound Builders—only Native Americans stood in their way. Belief in the Mound Builder race endured until the end of the 19th century, but its repudiation could not reverse the policies enacted by the U.S. government. For when scholars finally acknowledged that Native Americans built the great mounds, the tribes responsible, as well as many others, had been forcibly relocated or wiped out.

Even as support for the Mound Builder race waned, the assumption that Native Americans were in some way inferior continued to drive scholarship. Following the end of the Civil War, anthropology became enamored with the study of bodies—and especially crania—in the hope of quantifying race, intelligence, and temperament. For instance, scholars alleged that the short forearm of Euro-Americans, in contrast to those of Native Americans, was a clear sign of "evolutionary advancement" (Bieder 2000:28). Newly established institutions such as the Army Medical Museum, the American Museum of

Natural History, and the Chicago Field Museum, endorsed craniology and set out to collect the remains of all races but particularly those of Native Americans.

Over time, competition developed, and by the end of the 19th century, the race to find and retrieve the crania of native peoples reached a fever pitch. Excavated in order to "aid the in the progress of anthropological science" (Lamb 1917:50), Native American burial grounds were repeatedly excavated, many times only hours after the deceased had been put to rest. Anthropologists and museums did not stop there, combing battlefields, massacre sites, and burial grounds to such an extent that Harjo can only surmise: "some Indian people may have been murdered for their heads" (1995:4). Some scholars employed a more cunning strategy in obtaining crania. New York's American Museum of Natural History, for example, staged a funeral for a recently deceased Native American man so as to the prevent the bereaved family from discovering that his remains had been shipped to the museum (Harper 1998:174).

Desecration of native burials sites occurred at the hands of anthropologists from a variety of theoretical stripes, including those who disagreed with the racist theories of their colleagues. Franz Boas, the renowned "father of American anthropology," dedicated his career to refuting the claims that race determines intelligence and culture. He effectively argued that "in any population one would find philosophers and pragmatists, innovators and dullards, tyrants and tremblers" (Fine-Dare 2002:42). However, though his conclusions were strikingly different, Boas' methodology—analysis of crania obtained through the excavation of Native American graveyards—was identical to the scholars he opposed.

The work of Boas is particularly interesting. It underscores that anthropologists, even the few who defended native peoples, engaged in practices that wrenched Native American histories and ancestors from tribal lands and deposited them in the archives of museums

nationwide. Boas once observed: "it is most unpleasant work to steal bones from graves, but…someone has to do it" (Trope and Echo-Hawk 2000:127). This quote is telling, for in it, Boas admits that excavating native remains constitutes theft, but falls back on the assumption that if left *in situ*, someone else would surely dig them up. This line of reasoning stands as a testament to the power double silence held among the early practitioners of anthropology. In order to forward his theories, Boas could not rely on his substantial ethnographic work among native communities. Instead, he had no other option but to insulate his ideas within the dominant practice of the time, that of graveyard excavation and cranial measurements.

In the 19th and early 20th century, anthropology enjoyed considerable power in the acquisition and interpretation of Native American human remains, and double silence ensured that the discipline did not hear the concerns of native peoples. As a result, the discipline, in its frenzy to fill museums with the remnants of "vanishing" Native Americans, failed to interact with tribes in meaningful respectful ways. Of course though, double silence hit hardest among native communities, who watched as their ancestors and cultural objects left their lands in untold numbers. With this unequal relationship, double silence transformed the past into an entity accessible not to those who created it, but to those with the power to wrench it from them.

During the mid-20th century, the treatment of Native Americans by scholars underwent substantial shifts. From the work of Boas and others, racist theories regarding native peoples' supposed inferiority fell by the wayside, as archaeologists finally bestowed Native Americans with long-term cultural change and continuity with past populations. In turn, some scholars increasingly turned their attention to identifying artifact typologies and chronologies. This newfound focus served to consolidate archaeology as a subdiscipline of

anthropology, and, at the same time, succeeded in isolating archaeologists from the work of sociocultural anthropologists and the native communities with which they worked (Ferguson 1996:65).

This trend continued with the rise of processual archaeology in the 1960s and 1970s. By this time, scholars fully acknowledged cultural change and creativity among native groups but still interpreted the past solely within a Euro-American worldview (Ferguson 1996:65). Native beliefs and concerns regarding the presentation of their past were given little, if any, consideration. Additionally, excavation of graves and the housing of native ancestors in museums remained standard practice (Ferguson 1996:65). In essence, archaeologists had shifted "from using their discipline to rationalize Euro-American prejudices against native people, as they did in the 19th century, to simply ignoring native people as an end of study in themselves" (Trigger 1986:206). Still silenced by their lack of power, contemporary Native Americans faded from the archaeological conversation. However, the advent of processual archaeology also coincided with the passage of important heritage legislation and the rise of AIM. Together, they signaled the beginning of the end for double silence.

Heritage Laws and Native American Activism

Understanding the treatment of Native Americans and the practices of early anthropology is important, for to truly grasp the repatriation movement, it is important to recognize how Native American human remains found their way into museum archives in the first place. However, this thesis also concerns NAGPRA, a significant piece of legislation that substantially altered the way in which archaeologists study the past. Thus, in order to appreciate NAGPRA's passage, content, and implementation, pre-1990 heritage legislation warrants attention. In this section, I discuss a set of pre-NAGPRA laws, including their effects on archaeology, their relevance to Native American communities, and the ways in

which they filled double silence with meaningful cooperation.

Yet, not all heritage laws resulted in positive effects for native communities. Passed in 1906, the Antiquities Act represented the first legislative attempt aimed at preserving America's cultural resources. The law extended legal protection to historic and prehistoric sites on federal and tribal land, authorized penalties for the theft and destruction of antiquities, and required a permit before proceeding with any archaeological investigation (Watkins 2000a:38).

Though it greatly reduced looting on public and tribal lands, the Antiquities Act did not acknowledge or include Native American concerns. The possibility that tribes may not want archaeological investigations on their land or their ancestors exhumed and placed in museums was simply irrelevant. Native Americans were in no way included in the permit process, allowing excavations to proceed on tribal land against the wishes of the affected tribe (Nason 2008:107); and with language that defined native human remains as "archaeological resources" and "federal property" the law formally declared that the "Native American past belonged not to Indians but to scientists" (Fine-Dare 2002:62). Indeed, subsequent pieces of heritage legislation, those increasingly shaped by native interests, worked to undo these aspects of the Antiquities Act.

The government reinforced its commitment to the preservation of "archaeological resources" with the 1935 Historic Sites Act. It designated the Secretary of the Interior as responsible for compiling a National Survey of Historic Places, a list that includes landmarks, buildings, and sites deemed to be of national or archaeological importance (Watkins 2000a:38). Notably, the act placed the National Park Service (NPS) at the heart of the government's cultural preservation activities. It is a role that continues to this day, as the

NPS is the agency responsible for the implementation and regulation of NAGPRA (Fine-Dare 2002:66).

That these laws reflect the interests of Euro-Americans speaks to native peoples' exclusion from the political processes responsible for the above laws. Until 1879, the Supreme Court considered Native Americans "an inferior race of people without privileges of citizens" (Trope and Echo-Hawk 2000:130), and well into the 20th century, Native peoples did not possess the right to vote. Though this changed with the 1924 passage of the Indian Citizenship Act, Congress did not intend to empower tribes to join the political arena. Rather, as Nason notes, extending suffrage to Native Americans was yet another way by which the government attempted to "assimilate Indians into U.S. culture" (2008:106). The intent of the law notwithstanding, the act resulted in the establishment of various Native American political organizations. Most significantly, the National Congress of American Indians, which formed in 1944, became—and continues to be—a staunch advocate for Native American rights. In 1946, Congress passed the Indians Claims Commission Act, which worked to settle outstanding land claims and treaty disputes. However, the commission proved to be largely ineffectual because it could not return land to tribes and relied heavily on monetary compensation based on the price of land when it was acquired. Nonetheless, the act helped spur native communities into increased political involvement (Fine-Dare 2002:68).

As tribes coalesced into a political force, new heritage legislation began to chip away at double silence between tribes and archaeologists. With the passage of the National Historic Preservation Act (NHPA) in 1966, the government acknowledged that it had a duty to identify and protect historic sites on public lands. It authorized the Secretary of the Interior to compile a National Register of Historic Places and establish State Historic

Preservation Offices. The act also vastly increased employment opportunities for archaeologists who, under the new field of cultural resource management (CRM), found employment in evaluating the effects of projects on federal land (Fine-Dare 2002:71; Ferguson 1996:67).

Under the umbrella of CRM, the NHPA also afforded Native Americans the opportunity to be directly involved in archaeological activities. In the years following NHPA, tribes such as the Zuni Pueblo, Hopi, and Navajo Nation instituted archaeology programs aimed at training tribal members who could undertake CRM work on their land (Ferguson 2000:26-29). The success and expansion of these programs have had numerous benefits to native communities. Not only do they represent significant sources of employment and education for tribal members, they allow Native Americans to regulate archaeological projects, practices, and interpretations on tribal land. The Navajo include traditional religious leaders during projects (Watkins 2000a:97); the Hopi seamlessly meld scientific practices with oral histories (Kehoe 1998:214); and the Zuni regulate the excavation and study of human remains according to their cultural beliefs (Ferguson 1984:226). The NHPA has also brought about increased interaction between native communities and Euro-American archaeologists, many of which work for tribal archaeology programs (Kehoe 1998:214; Klesert 1992:19).

The importance of these programs cannot be overstated. By integrating native communities, interests, and belief systems into the practice of archaeology, the NHPA opened up double silence in significant meaningful ways. It injected a degree of equality to the historically unequal Native American-archaeologist relationship, facilitating meaningful communication and cooperation between tribes and scholars. If anything, the effects of the NHPA demonstrated that natives and non-natives, scientific and traditional practices, and

seemingly disparate worldviews can peacefully coexist and enrich our knowledge of the past (Kehoe 1998:214).

The late 1960s also witnessed a burst of Native American activism and the rise of AIM. Spurred by rising numbers of Native Americans nationwide as well as surges in native employment, health care, and prosperity, AIM was founded in Minneapolis in 1968 (Fine-Dare 2002:85-86). The movement advocated for native religious, treaty, water, and fishing rights, as well as increased job, education, and housing opportunities. AIM's activism, controversial even among native groups, included forcible takeovers of property, including the offices of the Bureau of Indian Affairs. These controversial acts aside, AIM empowered native communities and led to the creation of two important organizations—NARF in 1970 and AIAD in 1978—that would become significant backers in the push for repatriation legislation (Fine-Dare 2002:75-78).

AIM also set its sights on archaeology. Activists interfered with archaeology projects, protested the display of human remains at museums (Fine-Dare 2002:77), and even submitted grant proposals to excavate Arlington National Cemetery in order to draw attention to the lack of respect afforded to native burials (Watkins 2000a:6). A particularly famous confrontation occurred at a dig in Minnesota in 1971. AIM activists disrupted the project, filled in excavation trenches, burned field notes, demanded the return of native human remains, and went as far as to call the archaeologists "grave robbers." A frustrated Euro-American excavator commented: "we were trying to preserve their culture, not destroy it" (Zimmerman 1997:97). Reflecting upon the incident, famed native writer Vine Deloria Jr. offered his opinion:

> none of the whites could understand that they were not helping living Indians by digging up the remains of the village…the general attitude [of the archaeologists] was that they were the true spiritual descendants of the Indians and that the

> contemporary AIM Indians were foreigners who had no right to complain about their activities. [1973:31]

Though Native Americans were becoming increasingly involved in tribal archaeology programs, a wide rift between native peoples and Euro-American archaeologists remained. For centuries, scholars carried off Native Americans pasts without native consent. Certainly, archaeology had changed significantly since the 19th century, as many archaeologists began to advocate for cooperative projects with Native Americans (Sprague 1974; Zimmerman 1989); but the legacy of early anthropology remained, as archaeologists carried out the above project without consulting descendant tribes. This reveals a crucial assumption upon which archaeological practice was—and for some, continues to be—predicated: archaeologists, as scholars immersed within a Euro-American scientific worldview, did not see native groups as a source of legitimate knowledge regarding the past.

This is not to say that these archaeologists were intentionally attempting to offend native groups. From their perspective, they were celebrating native history through scholarship, and the dismay and frustration felt by the excavators on the above project was genuine. However, the AIM activists' anger was equally genuine (Deloria Jr. 1973:31). This incident represents another unfortunate manifestation of double silence. The archaeologists, silenced by a tradition of disregard for native concerns, failed to discuss the project with affected tribes. The AIM activists succeeded in breaking through the double silence, but resorted to disruptive measures in order to do so. Thus, while double silence still reigned, cracks began to emerge, primarily because of the increasing power wielded by native communities. The following decades saw these cracks widen eventually resulting in communication—rather than confrontation—between archaeologists and Native Americans.

In the wake of AIM, two pieces of legislation took significant steps in recognizing Native Americans' connection to their land and heritage, albeit with mixed results. Passed in

1978, AIRFA sought to explicitly protect Native Americans' Constitutional right to religious freedom. With this law, the U.S. government admitted that it had repeatedly violated Native Americans' religious beliefs and practices. The act required federal agencies to review their policies and ensure that they did not infringe upon the religious freedom of Native Americans. In theory, this granted tribes the power to veto projects that would affect sites fundamental to their religious beliefs (Fine-Dare 2002:79; Watkins 2000a:41). In practice, AIRFA "turned out to be one of the biggest disappointments in federal-Indian relations" (Hill 1996:87).

AIRFA was undone in three ways. First, the act was essentially toothless. It contained no legislative mechanism by which agencies were forced to change policies that impinged on Native Americans' religious rights (Watkins 2000a:41). Second, although the act mandated government consultation with native groups before proceeding with potentially destructive projects, tribes did not possess final say. Thus, native protestations to a particular project could be overridden by the government, which, according to Fine-Dare, sent a strong message that "Native practices should not impede the [United States'] control over *its* land" (2002:82). Finally, AIRFA required proof that a proposed project would restrict Native American religious freedom. As such, tribes had to "prove" that particular practices were indispensable to their religion and could not be performed elsewhere. By requiring objective proof, AIRFA subjected Native American religious beliefs to intense legal scrutiny not endured by other faiths and forced tribes to make public culturally sensitive information. Indeed, this was not the intent of the act, but until the passage of NAGPRA—which remedied many of these negative effects—native religious beliefs still did not possess full constitutional protection (Fine-Dare 2002:80-83).

Similarly, problematic language undermined the positive intentions of ARPA. Passed in 1979 as an update to the Antiquities Act, ARPA reaffirmed the archaeology permit system, but went beyond the 1906 law in two important ways. First, it established harsher penalties for illegally transporting or destroying archaeological material, including prison sentences and fines ranging into the tens of thousands of dollars (Fine-Dare 2002:83). Second, it recognized native concerns and granted tribes authority over particular projects. Under ARPA, acquiring a permit for projects on Native American land required tribal notification and approval. Tribes were free to set conditions regarding project specifics and decide whether any archaeological material left their land (Nason 2008:108). However, two aspects of ARPA tainted this otherwise positive piece of legislation. On non-native federal land, project permits must include AIRFA considerations, but again the federal land manager, not the affected tribe, held final say in the matter (Fine-Dare 2002:83). Furthermore, like the Antiquities Act, "Native American human remains were lumped together with bottles, baskets, weapons, and so on as 'archaeological resources' and were eligible to be kept by any eligible institution, not just museums" (Nason 2008:108).

With AIRFA and ARPA, native peoples were slowly reclaiming decision-making power over the treatment of their sacred history, but the Native American-archaeologist relationship was far from equal. In particular, though contact between archaeologists and Native Americans was increasing, the huge repository of sacred human remains and objects collected over the previous centuries remained firmly in the hands of museums and other institutions. With the arrival of the repatriation debate, this soon changed.

The Struggle for Repatriation and Grave Protection

These (at least partial) victories in hand, Native American activists turned to their sacred objects and ancestors housed in museums. The 1980s witnessed increased attention

to issues surrounding repatriation, resulting in important state laws that came to influence the writing and passage of NAGPRA. The 1980s was also a decade in which Euro-American scholars leveled significant critiques at archaeology. As a result, organizations such as the Society for American Archaeology (SAA) reexamined their fundamental principles, leading to revised ethics statements that addressed growing dissent with the status quo. In other words, the foundation upon which double silence stood became unstable. Weakened by internal and external criticisms and federal legislation that mandated changes in archaeological practice, double silence's grip over the disciple began to loosen. The repatriation movement succeeded in ending aspects of double silence, but actions taken by powerful archaeology societies ensured that it did not disappear entirely.

A noteworthy repatriation case that occurred during this time involved the Zuni and their sacred war gods or Ahayu:da. Each winter solstice, during the initiation ceremony of Zuni war chiefs, the Deer Clan carve and paint an image of the Elder Twin War God, Uyeyewi, while the Bear Clan carve and paint and an image of his younger brother, Ma'a'sewi. These gods ensure safety, health, and success for the Zuni over the coming year. After a year of service, the Zuni place the two gods in secret shrines in which they decay and return their power to the earth. In doing so, the power of the Ahayu:da is conserved and regenerated each year with the carving of new images (Fine-Dare 2002:96).

Unfortunately, over the years, Ahayu:da were repeatedly stolen from their shrines and removed from Zuni lands. They found their way to various museum and university archives, and even into the private collection of Frank Hamilton Cushing, the famed anthropologist who dedicated much of his career to the Zuni people. This shows that even among individuals who ostensibly fought for the rights of the Native Americans, tribes could not shake the pervasive attitude that cast them as "a vanishing people whose patrimony

needed to be 'salvaged'" (Fine-Dare 2002:97). In 1978, Zuni religious leaders decreed that the Ahayu:da must be returned home and returned to the earth, their natural place in Zuni religion. By 1995, after close to two decades of hard work and tireless negotiation, institutions nationwide had repatriated 80 war gods to the Zuni (Ferguson et al. 2000:243).

No litigation or legislation was necessary for the repatriation of the Ahayu:da. Instead, the Zuni's commitment sustained communication and museums' respect for native beliefs facilitated the repatriation of the war gods. Though some negotiations lasted longer than others—repatriation of the war gods from the Smithsonian Natural History Museum took nine years—they were all predicated on honest dialogue that succeeded in bridging cultural divides and healing historic violations of Zuni religion (Ferguson et al. 2000:241-243). During negotiations, the Zuni emphasized the religious importance of the Ahayu:da, stating that their return was "for the good of the people" (Tsadiasi 1991:13). The people to whom Zuni war chief Perry Tsadiasi refers are not the Zuni, but all people. The Ahayu:da are not mere statues, nor do they belong to a particular person; rather, the war gods are "living beings" that, estranged from the Zuni, prevent the world from being "healthy, sane, beautiful, nurturing, or 'right' for any of us" (Fine-Dare 2002:96). The repatriation of the Ahayu:da represents a meaningful opening of double silence. Institutions holding the war gods listened to and respected Zuni concerns, thereby equalizing the relationship between them. Indeed, when museums acknowledged the importance of the war gods in Zuni religion, the decision to repatriate became obvious. This case exhibits many qualities that would later underpin other equally positive interactions between tribes, museums, and archaeologists.

Like the Zuni, other tribes began to fight for protection and repatriation of sacred objects, eventually resulting in important legislative acts. Two particular cases deserve

mention here. In the 1930s, amateur archaeologist Guy Whiteford uncovered the skeletal remains of 146 individuals on his property in Salina, Kansas. Instead of turning the remains over to the authorities, Whiteford left them in place, erected a wooden viewing platform, and christened the so-called Salina Burial Pit a tourist attraction (Watkins 2000a:105). In the 1980s, the descendants of those put on display, the Northern Caddoan, hired NARF and began fighting for the reburial of their ancestors. They were ultimately successful, with the state agreeing to purchase the site and pay for the *in situ* reinterment of the skeletons (Watkins 2000a:109).

Meanwhile, the Salina Burial Pit did not go unnoticed by the Kansas legislature. In 1986, it passed the Kansas Unmarked Burial Sites Act, which protects human remains and associated artifacts on both public and private lands. The act outlines strict penalties for those who (without a permit) disturb, display, possess, buy, or sell human remains or associated funerary objects and applies to the graves of all people. If remains are disinterred, the act allows for consultations with kin and culturally affiliated groups regarding their disposition (Watkins 2000a:109). A powerful piece of legislation, the act simultaneously erased a deeply offensive "tourist attraction" and guaranteed that the graves of Native Americans would no longer fall through legal loopholes. The law also served to chip away at the longstanding notion that Native Americans were "curiosities to be collected and sold and as quaint, and sometimes gruesome, souvenirs to be displayed" (Fine-Dare 2002:30).

Three years later, Native Americans scored another major victory, this time in Nebraska. In 1988, the Pawnee Tribe of Oklahoma sent a request to the Nebraska State Historical Society (NSHS) museum asking for the repatriation of hundreds of Pawnee individuals and burial objects. James Hanson, executive director of the NSHS, flatly refused, arguing that "a bone is like a book…and I don't believe in burning books" (Peregoy

1999:230). The Pawnee countered that, like the Zuni war gods, their religious beliefs hold that all people live in jeopardy until their ancestors are put to rest (Fine-Dare 2002:102). Again led by NARF, the Pawnee, together with other Nebraska tribes, instigated a legal push for repatriation legislation. Following a grueling legislative battle, including a NSHS campaign rife with "sensationalism, half-truths, and outright lies" (Peregoy 1999:231), the Pawnee prevailed, and the 1989 Nebraska Unmarked Human Burial Sites and Skeletal Remains Act (LB 340) became law.

NARF lawyer Roger Peregoy praised the Nebraska lawmakers, stating that their "courageous vision…firmly committed to the principles of fairness, equality, and human dignity won the day for a traditionally oppressed minority group" (1999:231). The act mandated the repatriation of human skeletal remains and burial offerings housed in public museums to affiliated tribes. As a result, the Pawnee ancestors welcomed home their repatriated ancestors and on September 11, 1990, lay the remains and burial offerings of 403 individuals to rest. As the first Native American repatriation law in the United States, LB 340 exerted significant influence on repatriation legislation in other states, as well as on the subject of this thesis, NAGPRA (Fine-Dare 2002:102). The repatriation debate was slowly unraveling the entrenched colonialist practices that separated tribes from their ancestors, healing historical wrongs and opening up double silence in constructive respectful ways.

Archaeology's Response

The growing repatriation movement in the 1980s was not lost on archaeology. The discipline took numerous steps to address tribes' ongoing legislative success, primarily through an examination of ethics codes. Though these statements do not reflect the beliefs or practices of all archaeologists, I believe that as official policies they represent values central to the organization as a whole. As I discuss in later chapters, though organizations

altered their ethics statements following the passage of NAGPRA, they still do not fully embrace the law's guiding principles. The tension between these ethics codes and NAGPRA is untenable; revisions are not only necessary, they are vital if archaeology is to truly become—and thrive—as a culturally conscious discipline.

In general, archaeology has long "struggled with defining the ethical structure to be imposed on its practitioners" (Watkins 2000a:27). Indeed, the original by-laws of the largest archaeological organization in the United States, the SAA, contained very little in the way of ethical guidelines. The obvious exception was the Society's support for the "conservation of archaeological data" and opposition to "the practice of collecting, hoarding, exchanging, buying, or selling archaeological materials" (SAA 1977:308). These principles, which had existed since the group's founding in 1934, were refined in 1961. In "Four Statements for Archaeology," the SAA explained that archaeologists have an obligation to each other and to the archaeological record. They should, therefore, publish their findings, practice proper excavation techniques, and oppose any actions that destroy archaeological data (SAA 1961:137).

These statements, as the guiding framework for archaeology for much of the 20th century, reflect a lack of consideration for the interests of those outside the discipline. However, in light of early anthropology's practices, this disregard of native peoples is hardly unsurprising. If anything, it again reflects the legacy of double silence. Archaeologists had an obligation to each other, but not to the descendants of those they were digging up.

Obligations to living peoples were absent within other organizations' ethical and behavioral codes as well. In 1988, archaeologist Calvin Cummings compared and analyzed the ethics statements of the seven major professional archaeology societies in the United States: the SAA, the Society for Historical Archaeology, the American Society for

Conservation Archaeology, the National Association of State Archaeologists, the Register of Professional Archaeologists (RPA), the Archaeological Institute of America, and the Association of Field Archaeologists. He found that among these groups, only the RPA code of ethics instructs its members to be "sensitive to, and respect the legitimate concerns of, groups whose culture histories are the subjects of archaeological investigations" (Watkins 2000a:28). Clearly, the rising voice of Native American activists, which had resonated in museums and legislatures across the country, had still not penetrated the meetings and boardrooms of archaeology's top organizations.

Though not visible in its ethics statements, the successes of the repatriation movement were not completely lost on the SAA. At their annual meeting in 1986, the Society held a plenary session geared toward refining "a series of principles for ethical and socially responsible actions in situations involving the excavation, analysis, curation and ultimate disposition of human remains by archaeologists" (Watson 1986:1). The result of this meeting, the "Statement Concerning the Treatment of Human Remains," made one important concession and drew one line in the sand. On the one hand, the document took the significant step in acknowledging the "legitimate concerns derived from cultural and religious beliefs about the treatment and disposition of remains of [Native American] ancestors" (SAA 1986:7). It advocates for "close and effective communication" between scholars and native communities and is clear that human remains "must at all times be treated with dignity and respect" (SAA 1986:7). On the other hand, the document is unequivocal in its opposition toward repatriation legislation. Save for repatriating remains to living descendants, the SAA "opposes universal or indiscriminate reburial of human remains, either from ongoing excavations or from extant collections" arguing that "all human remains should receive appropriate scientific study" (SAA 1986:7-8).

These two positions are largely irreconcilable. For if the SAA were to truly recognize native concerns regarding the continued excavation and curation of their ancestors, they would proceed with respect, repatriating remains to the tribes upon request. However, given their steadfast opposition to repatriation, it would appear that the SAA acknowledges the existence of Native American concerns, but chooses to do nothing about them. It certainly begs the question: what exactly does the "close and effective communication" espoused by the SAA look like?

The treatment of Native Americans does not represent a high point in American history. Subjected to policies and practices that wiped out communities and cultures, Native Americans were viewed as a vanishing and inferior species. This justified, among other things, the wanton excavation and looting of untold ancestors and sacred funerary objects. Contrary to 19th century predictions, Native Americans did not vanish, and throughout the 20th century, native communities used their growing political clout to their advantage, winning numerous legislative battles that saw the slow but steady return of their sacred items back to tribal land. Archaeologists, for their part, supported Native Americans in many respects, participating in and advocating for cooperative excavations that respected the concerns of native peoples (Sprague 1974; Zimmerman 1989).

The discipline as a whole, however, stood firm in its belief that archaeologists are the preeminent interpreters of the past whose scientific ventures trump the cultural concerns of Native Americans. As I discuss in the following chapter, archaeology and museum organizations fought vehemently to retain complete control over the archaeological record, until finally receiving a severe blow that forced archaeologists to come to terms with the fact they are not the only group interested in the past. This stark reminder came with the passage of NAGPRA.

Bridging the Cultural Divide:

The Passage and Successes of NAGPRA

By 1990, repatriation reached the halls of Congress. Marked by intense lobbying, pointed criticisms, and acrimonious debate, NAGPRA was indeed born of conflict. Museum and archaeology groups lined up against the law, claiming that it would gut museums and place onerous restrictions on archaeological practice (Fine-Dare 2002:44). Congress eventually brushed these arguments aside, and on November 16, 1990, President George H.W. Bush signed NAGPRA into law. Christened as "the most important cultural heritage law ever enacted in the United States" (Nason 2008:108), NAGPRA forever altered the practice of American archaeology and brought about a host of benefits to Native Americans and archaeologists alike. In this chapter, I discuss the fight for federal repatriation legislation, including the arguments for and against NAGPRA's passage. I then examine the exact contents of the law, including its requirements and administration. Finally, I conclude with an overview of NAGPRA successes stories, with particular focus on cases that exemplify cooperation, communication, and mutual respect between archaeologists and native peoples. Indeed, when defined by equality rather than conflict, Native American-archaeologist collaboration is not only possible it is standard practice.

I again ground my analysis in Fine-Dare's (2002) theory of double silence. By interpreting the passage and implementation of NAGPRA through this lens, it becomes abundantly clear how aspects of the law work to break down debilitating double silence between tribes and archaeologists. Though they have dwindled in number, NAGPRA continues to have its share of dissenters, many of which rely on the same arguments forwarded by the law's opponents in 1990; but viewed through Fine-Dare's theory of double

silence, their criticisms appear to be nothing more than vain attempts to preserve an archaeology that has long since passed.

Resistance to NAGPRA

The push for federal repatriation legislation began in 1989 with the National Museum of the American Indian Act (NMAIA). Aimed at rectifying "some of the injustices done to Indian people" (Trope and Echo-Hawk 2000:138) the NMAIA created the museum of the American Indian within the Smithsonian Institute and established the first ever repatriation guidelines for a federal agency. The NMAIA required the Smithsonian to inventory its holdings and repatriate upon request human remains or sacred funerary objects to culturally affiliated tribes. It ensured that Native American ancestors housed at the Smithsonian would "finally be given the resting place that they so deserve" (Trope and Echo-Hawk 2000:138).

The passage of the NMAIA set the stage for the coming fight over NAGPRA. Foreseeing this conflict, Senator John McCain warned repatriation opponents: the NMAIA "is an important first step…[that] sends a clear signal to those in the museum community who have dismissed repatriation as a transitory issue" (Trope and Echo-Hawk 2000:138). Decades of activism and legislative victories by native groups for the return of their ancestors and sacred objects were anything but fleeting. By the end of the following year, these activists helped realize repatriation supporters' biggest goal: nationwide repatriation legislation.

Some of the most influential archaeology and museum groups, including the SAA, the American Anthropological Association (AAA), and the American Association of Museums opposed NAGPRA (Nason 2008:111). Additionally, individual archaeologists plastered journals with articles bemoaning the apparent end of their discipline. In the

following paragraphs, I present many of these criticisms as well as the counterarguments forwarded by Native American groups. Some of the authors cited below published their criticisms after the official passage of NAGPRA, but examining their positions is nevertheless vital in discussing the passage of NAGPRA. If anything, opposition to NAGPRA after its passage reveals a discipline in transition, one undergoing a reassessment of its basic epistemological tenets regarding excavation, curation, and interaction with descendant groups. I therefore include dissenting views of NAGPRA from before and after its passage, for I believe both are essential in gauging the general attitude of the discipline as it grappled to redefine itself in the new NAGPRA era.

The principle argument marshaled against NAGPRA revolved around the idea of world patrimony, the belief that museum collections are invaluable and transcend the cultures from which they stem. To many archaeologists, objects such as human remains rightfully belong to all of humanity and must remain in museums so as to enlighten and inspire all (Fine-Dare 2002:44). In the same vein, some archaeologists claimed that since all people are members of the same species, no one group should deny global dissemination of knowledge regarding ancient peoples (Turner 1986:1). In other words, storing human remains and sacred objects are a "common good, to be held in public trust" (Chippindale 1994:191) for current and future generations.

The problem with this line of thinking is that it diminishes and dismisses native concerns regarding their sacred histories. Though ostensibly concerned with protecting a mythical world patrimony, this argument serves to divert attention away from discussions regarding the acquisition of sacred items. If archaeologists and museums were forced to acknowledge the ignoble means by which many human remains and burial objects were procured, they would have little ground to stand on in arguing against their repatriation.

Safely ensconced within the rhetoric of world patrimony, however, this never comes to the fore. Instead, it posits Native Americans as a disruptive minority seeking to destroy the precious history of humankind. Their historical, religious, and cultural ties to the remains are of no importance. The world patrimony argument is, quite simply, double silence *par excellence*. It is an argument constructed by those in power that guarantees their success. Native remains may be integral to world patrimony, but it is a world constructed on the ideologies and interests of those in power.

Similarly, some archaeologists minimized native concerns by labeling them as only political in nature. Implicit in this argument is the notion that, unlike politicized Native Americans, archaeologists are entirely impartial, concerned only with the preservation of archaeological material (Clark 2001:3; Deloria Jr. 1992:595; Nason 2008:112). In a particularly pointed article, Meighan asserts that human remains are members of an "extinct group" (1994:65-66) and that Native Americans should thank archaeologists, without whom there would be no knowledge of native history. He also takes issue with Native Americans' religious concerns, arguing that there are few among this "allegedly oppressed minority" (1994:66) that actually hold traditional religious beliefs. Characterizing native religions as a "New Age disposition" (1994:66), he bemoans repatriation's push to legitimize these beliefs alongside the Euro-American worldview responsible for "the triumph of Western civilization" (1994:66). In his eyes, repatriating human remains "is the equivalent of the historian burning documents after [studying] them" (1994:68).

This argument is problematic for a number of reasons. It conveniently disregards the history of Native American treatment in the United States and relegates tribes' desire to bring their ancestors home to mere political posturing. It is not surprising, then, that Meighan employs rhetoric similar to that of 18th and 19th century scholars; namely, the view

of native peoples as a vanishing race. As Larry Zimmerman eloquently counters, "when archaeologists say that the Native American past is gone, extinct, or lost unless archaeology can find it, they send a strong message that Native Americans are themselves extinct" (1994:65). Meighan's argument also relies on the imperialist history of the United States. He claims that without archaeologists, tribes do not have a history and few Native Americans actually hold traditional religious beliefs. Yet, this assertion conveniently forgets the historically racist policies and practices of the U.S. government, archaeologists, and museum officials that worked to eradicate native religious beliefs and oral histories. Native peoples possess rich cultural and spiritual traditions, and their relative scarcity today reflects centuries of cultural extermination at the hands of Euro-Americans. Even so, these traditions continue to hold tremendous meaning to contemporary native peoples, just as they did in the past. This fact is completely lost on Meighan as he depicts Native Americans as a meddling bunch of radicals out to destroy a timeless academic tradition.

Contrary to Meighan's rather distorted view of American history, Native Americans did not disappear, and their desire to protect their ancestors is far from a new belief. NAGPRA did not put an end to the practice of archaeology, it forced archaeologists to come to terms with the fact that their interpretation of the past is neither impartial nor inherently superior to the beliefs of others. Reburying human remains indeed constitutes a loss of scientific data, but what Meighan fails to see are the numerous benefits that come with repatriation. Laying ancestors to rest represents an opportunity to heal old wounds, revive cultural practices, and establish working partnerships between tribes and scholars. In turn, archaeologists and native peoples are more likely to settle future disputes with dialogue and respect, rather than with journal articles that arrogantly refer to tribes as an "allegedly oppressed minority."

In previous centuries, the alienating effects of various political and scholarly policies and attitudes effectively silenced Native Americans from influencing what they considered disrespectful treatments of their history. By 1990, tribes had garnered substantial political clout, thereby forcing archaeologists such as Meighan to broadcast inflammatory rhetoric in the hope that with enough shouting, native views could again be muzzled.

NAGPRA opponents also argued that repatriating human remains constitutes destruction of priceless artifacts that, with the advent of new analytical techniques, could benefit people in the future (Buikstra 1981; Buikstra and Gordon 1981). Such a tragic loss of data would also succeed in emptying museums and virtually ending physical anthropology and archaeology—or so the argument went (Meighan 1992:705). Again employing divisive rhetoric, these scholars contended that reburying human remains before the creation of new analytical methods represents discrimination by Native Americans against archaeologists (Buikstra 1981:27). This argument implies that archaeologists as academics are an entirely neutral group, as opposed to politicized Native Americans who, for seemingly no reason, are threatening their work. Doing so normalizes archaeological work and pushes presumed political native interests to the margins of the conversation. In turn, this props up scientific investigations over cultural concerns and confines Native Americans' epistemologies to a mere secondary telling of the past.

Without a doubt, opposition to NAGPRA was strident, unequivocal, and reliant upon an array of arguments beyond the three mentioned above. Some contended that it was inappropriate for Native Americans to dictate what remains should and should not be studied; others accused tribes of wanting precious objects back in order to sell them (Nason 2008:112); and some resorted to polemics, branding the entire process as "lunacy" (Clark 2001:3). For their part, Native Americans turned many of these arguments around, stating

that non-natives had no right to tell them how their past should be treated and that, for all its supposed benefits, the study and preservation of world patrimony had done little to better the lives of contemporary Native Americans (Nason 2008:113). It was these arguments that eventually won the day and, in November 1990, NAGPRA became law. Decades of Native American activism culminated with federal repatriation legislation, resulting in the return of thousands of sacred objects and the formation of dozens of new partnerships between archaeologists and Native Americans. NAGPRA ushered in a new era of diminished double silence, one characterized by respect, communication, and understanding. In the next two sections, I examine how the law accomplished these feats.

The Law

Up to this point, I have attempted to show how, until the dawn of the NAGPRA era, the unequal Native American-archaeologist relationship lent itself to a muzzling double silence. For much of its history, archaeology, as the dominant party, fought to retain their unconditional access to the archaeological record, attempting to suppress native concerns along the way. However, the 20th century witnessed an incredible increase in political power for Native Americans. At the start of the century, native peoples did not have the right to vote, but by its last decade, they managed to bring large portions of their sacred histories home. NAGPRA was the most significant victory of the repatriation era, and, two decades later, its remains a profoundly influential document. In this section, I detail the fundamental aspects of this transformative law, including what it requires, how it changed archaeological practice, and, most importantly, how it opened up double silence in truly meaningful ways.

At its base, NAGPRA "fully recognizes that Native American human remains and cultural items are the remnants and products of a living people…[they] can no longer be thought of as merely 'scientific specimens' or 'collectibles'" (Trope and Echo-Hawk

2000:151). NAGPRA imbued tribal histories with legitimacy, human remains with respect, and, crucially, granted Native Americans final say over the treatment of their sacred pasts. This not only reversed centuries of harmful scholarly practices, it remedied some of the more blatant trouble spots of AIRFA and ARPA. However, it must be stressed, repatriation is not a "religious issue, except insofar as all laws against desecration and owning dead bodies are ultimately based on religious values common to humankind" (Nason 2008:114). Above all, NAGPRA is "a piece of human rights legislation designed to provide Native American human remains equal protection under the law" (Watkins 2000b:92). Congress did not pass NAGPRA as a repudiation of archaeological practice, seeking to terminate the study of human remains, or undermine archaeology as a viable discipline. The law, quite simply, was written in order to bestow upon Native American tribes, beliefs, and human remains the respect they deserve. It accomplished this task through three legislative mechanisms: consultation, grave protection, and repatriation.

First, NAGPRA is similar to ARPA in that it includes Native Americans in the permit process for projects proposed on tribal land. However, NAGPRA goes beyond ARPA by mandating "consultation with or, in the case of tribal lands, consent of the appropriate" (Sec. 3[c][2]) Native American tribe. In doing so, NAGPRA creates opportunities to voice and resolve concerns, outline project details, and discuss any subsequent studies (Rose et al. 1996:91-92). That NAGPRA requires communication between tribes and scholars and grants Native Americans final word over projects on their land ensures that archaeologists proceed with deference and understanding, qualities that were largely absent in pre-NAGPRA archaeological investigations.

NAGPRA also outlines the fate of human remains and burial objects excavated on tribal land. Final control of these items falls to the following parties, in this order: lineal

descendants; the tribe on whose land they were found; the tribe with the closest cultural affiliation to the objects; the tribe recognized as aboriginally occupying the area; or another tribe that can demonstrate a stronger cultural affiliation to the remains or objects (Sec. 3[a]). NAGPRA makes every effort to return sacred material back to tribes following approved excavation and study, again recognizing that as descendants of the material, Native Americans should oversee its final disposition.

Contrary to those who spoke of archaeology's impending doom, NAGPRA does not halt archaeological practice in any substantial way. In many ways, it represents a combination of ARPA's permit system with AIRFA's cultural tolerance, albeit in a more effective form. If anything, the law requires archaeologists to present their research in ways that resonate not just with Euro-Americans but also Native Americans, those who feel profound cultural connections to the sacred remains and objects in question. The law emphasizes that although contributions to world patrimony are important, archaeological research must also enrich native peoples' understanding of their heritage and ancestors.

Second, NAGPRA includes strong protections for Native American burials. Building off the language of ARPA, NAGPRA penalizes anyone who illegally "sells, purchases, uses for profit, or transports" (Sec. 4[a]) native human remains or cultural artifacts. The price for doing so is steep, with maximum penalties of one year in prison, fines of $100,000, or both for first time offenders and five years in prison, fines of $250,000, or both for repeat offenders (De Moe 1994:48). Significantly, NAGPRA differs from ARPA in that it does not lump sacred material with other "archaeological resources" but treats them more appropriately as human remains and funerary objects. Though some still question whether NAGPRA's penalties are stiff enough (Fine-Dare 2002:134), the intent of the law is clear: "human remains [and sacred burial objects] are contraband to all wrongful possessors" (De

Moe 1994:49). NAGPRA instilled sacred material with respect and strengthened ARPA's burial protections, in turn chipping away at the egregious but unfortunately persistent notion that Native Americans are "curiosities to be collected and sold" (Fine-Dare 2002:30).

Third, and most meaningfully, NAGPRA allows tribes to request the return of human remains, funerary objects, and objects of cultural patrimony from museums upon request. The law requires museums—defined as any institution that receives federal funding, including universities—to produce inventories that include descriptions of their collections and, after consultation with native groups, the geographic and cultural affiliation of each item. After publishing these inventories, tribes can then call for the return of human remains and sacred burial objects, to which museums must comply. NAGPRA does not require the reburial of any object. Instead, it recognizes that Native Americans are ultimately responsible for the disposition of repatriated material. In turn, this ensures that native religious beliefs are granted full expression vis-à-vis the treatment of their ancestors.

The inventory process, though straightforward, is not always simple. For example, many collections include human remains that—due to their extreme age or ambiguous origins—museums cannot confidently affiliate with any particular tribe. These remains fall under the purview of the NAGPRA Review Committee. Established in order to monitor the implementation of the law and settle competing repatriation claims between tribes and museums, the NAGPRA Review Committee is composed of seven members. Native American organizations nominate three members while museum and scientific groups nominate three more. These six individuals then nominate the final committee member. The Review Committee is responsible for compiling a list of human remains that cannot be affiliated with any tribe and developing "a process for [the] disposition of such remains" (Sec.

8[c][5]). As I discuss in later chapters, nearly two decades passed before the Review Committee disseminated such guidelines.

The repatriation process is NAGPRA's most defining aspect and, as such, does the most to open up double silence. It was not a mechanism by which Native Americans gratuitously emptied museums, as critics predicted but a way to reunite tribes with their sacred histories. Those opposed to NAGPRA conveniently forget that museum collections arose from colonialist practices that stripped human remains and burial objects from tribal land without consideration for Native American interests. NAGPRA seeks to address these historic wrongs. It recognizes the deep cultural connections tribes have with sacred items and establishes a process by which they return home. Indeed, repatriation forces museums to give up particular collections, but this does not constitute an assault on world patrimony; rather, what is lost are the scars of the past, emblems of a time in which the relationship between tribes and scholars was nothing like it is today. Consultation sessions and subsequent repatriations encourage both sides to address this less than pleasant history and, in doing so, work for a more meaningful present and lay the foundation for a more collaborative future (Bernstein 2010:196; Fine-Dare 2002:128-129).

Success Stories

Tribal inclusion, grave protection, and repatriation are integral to NAGPRA, and in the years following its passage, a panoply of examples proved that cooperation between archaeologists and Native Americans was not just a distant hope but a contemporary reality. In this section, I mention just a few of the many examples that have increasingly defined the Native American-archaeologist relationship in the NAGPRA era. Although the law ostensibly deals with repatriation and grave protection, it also engendered an atmosphere of cooperation that pervaded other aspects of archaeological practice. I thus include examples

that do not directly invoke NAGPRA, but nevertheless rely on the principles it champions. These cases legitimize and respect native concerns, promote dialogue between scholars and tribes, and generate projects free from lingering alienation and distrust.

NAGPRA has had a significant effect on those working in museum settings. Through inventories and consultations, museums have developed a better understanding of their collections, adding to new knowledge and more culturally conscious exhibits. For example, during discussions with the Zuni, the Museum of New Mexico presented tribal leaders with presumably sacred pots that curators had reverently kept out of exhibits for decades. After examining the items, Zuni leaders declared that the pots were not sacred and should be available to researchers and museum curators. Both sides benefitted from these consultation sessions. The Zuni welcomed home sacred items and were included in the curation process of their culture, while the museum clarified and enriched the knowledge of its collections (Bernstein 1991:19-20).

Similarly, other museums have incorporated Native American worldviews into the treatment of sacred and non-sacred native artifacts. Bernstein urges museum staff to treat native material with respect, guided by the view that "each object is a living being" (2010:197). To do so, museum personnel must be cognizant of tribal beliefs and treat native material accordingly. This may alter curation strategies, including objects' storage positions and proximity to other types of artifacts. Adopting such practices is not only a respectful gesture, it correctly incorporates native perspectives on native cultures. As Bernstein notes, "a community possesses an unalienable right to participate in a museum's interpretation of their culture" (1991:19) and that "no exhibition of native cultures is [complete] without proper native input" (2010:197).

Core principles of NAGPRA, particularly cultural validation and collaborative partnerships, are made manifest in these museum-tribe interactions. They also expose and seek to correct the harmful legacy of double silence. By excluding tribal knowledge, museums not only actively alienated tribes from their sacred histories, they presented a view of the past that was at best incomplete. In the NAGPRA era, however, partnerships between museums and tribes hold great potential, as articulated by Lee Davis:

> By keeping Indian people out of the museum system, museums are keeping themselves away from the kinds of knowledge they already value. Their collections will remain places of lost potential until Indian people can be seen as the only resource which will transform artifacts into meaningful cultural materials, alive and beautiful, full of context and style, interesting to the general public and useful to scholars, Indian and non-Indian alike. [1989:9]

Ending double silence is important not just because it addresses centuries of harmful policies, but because it amplifies present and future understandings of the past. NAGPRA may have been needed to force museums to recognize the validity of tribal knowledge, but its passage generated experiences replete with nothing but genuine respect, appreciation, and mutual benefit.

NAGPRA also impacted archaeological practice, specifically osteological analysis. As a methodological approach that focuses on the study of human remains, NAGPRA critics believed the law would put physical anthropologists out of business. In the early years of the NAGPRA era, though, collaboration disproved this prediction. Again via the inventory process, NAGPRA required museums to reexamine their collections of human remains and determine, if possible, any cultural affiliation. For many museums, this triggered the study of skeletons not touched for decades, leading to systemized collections, correction of errors, and more data for tribes and scholars (Killion and Molloy 2000:113). Since repatriation lingered on the horizon for most of these remains, osteologists conducted increasingly

comprehensive examinations, knowing that they would not have opportunities for reanalysis. This is beneficial not only from the perspective of Euro-American scholars, it helps establish cultural affiliation of the remains, which, according to NAGPRA, can be determined through osteological or genetic data (Rose et al. 1996:99-100).

However, though NAGPRA does not condone nor prohibit new studies of remains, some within the native community decried this osteological review, claiming that once NAGPRA passed, "*the rush was on* to study, document, analyze, and further desecrate our relatives before the precious 'scientific and cultural materials' could be 'destroyed' through reburial" (Taken Alive 1996:231). Yet, tribes such as the Hopi consider osteological analysis of human remains—even potentially destructive methods—an appropriate option for determining cultural affiliation (Dongoske 1996:5). There are therefore differing views on this highly sensitive subject, and navigating decisions regarding skeletal examinations should be conducted on a case-by-case basis and include affected tribes.

Successful consultation concerning osteological analysis has occurred away from museum settings as well. In 1989, a well-preserved skeleton was discovered in a gravel pit in Buhl, Idaho. Based on the geomorphology of the site, the remains were believed to be of great age and were thus of great interest to archaeologists. Though NAGPRA was not yet federal policy, Idaho's 1984 grave protection act mandated the inclusion of local tribes regarding the treatment of the skeleton. Archaeologists submitted a request to the Shoshone-Bannock Tribes to radiocarbon date a portion of the individual's humerus and ribs. Though a destructive dating technique, the tribal council agreed. Resultant analysis indicated that the individual died over 10,000 years ago, making it one the oldest skeletons ever found in the Americas. In 1991, the Shoshone-Bannock Tribes approved a request by archaeologists to make casts of the remains, but forbade further destructive analysis on the bones. They also

requested the return of the remains as soon as possible. By the end of 1991, archaeologists completed their study of the remains and returned the skeleton to the tribe. In December, the individual was reburied (Rose et al. 1996:98).

This case is not without contemporaries, thereby challenging the assumed notion that Native Americans are wholly against osteological analysis. Some have thus posed the question: is acquiring approval for skeletal analysis "simply a matter of reaching out to the tribe in an honest and meaningful way?" (Killion and Molloy 2000:115). Many Native Americans do not oppose scientific investigations of their culture (Mihesuah 2000:97-98; Nason 2008:123) and, at times, will approve osteological analysis, provided they are involved in setting the parameters of the study (Ferguson et al. 2000:53; Killion and Molloy 2000:115). What tribes are against is the hegemony of science, the view that scientific examinations represent the only worthwhile framework through which to interpret the past (Watkins 2004:72). In the Buhl, Idaho, case archaeologists recognized Native Americans as the cultural descendants of the ancient individual and thus granted them final say over the treatment of the remains. In order to gain permission, archaeologists had to present scientific analysis as beneficial not just to scholars but to tribes as well. This case exemplifies the power cooperation holds in encouraging dialogue and developing respectful approaches to the study of culturally sensitive material. Indeed, due to the age of the individual, this case is reminiscent of the one surrounding the individual known as Kennewick Man. As I show in the following chapter, the fundamental elements of the Buhl case—dialogue, respect, and inclusion—were utterly lacking in the treatment of Kennewick Man, leading to a protracted legal battle that tainted NAGPRA and the successes of its first ten years.

In the NAGPRA era, archaeology has become an increasingly cooperative venture, melding archaeological practice with native traditions. Outside osteology, a number of

examples highlight this trend. For instance, archaeologists and historians long-debated the exact location of the Sand Creek Massacre, the 1864 slaughter of more than 150 Cheyenne and Arapaho at the hands of the U.S. cavalry. In 1998, leaders from the Southern Cheyenne claimed that oral tradition had preserved the location of the infamous event. After consulting with archaeologists, Cheyenne elders pinpointed the location of the massacre. Subsequent archaeological surveys of the site yielded 12-pounder cannonballs, the exact type used by the soldiers. The finds also conclusively demonstrated that the massacre was not a battle but a surprise attack on defenseless villagers. This case not only demonstrated the validity of oral tradition in archaeological contexts, it provided a degree of closure to those whose ancestors suffered through one of the darkest moments in U.S. history (Thomas 2000:245-246).

An array of projects compliments the Sand Creek case. The University of Minnesota Field School has featured Dakota language instructors that introduce project members to the Dakota language, with particular emphasis on the cultural and natural material under study (Spector 2000:136). The Leech Heritage Sites Program, a CRM group in north-central Minnesota, seeks to hire Native Americans for their projects. Before beginning any project, archaeologists consult with their native workers, listening to and respecting any reservations participants may harbor regarding excavation. In turn, the archaeologists fully support daily traditions such as smudging and burying tobacco leaves as ways to ensure culturally safe participation in field work (Kluth 2000:139-140). On Kodiak Island, Alaska, archaeologists joined the local Alutiiq community in constructing a museum dedicated to their culture that contained culturally appropriate curation facilities (Knecht 2000:148).

These represent just a few of the dozens of examples of successful Native American-archaeologist partnerships founded in the spirit of NAGPRA. They prove that archaeology

is capable of change, that NAGPRA opponents, with their intransigence and divisive rhetoric, were on the wrong side of history, and that, most importantly, NAGPRA has made archaeology a more culturally conscious discipline. Gone are the days in which sacred native objects were collectibles of a vanishing inferior race. In the years following the passage of NAGPRA, tribes and scholars met as equals and demonstrated that the past, as a source of pride, education, and cultural significance to both groups, can be celebrated free from the stifling effects of double silence. Understanding, communication, and mutual respect may seem like simple strategies, but their rise in archaeology has succeeded in bridging the cultural divide and ensuring that the study of the past is to everyone's benefit.

If only the story ended here. NAGPRA is a successful piece of legislation, but its implementation has not escaped controversy. Unfortunately, a decade after NAGPRA's passage, a number of issues with the law came to the fore. The rhetoric surrounding the law quickly shifted from cooperation to conflict, as tribes and scholars alike began to raise issue with the law and, increasingly, with each other. The passage of NAGPRA transformed double silence into an endangered species, but, in the late 1990s, it again reared its head as conflicts over the study of America's past pitted Native Americans and archaeologists against each other.

A Discordant Discourse:

NAGPRA and the Return of Double Silence

The passage of NAGPRA was a watershed moment for Native Americans and archaeologists. Founded on instilling sacred human and funerary remains with the dignity afforded to all other American citizens, NAGPRA asserted that Native Americans are not artifacts to be gratuitously collected, but as peoples whose histories merit respect. The decade following its passage can, on the whole, be described as a success, replete with numerous examples of cooperation and collaboration, in turn quieting the prognosticators who envisaged the end of archaeology as a viable discipline. These critics were proven wrong in many respects, but some of the most contentious issues they foresaw did not disappear. Instead, they lay dormant—present, yet ignored. The past ten years, though, have seen a rise in conflicts surrounding NAGPRA, highlighting problematic elements contained within the law that threaten the nascent accord it established. A decade of cooperation followed with one in which "nearly everyone seems unhappy with some aspect of the law" (Thomas 2000:231). In this chapter, I examine NAGPRA's problems and attempt to show that they do not represent mere legal semantics, but rather fundamental issues that require resolution if NAGPRA is to remain a formative and constructive document.

When I reference NAGPRA's problems, I do not refer to obstacles that prevent Native Americans from reclaiming cultural artifacts or roadblocks that prevent archaeologists from remaining the sole source of knowledge concerning America's past. Rather, I refer to ambiguities and inconsistencies found in NAGPRA that preclude understanding and respect and, more often than not, are made manifest in legal battles and pointed journal articles. In this chapter, I present a number of examples that, though different in many respects, represent NAGPRA's four fundamental problem areas: cultural

assumptions, limited scope, ancient remains, and recent regulations. In discussing these issues, I again rely on the work of Fine-Dare (2002) and her concept of double silence. NAGPRA carved out space in which tribes and scholars can openly air their concerns, a space both parties successfully utilized in the law's first ten years. By contrast, problems arise when rancorous debate, rather than collaboration and honest communication, fills this space. Unlike the forced hush engendered by imperialist practices and an uneven power dynamic, this new double silence is the result of too much noise: argument, dismissal, and legal wrangling that generate a deafening cacophony in which the concerns of all involved are lost in the din. Winner-take-all court decisions that perpetuate an unequal relationship between Native Americans and archaeologists cannot solve NAGPRA's problems. Instead, resolution must ultimately end double silence, arising from dialogue, cultural understanding, and lowered voices.

Cultural Assumptions

Before delving into what NAGPRA does and does not say and how its problems facilitated the return of double silence, the cultural context of the law warrants attention. Constructed within the Euro-American political and legal system, NAGPRA is rife with cultural assumptions. As Nason notes:

> U.S. laws are primarily based on English common law principles…are written in English, with all the cultural understandings and nuances that inherently apply to the chosen words…reflect a Euro-American worldview…[and] are interpreted by a judiciary in a manner that is also embedded in this same legal cultural context. [2008:107]

These facts may seem inconsequential, but to Native American tribes, they are of utmost importance. For contained within NAGPRA, and any discussion of repatriation for that matter, are cultural biases regarding life and death, how human remains should be treated, and attitudes about ownership. As such, when contentious legal battles erupt over NAGPRA,

the U.S. legal system is predisposed to favor archaeologists who portray the issue in Euro-American derived terms. The arguments put forward by archaeologists in these cases come across as perfectly reasonable, but, "of course the catch is…'reasonable to whom?'" (Nason 2008:117).

Cultural attitudes regarding the past extend beyond court systems to those who conceptualize repatriation within a Euro-American worldview. A striking example of this comes from the Lakota and their struggle to recover the sacred Ghost Dance Shirt. Lifted off a corpse following the infamous massacre at Wounded Knee in 1890, the garment came under control of the Glasgow Museums of Glasgow, Scotland, who displayed it for over 100 years. Even though NAGPRA does not apply to institutions located outside the United States, the protracted dispute over the Ghost Dance Shirt highlights a collision of two worldviews often present in domestic repatriation debates. In 1995, the Wounded Knee Survivors Association (WKSA) requested the shirt be repatriated, stating that "because the Lakota tradition was to bury a dead person in his/her garments, the objects should be treated as having the same significance as human remains" (Curtis 2010:237). The Glasgow Museums rejected their request, with director Julian Spalding arguing that "the museum's duty to the modern Lakota [is] to tell the story of the Massacre, in ways which [reflect] their point of view" (Curtis 2010:237). After appeal, the museums finally repatriated the Ghost Dance Shirt, but they did so only after receiving assurances that the tribes would preserve and display the shirt, send a replica to the museums, and loan the original to Glasgow in the future.

Curtis heaps praise on this repatriation case, calling it "a model of good practice" (2010:237). Although he is correct in the sense that the two sides were able to come to an agreement and that the sacred garment returned home, Curtis fails to address Lakota

opinions regarding the settlement and provide any commentary on the apparent rejection of their religious views by the Glasgow Museums. From a Euro-American standpoint, resolution that returns a culturally significant object to its affiliated tribe while simultaneously preserving the object in perpetuity is an ostensible compromise. This may be true if the object in question was important, but not sacred, to the Lakota. However, the WKSA made their stance perfectly clear: the Ghost Dance Shirt merits treatment equal to that of human remains; but since Euro-Americans do not generally imbue clothing with such reverence, these religious considerations did not factor into the museums' repatriation plan.

The Ghost Dance Shirt case is not "a model of good practice" but rather an example that perpetuates the unequal power dynamic NAGPRA seeks to end. This case represents a new form of double silence, one in which repatriation occurs, but in accordance with the belief system of only one party. Although the museums eventually repatriated the Ghost Dance Shirt, its terms of agreement denied the Lakota unconditional control over their sacred and—in this instance, painful—history.

Euro-American cultural assumptions have left their mark not only on discussions surrounding repatriation, but on the wording of NAGPRA as well. Among the biases present in NAGPRA, one of the most crucial centers on what constitutes property. Fine-Dare raises a key question: is property "only a material, tangible thing, or [does] it [extend] into the realm of words, ideas, and spiritual phenomena?" (2002:157). NAGPRA is generally conceived as applying to human remains and associated funerary objects, but it also includes a process by which objects of cultural patrimony may also be repatriated. The crux of Fine-Dare's question lies within NAGPRA's definitions section, which describes "cultural patrimony" as:

> 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. [Sec. 2(3)(D)]

To many, and Euro-Americans in particular, the above definition seems to apply to just tangible property, but to Native Americans, this is not necessarily the case. For what possesses "ongoing historical, traditional, or cultural importance" may be immaterial objects such as words and songs. Farrer (1994) illustrates this point in her discussion of the Mescalero Apache and their efforts to acquire recordings of their sacred songs. Recorded in 1931 by Ruth Benedict, these holy songs wound up in a storage facility owned by the School of American Research in Santa Fe, New Mexico. Following their rediscovery in 1980, the songs were sent to the Library of Congress, who subsequently sent a copy of the recording to the tribe.

The songs continue to play an important role in Mescalero religious ceremonies, who sing them in the "ritual language" (Farrer 1994:319). According to Mescalero belief, the Creator is responsible for bestowing words to people, and thus Mescalero chief singers only compose songs when they feel compelled by the Creator to do so. These composers do not own their songs but hold them in trust until the time comes to pass them on to others. Additionally, as the songs are used only in ritual contexts and exist vis-à-vis inspiration from the Creator, attempting to control the songs—such as owning recordings of them—is anathema to the Mescalero. For example, when one particular singer added several songs to the canon, many people left his performance for fear "that such hubris would lead to catastrophe" (Farrer 1994:321).

In short, these sacred songs cannot be alienated from their tribe, are not owned by any single individual, and have ongoing cultural importance, criteria that, under NAGPRA,

would deem them suitable for repatriation. Though the Mescalero are pleased the Library of Congress sent them a copy of the original recordings, they are nevertheless "appalled that several of the songs…had been recorded in the first place" (Farrer 1994:320-321). The notion that their holy songs continue to reside in an impersonal dusty archive is highly offensive, but nevertheless the Mescalero have not demanded their return, nor do they wish to begin a legal battle over the recordings (Farrer 1994:322). However, that such intangible items cannot, under NAGPRA, be repatriated is telling. By assuming native songs belong to their composer, as is the case in the U.S. legal system, NAGPRA fails to protect sacred cultural material. Together with the Lakota Ghost Dance Shirt, these cultural assumptions not only provide legal headaches for tribes, they divorce Native Americans from the sacred past to which they are entitled. Excluding songs from the purview of NAGPRA may be an unintentional perpetuation of double silence in the sense that it rose from cultural ignorance rather than deliberate alienation, but as it deprives Native Americans objects of cultural patrimony through an uneven power dynamic, it is a perpetuation nonetheless.

The growing litany of problems found in NAGPRA is unfortunately not constrained to a few cultural assumptions. Ambiguous and inconsistent wording are also responsible for many of the law's trouble spots. These shortcomings not only present more obstacles that stand between tribes and their history, they thwart opportunities in which cooperation between archaeologists and Native Americans could flourish.

Narrow Scope

As its name suggests, NAGPRA protects native burial grounds and facilitates the return of sacred human remains and burial objects. Despite its ambitious title, though, the scope of NAGPRA is surprisingly limited. The law regulates archaeological excavations only on federal and tribal land. The law's narrow focus befuddles many Native American groups,

who assert that tribes once covered the entire continent and that if the law seeks to protect their graves, it should protect private as well as public land. Moreover, NAGPRA is generally posited as a sweeping piece of legislation, but it only affects the research of archaeologists working within government agencies, the private sector, or museum settings. Academic archaeologists are more likely to undertake research on private land, and in doing so are not required to consult with tribes regarding their project. However, though NAGPRA does not affect these projects, artifacts excavated by academic archaeologists may eventually fall under the law's purview, provided they are curated at a federally funded institution (Watkins 2004:67). Furthermore, archaeologists are not the only individuals interested in Native American sites, and NAGPRA's restricted applicability leaves an untold number of sites, human remains, and artifacts on private land unprotected from looters. This not only increases the possibility that sacred Native American locations become subject to desecration, it surrenders archaeologically valuable sites to the whims of robbers—the educational benefit contained within lost forever.

NAGPRA's failure to cover private land stems from Congress' concern over property rights protected under the Fifth Amendment (Seidemann 2010:200). However, Trope and Echo-Hawk (2000:135) cite burial protection laws enacted by 34 states that cross into private property and the subsequent court cases that have upheld their constitutionality. I discuss the details and effects of these laws in chapter 5. NAGPRA mandates consultation and cooperation between archaeologists and Native Americans on excavations of tribal and federal land. As I discussed in the last chapter, this legal impetus has had an array of positive effects on Native American-archaeologist relations. One can only speculate how much stronger this relationship would be if NAGPRA's reach extended to the entirety of U.S. land.

Native American groups also take issue with the fact that the tribes on whose land artifacts are found become automatic owners over the material, regardless of cultural affiliation (Dongoske 1996:290). NAGPRA assumes that current tribal land equals traditional land, a line of reasoning that does not take into account numerous government backed relocations endured by tribes. Dongoske highlights this discrepancy, claiming that "contemporary tribal land ownership often reveals very little about pre-reservation land use by other Native American groups" (1996:289). Therefore, current tribal land is not an appropriate indicator of cultural affiliation and denies rightful owners from making culturally appropriate decisions regarding their ancestors' remains.

Repatriation also falls prey to NAGPRA's limited scope. The law does not require institutions that do not receive federal funding to publish their holdings to tribes who could then submit repatriation requests. This then begs the question: why can private groups withhold sacred Native American objects from their affiliated tribes? That private collections can shirk such a foundational principle of NAGPRA is not only problematic, it is a "deep concern" (Fine-Dare 2002:144).

NAGPRA's failure to protect sacred native items in private holdings is puzzling given the law's strict penalties regarding the trafficking of Native American remains. The law doles out fines and prison sentences to "whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains" (Sec. 4[a][1170][a]). These penalties also extend to the trafficking of "cultural items obtained in violation of" NAGPRA (Sec. 4[a][1170][b]). Together with clauses that require consultation (in the case of federal land) or consent (in the case of tribal land) prior to excavation, interesting scenarios become possible. For private individuals, it is both illegal to excavate a Native American site on federal and tribal land and

profit from the items in any way. However, these same individuals could display the surreptitiously acquired remains or artifacts in their home or privately funded museum free of repercussions. This loophole is nothing less than glaring and, again, undermines a basic aim of NAGPRA. That Native Americans have a right to their sacred objects is a core concept of the law. The current owner of these objects should therefore be irrelevant. This is not to say that the government should be in the business of systematically interrogating people as to the origins of their possessions, but adding a provision that urges voluntary repatriation by private individuals would not only align with the spirit of the law, it would cultivate increased awareness among communities that sacred Native American objects deserve repatriation.

Even when federally funded institutions identify sacred objects in their collections, repatriation does not necessarily occur. This is possible because NAGPRA permits repatriation only to federally recognized tribes. This has proved to be a divisive issue, especially among Native Americans. On the one hand, many tribes "feel that non-federally recognized tribes are no less Indian than their federally-recognized counterparts" (Watkins 2004:69), an opinion that rejects the power held by the government to define who is and who is not Native American. On the other hand, some tribes tie federal recognition to historical continuity and tribal legitimacy, claiming that non-federally recognized tribes have no right to receive repatriated remains (Watkins 2004:69). The debate surrounding tribes' struggle for federal recognition is a subject far beyond the scope of this work, but it is important to note the problems inherent to excluding non-federally recognized tribes from NAGPRA. One can reasonably ask: how can NAGPRA label only federally recognized Native American human remains and funerary objects as sacred? Are the ancestors of non-federally recognized tribes any less sacred to contemporary native peoples? It would seem

that again NAGPRA, while at times clear and far-reaching, is nonetheless fraught by a narrow focus that prevents it from fully implementing the principles upon which it stands.

Ancient Human Remains

The above issues, while contentious in their own right, do not hold a candle to the uproar surrounding NAGPRA's treatment—or lack thereof—of ancient human remains. Scholars usually describe ancient human remains, those dated to before the "discovery" of the New World, as "culturally unaffiliated" or "culturally unidentifiable." Although rarely discussed, I strongly disagree with the use of these terms. The ability to name is inextricably tied to political power and, as Thomas points out, facilitated colonialist expansion across Native American lands: "the names established an agenda under which the rest of the encounter would be played out….The power to name reflected an underlying power to control the land, its indigenous people and its history" (2000:4). Thus, automatically categorizing extremely old human remains as "culturally unaffiliated" or "culturally unidentifiable" implies that they belong to no tribe and thus fall outside the purview of NAGPRA. Describing items in this way influences how they are perceived, thereby increasing the likelihood that Native American claims and access to the remains will be denied.

The rhetoric used in issues involving dissimilar cultural beliefs is important, and divorcing Native Americans from their history vis-à-vis these terms perpetuates imperialism and the alienating forces contained therein. Therefore, I refer to ancient remains such as Kennewick Man and others as "ancient," a term I feel is more—but not completely—value-free and refers to their antiquity rather than to any presupposed affiliation. Additionally, references to remains as "culturally unaffiliated" or "culturally unidentifiable" will include quotation marks in order to indicate where others have employed these terms.

On July 28, 1996, human remains were found on the bank of the Columbia River near the town of Kennewick, Washington. After recovery, they were delivered to anthropologist James Chatters, who initially believed the individual to be a recently deceased victim of foul play. However, after noticing a stone projectile point imbedded in the individual's pelvis, Chatters postulated that the remains were of great age. Subsequent radiometric dating of the remains confirmed this suspicion, placing the remains to between 8,340 and 9,200 years old (Seidemann 2003:152). Scientists, Native Americans, and the media began to take notice. Local tribes—the Confederated Tribes of the Umatilla Reservation, the Confederated Tribes and Bands of the Yakama Indian Reservation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Colville Reservation, and the Wampum Band—demanded reburial of the individual, asserting that the remains were protected by NAGPRA (Fine-Dare 2002:149). As the remains were discovered on federal land, they fell under the purview of the U.S. Army Corps of Engineers, who, after considering the tribes' claims, refused to allow further scientific study and intended to repatriate the bones to the claimant tribes (Bruning 2006:503). This decision was met with dismay by "some of the biggest names in physical anthropology" (Seidemann 2003:152), who subsequently filed suit against the Corps. Six years of legal wrangling followed, ending with Judge John Jelderks ruling that the remains were not culturally affiliated with the claimant tribes and that "the government failed to prove that Kennewick Man, is according to NAGPRA, a Native American" (Bruning 2006:503).

The battle for Kennewick Man reignited the repatriation debate and, for the first time, called the efficacy and content of NAGPRA into question. First and foremost, the notion that Kennewick Man is somehow not Native American perplexed tribes and scholars alike. The crux of the dispute again lies in NAGPRA's definition section. Six years of

courtroom drama over this 9,000 year old skeleton came down to Jelderks' interpretation of a single sentence: "'Native American' means of, or relating to, a tribe, people, or culture that *is indigenous* to the United States" (Sec. 2[9], emphasis added). The definition's use of the present tense led Jelderks to conclude that for NAGPRA to apply, Kennewick Man must represent a contemporary tribe rather than one, he presumed, no longer exists.

This interpretation was not without its critics. The Department of the Interior and the Army Corps of Engineers countered with their own reading of the law. They asserted that cultural affiliation with a present day group is irrelevant and that NAGPRA's definition of Native American speaks to human remains associated with a group of people that resided in what is now the United States prior to European contact (Bruning 2006:507), a position that received support from the powerful SAA (2000). From a legal standpoint, assuming Kennewick Man is Native American would have shifted the burden of proof from tribes to those challenging the identity of the skeleton. These opinions ultimately fell on deaf ears, though, as Jelderks denied Kennewick Man Native American standing, thereby making any discussion of his cultural affiliation a moot point.

In the wake of Jelderks' decision, an amendment to NAGPRA's definitions section was suggested that, despite its simplicity, would be of utmost consequence. Proposed by Senator John McCain, the Native American Omnibus Act of 2005 would change NAGPRA's definition of Native American to include the phrase "is or was indigenous" (U.S. Congress 2005:Sec. 108). Clearly targeted at the contentious Kennewick Man case, this alteration would afford ancient remains Native American status until proven otherwise. Unfortunately, the 109th Congress concluded without acting on the bill. NAGPRA's definition of Native American stands unaltered to this day.

In defense of his decision, Jelderks claimed that "requiring a 'present-day relationship' is consistent with the goals of NAGPRA" and that "courts do not assume that Congress intends to create odd or absurd results" (Seidemann 2003:152,153). By "absurd results," Jelderks refers to a scenario in which pre-1492 European artifacts found in North America—Viking remains for instance—would be automatically, and incorrectly, classified as Native American. Critics were swift in their repudiation of this hypothetical. Some phrased their thoughts bluntly: "absurd? The narrow interpretation of the law directed by Jelderks is perhaps as absurd" (Edgar et al 2007:114). Others articulated their criticisms with a bit more finesse: "a determination of Native American is not simply a question of being pre-Columbian. Viking sites contain artifacts from a culture that is not indigenous to the United States" (Moura 2008:94). These scholars stress that altering NAGPRA's definition of Native American would not grant tribes full authority over all remains found in the United States; rather, it would merely presuppose discovered ancient remains to be Native American until proven otherwise. Clearly, if Viking artifacts were unearthed in the United States, any surface level description would illuminate their European origin and thus disqualify them from protection under NAGPRA.

NAGPRA does not intend to dismantle archaeology as a discipline or undermine its investigations of the past; it works to legitimize and protect Native American's right to their sacred history. Decreeing Kennewick Man as non-Native American, though not as explicitly offensive as stealing shirts from the Wounded Knee dead, is a means to a similar end: marginalizing Native Americans from their own history—an act that serves to resurrect double silence.

Since six years of legal struggle preceded Jelderks' decision, it is important to dissect the case brought forward by both sides and what these arguments say about the application

and ambiguity of NAGPRA. Abstruse legal analysis of the case is legion, but deserves mention in this work, if only to highlight the legal intricacies and cultural forces at work in the Kennewick Man debate.

Central to repatriation disputes is the position, purpose, and privilege of scientific study with respect to human remains. The Kennewick courts did not directly address legal rights to scientific examination, stating that "NAGPRA and its implementing regulations are silent on this point" (Bruning 2006:513). This position is patently incorrect. Under certain conditions, NAGPRA does in fact allow scientific study of remains to proceed, even if cultural affiliation has been established. Clauses within Section 3 and Section 7, which concern newly discovered remains and institutionally held remains respectively, address the position of scientific inquiry.

Section 3 of NAGRPA permits the study of intentionally excavated Native American remains so long as archaeologists consult with appropriate tribes before excavation (Sec. 3[c][2]). Section 3 does not delineate between types or length of study, but it emphasizes that the hierarchy established in Section 3(a)—lineal descendants, tribal landowner, culturally affiliated tribe, or tribe traditionally associated with the area—determines remains' final ownership.

Section 7 refers to remains housed in federally funded institutions. If a culturally affiliated tribe requests repatriation, the institution must expeditiously return said items "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" (Sec. 7[b]). In other words, scientific inquiries can delay repatriation, but final disposition again lies in the hands of the affiliated tribe (Bruning 2006:515).

Thus, the million-dollar question: does Section 7 apply to newly discovered remains? Indeed, newly discovered remains do not just sit at their excavation site, exposed to the elements and looters, but are curated at some institution during which time their cultural affiliation can be established. Section 3 mandates consultation sessions but, in the case of Kennewick Man, Chatters did not surmise the antiquity of the individual until after collection. Thus, once housed in a federally funded institution, albeit temporarily, it would seem Section 7 permits scientific study to proceed, even if potentially affiliated tribes protest such examination. Unsurprisingly, like NAGPRA's definition of Native American, others read the law quite differently. The Kennewick court acknowledged that NAGPRA's provisions "do not depend upon when or where the object was found, but whether the item is presently in the possession or control of federal agencies or federally-funded museums" (Bruning 2006:516). However, the Interior Department, the administrative body of NAGPRA, stated that Section 7 does not apply to Kennewick Man or any newly discovered remains, setting a precedent that severely restricts future scientific research.

It is easy to get lost in complex legal pronouncements related to Kennewick Man. Thus, it is important to take a step back and consider the bigger picture and, in particular, the unfortunate effects the case has engendered. Kennewick Man successfully quarantined the issue of repatriation within a sterile world of legal semantics and barbed opining. Honest dialogue and cultural understanding between scholars and tribes played a pivotal role in the successes of NAGPRA's first ten years, but in documents prepared by lawyers these concepts are nonexistent. Such courtroom antics represent another regrettable installment in the practice of double silence. By becoming entrenched in the legal system, tribes and archaeologists created an arena in which repatriation was not negotiated—it was fought over. This space, occupied primarily by those with law degrees, failed to promote the interests of

either side in ways that elicited compromise and respect. Instead, definitions and subsections became the focus of intense dissection to the point in which one and only one side could triumph. It is regrettable that Kennewick Man is NAGPRA's most well-known example and, even more unfortunately, the problems the case brought to the fore do not end here.

Casting ancient remains within a framework of singular ownership stems from more than just disparate legal interpretations. In the case of Kennewick Man, discussions regarding the individual's "race" further eroded the case of claimant tribes and, in the process, "stirred up some of anthropology's most hateful and threatening ghosts—the legacy of scientific racism" (Thomas 2000:117). James Chatters, the anthropologist responsible for Kennewick Man's initial examination, described the skeleton's "Caucasoid traits" (Thomas 2000:114), referring to his long slim face and narrow cheekbones. Subsequent facial reconstructions resulted in an individual who looks strikingly similar to English actor Patrick Stewart. Lawyers eventually used this portrayal in court to argue against cultural affiliation with modern tribes. A media firestorm quickly followed, and in subsequent interviews, Chatters qualified his statement, adding the caveat: "this finding does not necessarily mean that white people were in North America before Indians" (Thomas 2000:114). Nonetheless, Timothy Egan, the respected *New York Times* writer conducting the interview, used the word "Caucasian" several times in the subsequent article and even suggested that Kennewick Man "adds credence to the theories that some early North Americans came from European stock" (Thomas 2000:114).

Egan's opinion is highly problematic. The use of terms like Caucasoid—and its cousins Mongoloid and Negroid—is predicated on a relic of the 18th century: immutable racial types. Differences in cranial morphology may exist in current populations across the globe, but extending these racial identifiers back 9,000 years is not only bad science, it is

wholly inappropriate. Numerous scholars (Edgar et al. 2007; Nason 2008; Thomas 2000; Watkins 2004) on both sides of the debate have commented on the spuriousness of this act, asserting that, in short, the United States was a very different place during the life of Kennewick Man and thus, by all means, he *should* look different from current Native Americans. Since his death, tremendous shifts in climate, diet, and settlement patterns have occurred, in turn affecting the biological makeup and appearance of the land's inhabitants. Does this then imply that Kennewick Man possesses no cultural affiliation with the claimant tribes? Absolutely not. The passage of time has affected the appearance of all human beings, not just Native Americans. As Edgar et al. point out: "ancient Asian remains differ from contemporary Asian populations," adding that such differences are "simply due to the temporal distance between ancient and contemporary native peoples" (2007:107). Biology does not equal culture. Those who forget this fact run the risk of falling into outmoded racial thinking that is as destructive as it is false.

Although I do not believe Chatters and others who cast Kennewick Man in racial terms are themselves racists, their words nevertheless speak to how "painfully naïve [they are] about the power of racial language in modern America" (Thomas 2000:118), for there are those who do not hesitate to use such language to promulgate a hateful and offensive ideology. In the case of Kennewick Man, these individuals made themselves known. The Asatru Folk Assembly, a Neo-Nazi group, cited statements by scientists to prop up their view that America was first settled by whites, "and, by implication, rightfully 'belongs' to their Aryan descendants" (Thomas 2000:118).

The words of the Asatru Folk Assembly, though easily discredited by the academic community, speak to a troubling implication inherent to racializing the remains of Kennewick Man; that is, threats to tribal sovereignty. Despite assurances that tribal

sovereignty is fundamentally a political issue, grounded in a series of treaties between Native Americans and the United States government (Fine-Dare 2002:161; Thomas 2000:235), the representation of a "Caucasoid" as the nation's first inhabitant is no less significant. For although the political effects of racializing Kennewick Man are minimal, the influence on public opinion and the perception of Native Americans are potentially profound. Some native scholars worry that the archaeologists opposing repatriation for scientific purposes also possess a more sinister motive, one that seeks to "establish a tie that Caucasoid people lived here thousands of years ago" in order to "denigrate Indigenous rights and relationships to this land" (Sirois 2008:99). In response, the tribes seeking repatriation adamantly fought for the rights to Kennewick Man since, in their view, any compromise would be perceived as a sign of weakness (Thomas 2000:238). NAGPRA set out to endow Native American history with respect and legitimize tribal claims to their sacred past; the thought that this same document could instigate an erosion of Native American tribal sovereignty is troubling to say the least.

In short, cranial morphology measurements can have a multitude of unforeseen consequences. Anthropologists who viewed Kennewick Man in racial terms succeeded not only in stripping him of cultural affiliation, they also facilitated the dissemination of beliefs that upend Native Americans' status as the continent's first peoples. This is demeaning and offensive to countless tribes and undermines anthropology as a discipline. It also perpetuates double silence, in two important ways. One, it allows a group unassociated with repatriation proceedings to hijack the debate in order to spread a bigoted ideology; and two, employing racially charged terms recalls a period in history in which a stifling double silence was the norm, a time in which the relationship between Native Americans and archaeologists was anything but equal. Carefully choosing one's rhetoric is of great importance when dealing

with culturally sensitive material. The Kennewick Man case is a prime example of what happens when such cognizance is forgotten.

Alluded to in the above paragraphs, the battle for Kennewick Man's remains highlighted NAGPRA's method of establishing cultural affiliation. Section 7(a)(4) of the law states that cultural affiliation can be ascertained from "a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." In the Kennewick Man case, the tribes seeking repatriation cited their oral traditions, which state that they have lived in the Columbia River region since the beginning of time, as proof of cultural affiliation (Seidemann 2003:153). Jelderks admitted that traditional "narratives can provide information relevant to cultural affiliation determination in relevant circumstances" (Seidemann 2003:153), but, apparently, Kennewick Man is not one of them. He concluded that despite claimant tribes' oral traditions and geographic proximity between their traditional land and the discovery of the remains, Kennewick Man's age was enough to warrant classification as "culturally unaffiliated." It must be noted that NAGPRA does not require unequivocal cultural affiliation in order to repatriate human remains—only a preponderance of evidence, or 51 percent. Do geographic links and oral tradition represent more claims to cultural affiliation than facial reconstructions argue against it? In Jelderks' opinion, the answer was most clearly in the negative.

That cultural affiliation, and the means by which it is established, is the focus of debate again reflects the ambiguous wording of NAGPRA. Section 7(a)(4) does not grant priority to any method of establishing cultural affiliation. Thomas (2000:226) argues that since NAGPRA is silent on the relative merits of these sources of evidence, they should receive equal treatment when establishing cultural affiliation. Another reading of this section

is possible, however. NAGPRA does not endow preeminence to any method in particular, but it also does not state that all lines of evidence merit equal consideration, an interpretation echoed by Jelderks' decision (Seidemann 2003:153). Even if courts treated native epistemologies equal to those of archaeologists, the case would still exist within the Euro-American legal system, replete with all the cultural biases contained therein. As Bruning aptly avers: "the Kennewick courts' rulings suggest that it may be a challenge to convince judges and juries of the probative value of [oral tradition and folklore] when dealing with items of great antiquity" (2006:511). Can courts, given their Euro-American cultural context, validate native epistemologies in fair productive ways? If the Kennewick Man decision is any indication, answers to this question seem likely to be in the negative.

The Kennewick Man decision upset Native American groups, as many felt the courts did not take their oral traditions seriously, privileged scientific ways of knowing the past, and subjected native epistemologies to positivist scrutiny not suffered by other religions. Vine Deloria Jr. questions the unique burden of proof placed on Native Americans to defend their religious beliefs: "do devout Christians actually believe that the bread and wine they consume at Mass are the body and blood of Jesus? A simple scientific lab test could dispel this superstition" (1999:201). Others counter that the Kennewick decision does not represent the dismissal of religious beliefs by a dominant culture grounded in objective scientific reason but instead reflects decades of legal precedent that have long opposed the "imposition of Christian creationism on federally funded institutions" (Seidemann 2003:153). This argument, though, is predicated on the assumption that Christianity and Native American spiritual traditions are comparable and ignores the specifics of the Kennewick Man decision; namely, the fact that this case involved NAGPRA, a document that legally sanctions the inclusion of oral tradition and folklore as valid means of reconstructing the

past. In short, Native American religious beliefs are situated at the heart of a paradox: they exist within an empirically driven Euro-American legal system that privileges scientific ways of constructing the past, but at the same time, have been afforded legal legitimacy. Ultimately, the ambiguity of NAGPRA undermines the inclusion of tribal histories in Section 7(a)(4), thereby facilitating their dismissal as mere secondary accounts of history.

The case surrounding Kennewick Man is rife with arguments that, to their respective sides, seem entirely reasonable. Yet, we would do well to remember Nason and his warning: "of course the catch is…'reasonable to whom?'" (2008:117). The Kennewick Man case is full of cultural clashes that preserve double silence between archaeologists and Native Americans. However, this debate should not be construed as a clash between Native American religions and archaeological science, but as a clash between two cultures that possess disparate ways of interpreting and treating the archaeological record. Cultural biases influence the behavior and beliefs of native peoples as well as Euro-Americans—even though those of the latter are often overlooked. As Thomas correctly observes: "science is a part of culture, not outside it" (2000:242). Recognizing Euro-Americans' culturally bound predispositions, especially those regarding science, is crucial. Without this acknowledgment, Native American beliefs can and are portrayed as alien and contrary to American society and its empirically derived view of history. Unfortunately, this perception is unlikely to change in courtroom settings as long as NAGPRA's ambiguous establishment of cultural affiliation remains. Thomas (2000:242-243) concisely sums up the problem: "the 'preponderance of evidence' criterion provides no way to resolve the conflicts between scientific and traditional belief systems whose notion of 'evidence' may be entirely incompatible." Neither Euro-American science nor native beliefs possess "absolute value neutrality" (Thomas 2000:242), and until these disparate worldviews are given equal footing and are assessed as complementary—rather than competing—

depictions of the past, disputes over ancient remains are sure to continue at the expense of Native Americans, archaeologists, and the relationship between them.

As destructive as the Kennewick Man case was, it is important to mention the profound effects the courts' decision had on the repatriation of other remains. Kennewick Man was indeed a rare find, but it is not the only set of ancient remains from the NAGPRA era. The rhetoric surrounding the individual known as Sprit Cave Man in many ways resembles that of Kennewick Man. Originally excavated in Spirit Cave, Nevada, in 1940, the remains of one mummified individual lay relatively unstudied in the Nevada State Museum for decades. In 1994, archaeologists requested that the individual be carbon dated. The results indicated the remains were a startling 9,000 years old, making Spirit Cave Man the oldest known mummy in North America (Edgar et al. 2007:104). Recognizing the scientific potential of the remains, the non-profit Friends of America's Past stated "that the case of Kennewick Man can and should be seen as precedent setting for the Spirit Cave Man case" (Edgar et al. 2007:103). However, the Kennewick courts denied repatriation requests not because the remains were of great age, but because, in the court's eyes, the tribes did not prove a cultural connection with the individual. Thus, to employ Kennewick Man as a precedent ignores the specifics of the Spirit Cave Man and implies that all ancient remains are simply "culturally unaffiliated."

Indeed, when one examines the contextual finds of Spirit Cave Man, a picture quite different to Kennewick Man develops. From a cranial morphological standpoint, Spirit Cave Man does not resemble contemporary Native American groups, but, like Kennewick Man, numerous scholars have called into question the sense and accuracy of racializing the remains (Edgar et al. 2007:107). Spirit Cave Man is distinct from Kennewick Man, however, by the amount of cultural material recovered from his burial. At the time of discovery, Spirit

Cave Man was "wearing hide moccasins, a fiber breechcloth, and wrapped in at least four layers of finely woven textiles, some of which were decorated with leather strips and feathers" (Edgar et al. 2007:108). Finds almost as extraordinary as the individual, these items have also been carbon dated to around 9,000 years old.

When compared to Kennewick Man, and the sheer paucity of information regarding his material culture, Spirit Cave Man provides a unique window into the past. "Perhaps," Edgar et al. surmise, "it is because we had no indication of the 'culture' to which Kennewick Man belonged that the court proceeded the way it did" (2007:116). While impossible to know how the Kennewick decision would have played out, these authors raise a critical point: the discrepancies in material culture and disposition (unlike Kennewick Man, Spirit Cave Man was intentionally buried) are such that blanket statements by Friends of America's Past that equate these two finds are misguided. If anything, they reveal the group's lack of research into the specifics of the Spirit Cave Man case. Edgar et al. (2007) challenge kneejerk resistance to repatriation, calling for contextualized case-by-case analysis for all sets of ancient remains. These authors are not actively calling for the repatriation of Spirit Cave Man but stress that the remains' potential affiliation should be considered free of misleading outside influences.

Recent Regulations

The clamor over "culturally unaffiliated" remains has not been lost on the law's governing body, the NAGPRA Review Committee. Indeed, it is a difficult issue to ignore, as the term "culturally unaffiliated" extends beyond Kennewick Man to the remains of more than 116,000 individuals and nearly one million funerary objects (Colwell-Chanthaphonh 2010:4). That these vast holdings exist is due to a familiar culprit: NAGPRA's vague language. As noted by Seidemann (2003:151), if scholars cannot establish cultural affiliation,

NAGPRA is silent on how to proceed. Consequently, most "culturally unaffiliated" remains have stayed in the possession of their holding institutions. NAGPRA is clear, however, on who can alter this situation. Outlined in Section 8(c)(5) of NAGPRA, the Review Committee holds sole responsibility for disseminating regulations regarding "culturally unaffiliated" remains. These arrived on March 15, 2010, with the release of CFR 43 (Code of Federal Regulations, Title 43, Subpart C, Section 10.11)[3].

As discussed in the previous chapter, the NAGPRA Review Committee is composed of members from archaeological and tribal groups, and thus, in theory, rulings such as CFR 43 symbolize compromise between the two groups. These regulations, which took effect on May 14, 2010, sought to provide much needed clarity on the issue of "culturally unaffiliated" remains. Unfortunately, they succeeded in doing just the opposite, triggering such a firestorm that some fear that a "battle of the bones" (Toner 2010:9)—which the passage of NAGPRA successfully avoided—may finally be occurring. Again, though, the raised voices of archaeologists and federal agencies succeed in accomplishing little besides reproducing double silence. The new regulations may have done little to clarify NAGPRA's treatment of "culturally unaffiliated" remains, but it did present another example of how, despite tremendous progress, the cultural gap between those in the repatriation debate is far from closed.

CFR 43 requires federally funded institutions to transfer control of "culturally unaffiliated" remains and associated funerary objects to the following recipients, in this order: the tribe from whose tribal land the objects were recovered; the tribe recognized as aboriginal to the area; a non-federally recognized tribe; or reinterred in accordance with state or other law (10.11[c]). This simple statute signifies a marked departure from the language of

[3] The full text of CFR 43 can be found in Appendix C.

NAGPRA. One, it requires the disposition of "culturally unaffiliated" remains based on one aspect of determining cultural affiliation—the geographic origins of remains. Two, it provides a method by which non-federally recognized tribes can successfully request repatriation. Three, the regulations prohibit continued curation of "culturally unaffiliated" remains, mandating reburial according to external laws.

Response from the archaeological community has been swift and unequivocal. The American Association of Physical Anthropologists (AAPA) views the new regulations as "an expedient and destructive solution that was in no way envisioned by those who worked towards the passage of the law" (O'Rourke et al. 2010:2). John O'Shea, a curator at the University of Michigan Museum of Anthropology, believes CFR 43 is "a major departure, going way beyond the intent of the original law" (Dalton 2010:662). In a letter to Secretary of Interior Ken Salazar, dozens of prominent anthropologists aver that these regulations "[destroy] the fundamental balance of NAGPRA" and will result "in an incalculable loss to science" (Smith 2010:1,2).

The AAPA most clearly articulated their dissatisfaction with the regulations, asserting that various provisions in the new regulations directly contrast statutes found in NAGPRA. They point to NAGPRA's definition of Native American tribe, which includes the phrase "eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (Sec. 2[7]), as proof that non-federally recognized tribes cannot be repatriation recipients. They also take issue with CFR 43's definition of disposition, which reads: "the transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency" (O'Rourke et al. 2010:3). They argue that under NAGPRA, disposition was intentionally undefined in order to allow case-by-case resolutions that included repatriation

as well as continued curation. However, the new regulations strict definition of disposition requires the removal of remains from museums, which the AAPA views as outside the scope of NAGPRA and ultimately unlawful.

The AAPA also believes that CFR 43 contradicts the Department of the Interior's previous statements vis-à-vis the role tribal land plays in repatriation. Echoed by Dalton (2010), the AAPA draws attention to the NAGPRA statute that allows repatriation claims by tribes on whose land the remains were found to be supplanted by other tribes, provided they present a stronger case for cultural affiliation. This implies that current and aboriginal lands do not necessarily represent accurate markers by which to establish cultural affiliation. In their eyes, this statute conflicts with CFR 43, which requires the repatriation of remains to tribes based on geographic links and nothing more.

Finally, the AAPA, as well as the SAA (2010), contend that CFR 43's mandate to reinter cultural material in the event of continued "cultural unaffiliation" greatly oversteps NAGPRA's intent. NAGPRA never uses the words "reburial" or "reinterment," as those decisions were rightly left to tribes following repatriation. For Smith (2010:2), mandatory reburial of "culturally unaffiliated" remains destroys their untapped wealth of scientific knowledge, which can only be realized through continued curation and the advent of new analytical techniques. He goes on to argue that "culturally unaffiliated" remains may yield new data with the potential to shed light on remains' cultural affiliation. Determining cultural affiliation through scientific analysis should be a priority, because without explicit knowledge of remains' cultural affiliation, some individuals may be transferred to tribes that are "enemies of their actual ancestors" (2010:2). This line of reasoning is reminiscent of Seidemann (2003) and his belief that Kennewick Man should not have been repatriated to claimant tribes so as to protect the individual from foreign burial traditions. From their

perspective, relinquishing control over these remains is not only potentially offensive to the deceased individual, it denies the possibility of new data and actual determination of cultural affiliation. As such, CFR 43's insistence on burying all "culturally unaffiliated" remains constitutes destruction of irreplaceable data and "demonstrates a continued misunderstanding of NAGPRA" (O'Rourke et al. 2010:5). These critics believe that only Congressional action, not regulatory measures, can enact such drastic changes (SAA 2010).

Those within the NAGPRA administration have responded with strongly worded statements of their own. Sherry Hutt, manager of National NAGPRA, the NPS program responsible for the law's implementation, has spearheaded the defense of CFR 43. She avows: "we are going to treat these human beings ["culturally unaffiliated" remains] the same way we've treated the dominant culture" (Keeping 2010:2), claiming that the new regulations merely reinforce NAGPRA's requirements. She questions archaeologists' fears that increased disposition will be of tremendous detriment to science, contending that the vast majority of "culturally unaffiliated" remains have sat untouched for decades, are bereft of contextual information, and are thus of little scientific value (Culotta 2010:1).

A deeper look at these collections adds weight to this argument. The Denver Museum of Nature and Science, for example, possessed 67 "culturally unaffiliated" remains acquired by way of grave robbers and centuries old purchases at trading posts (Colwell-Chanthaphonh 2010:4). These remains have undergone little, if any, study and the circumstances surrounding their acquisition are discomforting. Therefore, continued curation of these remains is scientifically insignificant and offensive to tribes who feel connected to the remains. This is precisely what CFR 43 attempts to remedy. For whatever reason, many museums classified scores of remains as "culturally unaffiliated," but this does not mean they are of no importance to local tribes. Requiring repatriation to geographically

associated tribes is not a burden as much as it is an opportunity, a chance to engage with Native American communities and free museums of collections whose origins they would rather forget.

To Hutt and National NAGPRA, CFR 43 represents a reasonable solution to a thorny issue, but to the AAPA and others, it is an enormous blow to science. A familiar foe is responsible for this disagreement: a lack of listening. Cutting through the shouting, it becomes apparent that though both sides argue on behalf of "culturally unaffiliated" remains, they defend different types of "culturally unaffiliated" remains. From the standpoint of the AAPA and others, "culturally unaffiliated" remains are those of great age à la Kennewick Man and Spirit Cave Man, individuals that are of great scientific interest to those hoping to understand ancient cultures of North America. By contrast, National NAGPRA defines "culturally unaffiliated" as remains that have slipped through the cracks in the repatriation process as a result of historically poor documentation or, as Hutt contends, "unnecessarily rigorous scientific standards to classify individual remains as culturally affiliated" (Toner 2010:10). Both camps are technically correct, but their inability to recognize the other's concerns succeeds in only prolonging controversy and discord. If double silence is finally to end, both sides must take a step back and realize that all are concerned with celebrating and learning from the past. This does not mean that both sides must always agree, but that all would benefit from lowered voices and renewed commitment to listening rather than shouting.

NAGPRA's failure to address "culturally unaffiliated" remains is nothing more than a glaring oversight, and due to the large number of remains that have been classified as such, demands remedial regulations. Hutt contends that CFR 43 works to fully implement NAGPRA's guiding principles, an opinion with which I would have to agree. At its base,

NAGPRA grants Native Americans the power to oversee the treatment of their sacred histories, an idea clearly present in CFR 43. For all their citations of NAGPRA's definitions, the AAPA and other critics seem to forget the law's details regarding cultural affiliation. NAGPRA outlines various sources of information that can be used in order to establish cultural affiliation, one of which is geography. When all other sources fail to produce cultural affiliation, it is thus entirely appropriate to dispose of "culturally unaffiliated" remains based on the land on which they were found. Following the passage of NAGPRA, museums were responsible for classifying particular remains as "culturally unaffiliated." Native Americans were not included in this process, and profound cultural connections they may have felt toward individuals excavated from their land went unnoticed. CFR 43 is important because it takes an already established method of cultural affiliation—geography—and seeks input from tribes, not just museums, as to the disposition of human remains. The value of geographic affiliation is clearly articulated by the Cowlitz Indian Tribe of southwest Washington who argue "that any remains found near our ancestral homeland, regardless of tribal affiliation, are our responsibility to respect and honor" (n.d.:3). Archaeologists must be willing to recognize this responsibility, accept that it exists irrespective of the remains' age, and concede that when it comes to sacred histories, the rights of descendant populations hold preeminence over scientific interests.

In my view, Smith's (2010) worry that "culturally unaffiliated" individuals may be transferred to an enemy tribe rings hollow. Scholarly opposition to NAGPRA has consistently reflected archaeologists' desire to maintain control over scientifically viable collections. Smith's sudden concern for the cultural beliefs of deceased individuals appears to be nothing more than artifice forwarded in order to undermine other aspects of CFR 43. Because there is ultimately no way of knowing the wishes of the deceased individuals,

discussions over the remains' allegiances are a moot point. Again according to the Cowlitz, archaeologists' ability to determine the "correct" recipient of "culturally unaffiliated" remains is less important than repatriation itself. They contend that scholars "[do] not and cannot consider the tribal values and sense of responsibility for all of our shared ancestor's remains that, sadly, have not found a final resting place" (Cowlitz Indian Tribe n.d.:3). For native peoples, these remains are not "culturally unaffiliated" as much as they are "shared ancestors," individuals that deserve respect and, ultimately, repatriation.

Yet, despite my support of CFR 43, I find two aspects of the regulations problematic. One, they do not cover the one million "culturally unaffiliated" funerary objects currently housed in museums. This is surprising given NAGPRA's protection of these items and upsetting to tribes, who point out that these objects often constitute crucial parts of native burials (Dalton 2010:662).

Second, I agree with the AAPA and others in that CFR 43 should not mandate reburial, though I do so for different reasons. NAGPRA does not require reburial, as tribes were ultimately responsible for the disposition of repatriated material. CFR 43 requires museums to "offer to transfer control" (10.11[c]) of "culturally unaffiliated" human remains to federally and non-federally recognized tribes. However, this leaves crucial questions unanswered. What if a tribe asks for continued curation of the remains? What if, for whatever reason, a tribe is unable or unwilling to accept control over "culturally unaffiliated" material but may wish to do so in the future? If no federally or non-federally recognized tribe accepts control over "culturally unaffiliated" remains, they should stay in museums. However, such continued curation should be only temporary, and if an affiliated tribe offers to accept the remains, this request should be respected and the remains expeditiously returned. In other words, museums' offers to tribes should be standing. Museums should

preserve "culturally unaffiliated" remains, not in perpetuity, but in trust until a geographically affiliated tribe wishes to bring their ancestors home.

The problems with NAGPRA, as complex as they are, can be summed up by two contrasting opinions: "it seems a shame to rip a page out of history and bury it" and "when someone steals from you, what is there to compromise" (*New York Times* 1993). These are the words of Audrey Stevens, a Euro-American library board member, and Tim Giago, publisher of *Indian Country Today*, in response to a repatriation case in Barre, Massachusetts. Though debates surrounding repatriation, ancient remains, and the specific language of NAGPRA are enormously varied, these opinions highlight the primary reason many of these situations erupt into conflict in the first place. Native Americans would certainly disagree with the notion that they are burying history, just as archaeologists would with the claims that they are thieves. Yet both sides are far too often categorized as such, underlining the fact that cultural misunderstandings facilitate dispute.

A revised NAGPRA, one that confronts and settles these challenging issues, must include multifaceted solutions grounded in dialogue and respect. It must also shift the manner in which archaeologists and Native Americans think about repatriation from a battle in which one-sided triumph is the only option to a collaborative approach that protects native history for all. How is this possible, given that CFR 43, the most significant repatriation regulations passed in NAGPRA's history tried, but ultimately failed, to solve just one of the law's numerous problems? More broadly, how can NAGPRA become a document that engenders cooperation between Native American and Euro-American interests in ways that finally relegate double silence to an antiquated problem of the past? Answers to this question come in many different forms, including legal amendments, changes to ethics codes, and shifts in archaeological practices. However, there are simple

ways in which the repatriation of "culturally unaffiliated" remains can proceed without controversy; namely, through a commitment to dialogue and respect. Precisely this occurred in a repatriation case again from the state of Washington; it is the subject of the next chapter.

"If It Can Happen Here…":

Putting Remains to Rest at Fort Vancouver, Washington

Though NAGPRA is an increasingly embattled document, it still possesses great potential in fostering cooperation between archaeologists and Native Americans. In the last two chapters, I have attempted to show that when NAGPRA's principles—dialogue, respect, and cooperation—guide archaeological investigations, mutually reasonable solutions are quick to follow. However, when NAGPRA's statutes become the subject of legal wrangling and intense dissection, the law becomes a vehicle by which double silence is again injected into the Native American-archaeologist relationship. In the final three chapters of this thesis, I explore how, in view of both NAGPRA's successes and failings, the future of American archaeology can proceed with collaboration and respect between scholars and tribes. Legal amendments to NAGPRA and shifts in archaeological practice can help bring about such a future; the following two chapters consider these changes in detail.

In this chapter, however, I discuss the Vancouver case, an example of Native American-archaeologist collaboration that is particularly salient to discussions regarding the future of NAGPRA. Involving officials at FOVA and members of the VITC, this case can and should be used as a model for others engaged in repatriation. It was, from the outset, replete with challenges that could have derailed repatriation[1]. For one, the case centered on sets of "culturally unaffiliated" remains, which, as the Kennewick Man debacle clearly showed, can be lightning rods of controversy. FOVA officials and VITC members navigated these culturally sensitive aspects of the case with grace and respect, proving that when

[1] Since this case involved "culturally unaffiliated" remains, their return to tribes is technically known as disposition rather than repatriation. However, since the outcome is effectively the same, I employ the term repatriation in discussing the Vancouver case.

steered by the principles of NAGPRA, resolution, free from the adverse effects of double silence, is possible.

Background

The complexity inherent to the Vancouver case stems from three factors: the history of FOVA, the presence of "culturally unaffiliated" remains, and the inclusion of non-federally recognized tribes. To begin with, native peoples inhabited the area surrounding FOVA long before the arrival of Euro-Americans. In 1824, the Hudson's Bay Company (HBC) occupied the site and established the fort, which until 1860, served as HBC's administrative headquarters over what is now British Columbia, Canada, Oregon, Washington, Idaho, and western Montana. As a significant trading post, FOVA became home to and was visited by individuals from various Northwest, Great Plains, Eastern Seaboard, and Hawaiian tribes. From 1860 until 1948, the U.S. Army occupied the fort, with the purpose of facilitating peaceful settlement of Euro-Americans to southwest Washington. However, the army's presence was often made manifest in violent clashes with local tribes. Consequently, the fort took on another function, that of a prison, and during its occupation of FOVA, the Army incarcerated numerous native individuals and families at the fort. In 1948, the present day Fort Vancouver National Monument was established. There is, therefore, an incredibly diverse, complex, and sensitive history surrounding FOVA and its relationship with local tribes (Fort Vancouver National Historic Site n.d.:5-6).

The Vancouver Ancestors, the "culturally unaffiliated" remains involved in this case, were unearthed by various construction projects. In 1952, construction near FOVA associated with Interstate 5 displaced the remains of 14 individuals from what was likely a mid-19th century HBC cemetery. Subsequent highway construction unearthed the remains of two other individuals in 1977. Both sets of human remains were later determined to be

Native American and curated at FOVA. Finally, the Vancouver case also involved three skull fragments recovered from FOVA building projects in the early 1990s. They too were determined to be Native American and were housed by Oregon State University and the University of Washington's Burke Museum. As these projects occurred in the days before NAGPRA, museums had no legal obligation to transfer human remains to tribes, and thus the Vancouver Ancestors were curated for decades. Though physical anthropologists conducted cursory studies of the remains, the Vancouver Ancestors were not the subjects of any significant archaeological study. This situation persisted even after the passage of NAGPRA, as officials conducting required inventories were not able to discern the remains' cultural affiliations. (Code of Federal Regulations 2011; Fort Vancouver National Historic Site n.d.:7; NAGPRA Review Committee 2008:14).

The push to repatriate the Vancouver Ancestors began in 2007, when the Cowlitz Indian Tribe received a NPS grant to fund their repatriation efforts. According to dAVe Burlingame, Director of Cultural Resources for the Cowlitz and a central figure in the case, the Cowlitz were spiritually obligated to seek repatriation, for their beliefs hold that ancestors must be cared for, even after death. He noted that "every day they spend 'in violation' is a day we aren't caring for them properly. And if we continue to do nothing to rectify the situation, we are not caring for our Ancestors, our People, or our Land" (pers. comm.)[2]. Though they had been aware of the remains since the late 1990s, the Cowlitz were not able to pursue repatriation, primarily because they had not attained federal recognition. The Cowlitz became federal recognized in 2002 and, with funds to pursue repatriation, the Vancouver case began.

[2] In my research of the Vancouver case, I spoke to various individuals who had played a part in the proceedings. During September 2011 and January 2012, I exchanged emails and conducted personal interviews with Tracy Fortmann and Tessa Langford of FOVA, dAVe Burlingame, Ed Arthur, and Eirik Thorsgard of the VITC, and Fred York of the NPS. Their words are included in this chapter.

In early 2008, the Cowlitz approached FOVA officials with a request to repatriate the remains via a tribal consortium. FOVA administrators, archaeologists, and curators immediately supported the idea. According to Tracy Fortmann, superintendent of FOVA, holding the remains "was not necessary or appropriate" and that, with repatriation, the fort had an opportunity to "do the right thing" (pers. comm.). FOVA was particularly encouraged by the possibility of forming a consortium, which park officials believed would finally provide a viable means for repatriation. Since the Vancouver case occurred before the promulgation of CFR 43, the fort possessed no legal recourse by which to repatriate the "culturally unaffiliated" remains. FOVA and the Cowlitz hoped that by forming a tribal coalition and submitting their repatriation plan to the NAGPRA Review Committee—which reserves the right to approve the transfer of "culturally unaffiliated" remains on a case-by-case basis—they could finally pull the Vancouver Ancestors from their legal loophole (Fort Vancouver National Historic Site n.d.:1).

The Cowlitz sent invitations to join the VITC to tribes possessing a link to FOVA or a possible connection to the remains. The former was determined by FOVA burial records, which document the internment of individuals from over 50 tribes at the fort's HBC cemetery. The latter was based on tribal accounts of head flattening, as some of the remains exhibited cranial deformations. Therefore, the Cowlitz invited any tribe known to have historically engaged in this practice to join the VITC. In all, the Cowlitz extended VITC membership to approximately 50 tribes from the Pacific Northwest and Hawaii. The VITC was intended to be inclusive. Burlingame noted that the Cowlitz's emphasis in forming a broad coalition of tribes sprung from a desire to involve all potential descendants of the remains. Inclusion carried a religious component as well, with Burlingame saying that by inviting numerous tribes, the Cowlitz were spiritually "covering all [their] bases" (pers.

comm.). Furthermore, the Cowlitz did not distinguish between federally and non-federally recognized tribes. The Cowlitz are "mindful of the difficulties in attaining federal recognition" (Bagheri n.d.:1), in large part because they struggled for many years to attain this status. For the Cowlitz, "possible affiliation with an Ancestor does not depend upon whether a group of Indians has been recognized by the federal government" and that "the bond between modern Indian people and their Ancestors exists regardless of the legal status ascribed to the modern claimant by a non-Indian party" (Bagheri n.d.:1). Those from other tribes echoed this view, claiming that the consortium model represented a particularly effective way to include non-federally recognized tribes in the repatriation process (Thorsgard, pers. comm.). Among the invites, 12 federally recognized and 3 non-federally recognized tribes chose to join the consortium; others declined but voiced their approval and support for the repatriation effort.

The mission of the VITC was simple: laying their ancestors to rest. In discussions with FOVA, Oregon State University, and the University of Washington, the VITC requested that the remains be subject to no future testing and that any member of the consortium be able to visit the remains. Officials at each institution agreed to these conditions. From there, the parties worked to find an appropriate site for reburial. Though some proposed reinterring the remains at the HBC cemetery or a Yakama Nations burial ground, the groups eventually identified a suitable reburial site on FOVA property. They selected a quiet spot on the fort's grounds that was near the remains' original burial locations, allowed access for VITC members to conduct spiritual rites, did not experience heavy foot traffic, and would, to FOVA officials' best predictions, not be disturbed by future construction projects (Vancouver Inter-Tribal Consortium n.d.:1-3).

Having agreed to the repatriation plan, FOVA and the VITC submitted their proposal to the NAGPRA Review Committee, which subsequently invited the groups to speak at their annual meeting in San Diego. On October 11, 2008, representatives from both groups stood before the committee and presented the historical background and complexity of the case as well as their plan for repatriation. Their proposal impressed the Review Committee, who called their collaborative effort "very reasonable" (NAGPRA Review Committee 2008:15) and, after a vote, unanimously approved the repatriation plan.

The VITC laid their ancestors to rest in October 2009. FOVA granted the VITC full access to the remains in order to prepare the individuals for reburial and full authority over planning the reburial ceremony, including who would be invited. On the day prior to the ceremony, VITC members prepared the remains for reburial with prayers, cleansing, and wrapping the bones in cloth. To her surprise, the VITC invited Tessa Langford, the FOVA curator who oversaw the remains before the case, to the burial preparations. VITC members explained to her that "she was important to the process because [she] had been the temporary caretaker" (Langford, pers. comm.) of the individuals and was thus connected to them. Being included in this process was, for Langford, "one of the more meaningful opportunities" of her career (pers. comm.). Furthermore, the VITC invited FOVA officials to the reburial ceremony, which Fortmann described as a "privilege" (pers. comm.). The VITC elected to leave the burial site unmarked, though they sent its coordinates to all members of the group. Both sides felt "tremendous pride" (Fortmann, pers. comm.) over how the case had proceeded, and, most importantly, were pleased that the Vancouver Ancestors were finally at rest.

Discussion

The cooperative effort that was the Vancouver case was unprecedented in the state

of Washington. It was the first case in which multiple institutions simultaneously repatriated human remains to a consortium of tribes. This adds an exclamation point to an already successful example of repatriation, one guided by the principles of NAGPRA, free of double silence, and characterized by mutually reasonable solutions. FOVA and the VITC consistently met as equals with honest dialogue and validation. FOVA recognized the consortium's relationship with the Vancouver Ancestors and, by agreeing to repatriation, acknowledged that any scientific value inherent to the remains did not supersede their cultural and spiritual importance to contemporary peoples. For their part, the VITC realized that the remains lay in legal limbo and were thus very patient with FOVA and the NAGPRA Review Committee in approving the repatriation plan. Numerous correspondences and memorandums drafted by the two groups reveal in meticulous detail the scope of the repatriation agreement and the responsibilities of all involved. These steps emphasize the groups' commitment to open communication, which ensured repatriation would conclude without hard feelings.

Understanding and respect eliminated the possibility for double silence between FOVA and the VITC; it also helped unify the consortium. VITC membership was based solely on possible connection to the FOVA remains and no tribe assumed a principal role in the proceedings. Importantly, the cultural resource departments—not tribal councils—of each tribe were responsible for VITC decisions. Burlingame speculated that political jockeying between tribes could have hampered repatriation efforts, especially if tribal councils had been more involved. For instance, one tribe may have sought sole affiliation with the remains; others may have objected to the inclusion of non-federally recognized tribes; some may have used the case as a soapbox in which to air political misgivings. Instead, the cultural resource department members that represented each tribe acted according to a

simple principle: "do what was right by [the Ancestors]" (Burlingame, pers. comm.). United by their desire to lay the Vancouver Ancestors to rest, the VITC did not face any significant problems. The tribes set aside their disagreements, working for their ancestors rather than personal interests. In turn, the VITC successfully repatriated a set of "culturally unaffiliated" human remains, or as Burlingame more appropriately calls them, "shared Indian ancestors" (Cowlitz Indian Tribe n.d.:1).

The Vancouver case, like all successful repatriation efforts, laid the groundwork for collaborative ventures in the future. Langford called the Vancouver case a "healing experience" (pers. comm.) for the fort, but she noted that, as a complex historically rich site, inadvertent finds of human remains are likely to occur in the future. However, due to the success of the Vancouver case, she is confident that FOVA and VITC tribes can find resolution for any future issue. Significantly, Langford stated that her involvement in the Vancouver case altered how she approaches her position as a curator. She consistently reminds herself that she is a "caring but temporary custodian" not just for human remains, but for other Native American artifacts as well. As a curator, Langford believes she is holding these objects in trust, since they "belonged to other people for a lot longer" (pers. comm.). This shift has also affected her work, for she now remembers to take a step back and consider native perspectives when planning an exhibit or publication. Fortmann echoed these sentiments, saying that the fort is committed to maintaining a relationship with the tribes within and beyond repatriation contexts. She simply does not "see a way forward without [working with tribes]" (pers. comm.), and though she admitted that tribes and fort officials will not always agree, this should not preclude cooperation and respectful resolution.

The importance of Langford and Fortmann's comments cannot be overstated. That Langford altered her occupational approach speaks to the power repatriation holds in

bringing different groups together and exposing people to differing worldviews. This is not to say that her work before the Vancouver case was misguided or offensive, it merely means that in the future, her curation practices will be more culturally conscious. NAGPRA does not seek to supplant Euro-American beliefs regarding the past, it works to include native beliefs into discussions regarding native culture. In addition, by meshing Euro-American and native worldviews, NAGPRA aims for respectful resolution regarding culturally sensitive issues. As is often the case in repatriation disputes, such as in the Kennewick Man debate, the views of tribes and scholars are cast as entirely irreconcilable. Protracted legal battles ensue and the debate quickly turns from doing right by the remains and their cultural descendants to questions of who "owns" the past. Fortmann's comments offer a different perspective regarding the disparate cultural views of scholars and tribes. As she said, successfully repatriating the Vancouver Ancestors did not necessitate complete agreement between FOVA and the VITC, it merely required a willingness to listen and validate the concerns of others, no matter how different they may seem. Additionally, though she directed her comment toward FOVA, it is nevertheless applicable to archaeology as a discipline: there is no way forward for archaeology without the inclusion of Native Americans.

The Vancouver case underscores what is possible between scholars and tribes regarding "culturally unaffiliated" remains. It demonstrates that thoughtful consultation and patient understanding—as opposed to the legal sniping present in the Kennewick Man case—do wonders in resolving sensitive issues surrounding this type of remains. FOVA officials acknowledged and respected the VITC tribes' deep spiritual connection to the Vancouver Ancestors, irrespective of the fact that this connection was geographically based. Recall that the vast majority of "culturally unaffiliated" remains are analogous to the

Vancouver Ancestors: individuals that are only a few hundred years old and are of little scientific value. Therefore, from FOVA's perspective, repatriating the remains to the VITC represented little loss of scientific data. Of course, the case would have been quite different had the Vancouver Ancestors been much older and thus more scientifically intriguing. Nevertheless, FOVA officials' willingness to recognize geographic affiliation and commitment to mutually reasonable solutions minimized the case's three potential roadblocks. Moreover, the Cowlitz's idea for a consortium succeeded in bringing numerous tribes into this healing experience and precluded any discussion of repatriation to the "right" tribe. If anything, the collaborative success of the Vancouver case is reminiscent of the Buhl, Idaho, repatriation case. Both relied on geographic affiliation, brought tribes and scholars together as equals, and resulted in mutually beneficial solutions. Together, these two cases can and should be used as a model in discussions regarding "culturally unaffiliated" remains.

Learning from the past is an inherently cooperative venture. NAGPRA forced archaeologists to reexamine basic tenets of their discipline, including the role of native epistemologies regarding human remains. In the wake of NAGPRA, Bernstein asked: "are [scholars] willing to allow another type of scholar to join" (2010:198) the archaeological conversation? In the Vancouver case, FOVA archaeologists and curators answered in the affirmative, paving the way for meaningful validation of native beliefs and repatriation. Every individual I talked to was pleased with the case. Fortmann went as far as to call it one of the "finest hours of her career" (pers. comm.). Despite the historical complexity of the site, "culturally unaffiliated" remains, and inclusion of non-federally recognized tribes, repatriation was a resounding success. Fortmann put it best, concluding that "if [repatriation] can happen here, it can happen anywhere" (pers. comm.).

Toward a Virtuous Discipline:

Strengthening the Native American-Archaeologist Relationship

It is important to remember that the passage of NAGPRA did not occur in isolation; rather, it was the culmination of decades of native activism that problematized centuries of harmful scholarly practices. By the same token, the passage of NAGPRA in no way represented the conclusion of the repatriation debate. NAGPRA is "a *movement*, a process that is ongoing with no end in sight" (Fine-Dare 2002:177). November 16, 1990, ushered in the NAGPRA era in American archaeology. It is an era that is sure to continue for, as scholars assert, "NAGPRA is not an event. There is no post-NAGPRA. 'NAGPRA is forever'" (Rose et al. 1996:82).

NAGPRA is a tremendously influential document, but it is not flawless. Rather than bickering over statutory interpretations of NAGPRA—as was the case in fight over Kennewick Man—the energy of tribes and scholars would be better served strengthening the law, and by extension, their relationship. NAGPRA has proven to be a transformative piece of legislation, but if it is to remain as such, its problem areas must be addressed. However, as a legal document, NAGPRA's potential to improve the Native American-archaeologist relationship is limited. The law brought about significant legal changes, but if the NAGPRA era is to be one of true collaboration, archaeologists and tribes must strive for consistent positive interactions within and without repatriation contexts. Resistance to such a relationship will only perpetuate inequality in the Native American-archaeologist relationship, invariably leading to dispute, legal battles, and continued mistrust.

In this chapter, I discuss changes I believe would benefit the Native American-archaeologist relationship and lay the groundwork for an improved NAGPRA era. Some of these changes are legal in nature, as many of the law's problems can be resolved through

amendments and loopholes remedied by state laws. Other changes concern archaeology as a discipline, particularly organizations' codes of ethics. In my historical overview of Native American-archaeologist relations, I analyzed the pre-NAGPRA ethics statements of some of American archaeology's most powerful organizations. In this chapter, I return to these codes of ethics and examine what has changed, what has not, and what positive steps these groups can take to improve the discipline vis-à-vis Native Americans.

Two theoretical perspectives guide my analysis in this chapter. First, Fine-Dare's notion of double silence again plays a prominent role, as it is useful in determining to what degree legal and ethical changes surrounding NAGPRA promote or diminish open communication. Second, I employ Colwell-Chanthaphonh and Ferguson's (2004, 2006) work on virtue ethics as an effective means by which tribes and scholars can cultivate positive long-lasting relationships. As discussed in the introduction, virtue ethics—with its focus on character and morals—differ significantly from common ethics statements. Unlike the prescriptive codes of the latter, the former implores scholars to create and sustain "sincere relationships guided by virtuous ideals—civility, cooperativeness, tactfulness, patience, trust, honesty, thoughtfulness, tolerance, and respect" (Colwell-Chanthaphonh and Ferguson 2004:23). Of particular importance is the cultivation of trust, which can only develop in an atmosphere of equality (Colwell-Chanthaphonh and Ferguson 2006). With this perspective, I examine whether and to what extent current ethical guidelines in archaeology promote virtue ethics and the generation of trust between scholars and tribes.

Without a doubt, double silence and virtue ethics are critical to the future of the NAGPRA era; they are essentially two sides of the same coin. For centuries, double silence kept scholars and tribes apart. It silenced archaeologists by isolating them within their dogmatic views that excluded tribal participation and silenced tribes by alienating them from

the academic and political processes responsible for treatment of their history. Legislation in the 20th century, including NAGPRA, contributed greatly to the end of double silence, bringing Native Americans and archaeologists together in the spirit of respect and collaboration. Double silence has not disappeared forever, though, as the Kennewick Man debate clearly showed. Looking to the future of the NAGPRA era, tribes and scholars must redouble their efforts in ending double silence, which can be achieved through reliance on virtue ethics. By maintaining contact and communication, the two groups succeed in actively cultivating trust, thereby preventing conflicts and cementing collaborative partnerships.

Legal Changes

To begin with, there are simple yet significant changes that would significantly improve the wording of NAGPRA. First and foremost, Senator McCain's proposed amendment that alters the definition Native American to read: "of, or relating to, a tribe, people, or culture that *is or was indigenous* to the United States" (U.S. Congress 2005:Sec. 108, emphasis added), aligns with the spirit of the law and would have positive benefits. Pre-1492 human remains discovered in the United States should be assumed to be Native American until proven otherwise. That Kennewick Man was ultimately decreed non-Native American speaks to the problems with this definition. Recall that Judge Jelderks defended his interpretation of the definition, asserting that Congress did not intend to create "odd or absurd results" (Seidemann 2003:153). However, it would seem that by classifying Kennewick Man as "Caucasoid" and not Native American, Jelderks succeeded in creating an "absurd" result.

At its base, NAGPRA seeks to include native peoples into the excavation, curation, and interpretation of their past. Amending the definition of Native American aligns with this principle and encourages contact between tribes and scholars. For instance, if Kennewick

Man had been determined to be Native American, or rather, if the archaeologists who sued for control of the remains had assumed the skeleton was Native American, the case may have played out quite differently. Acknowledging that the individual was Native American and thus protected by NAGPRA may have prompted dialogue between the two groups, possibly leading to an agreement in which the claimant tribes permitted some testing and/or casting of the remains before repatriation. Of course, such open honest discussion did not occur, as the Kennewick Man debate became dominated by communication—but by lawyers. Initially treating all human remains as Native American is useful in fostering dialogue and resolution between tribes and scholars, as it validates the very real spiritual and cultural connections tribes feel toward their ancestors.

The Kennewick Man case also exposed NAGPRA's ambiguous wording regarding the determination of cultural affiliation. According to NAGPRA, evidence for determining cultural affiliation stems from a number of scientific and traditional sources. The document is silent on the relative merits of these sources. This led some scholars to believe that all should be treated equally (Thomas 2000:226), while others, including Jelderks, concluded that traditional sources are valid only "in appropriate circumstances" (Seidemann 2003:153). NAGPRA set out to increase native participation and inclusion into the study of the past, but if courts grant scientific ways of understanding the past preeminence, the law is not living up to its principles.

Thus, I believe NAGPRA's method for establishing cultural affiliation should include a clause that prohibits giving one type of evidence priority over another. This is not to say that the data arguing for and against cultural affiliation should be deemed equal, only that all types of information should be considered valid irrespective of whether they stem from a scientific or native worldview. However, even with this clause, reconciling these

belief systems remains a nearly impossible task. How does, for instance, biological data that argue against cultural affiliation stack up against folkloric accounts that support it? Even if the courts were not predisposed to favor Euro-American ways of knowing the past, how could they assess these incongruous worldviews in an impartial way? In my view, the current "preponderance of evidence" method for establishing cultural affiliation must be substantially revised or even replaced in such a way that differing views of the past are given equal footing and protection.

I do not claim to know what form this new cultural affiliation system should take. If anything, it seems that once NAGPRA disputes reach the legal system, the chance for positive resolution has passed. Courts are not only unable to impartially judge contrasting native and Euro-American epistemologies, they are by their very nature adversarial. Therefore, whether the court rules in favor of archaeologists or tribes is irrelevant, because the decision is one-sided and thus serves to alienate the interests of the losing party. Double silence thrives on unequal relationships. Dialogue and respect flourish in cooperative partnerships in which tribes and scholars meet on equal terms. As FOVA and VITC members clearly demonstrated, resolving NAGPRA's most complex issues is possible when both sides work together with an eye toward improving present relationships and laying the groundwork for future collaboration. When disagreements arise, both sides must remain committed to understanding and patience and not jump to winner-take-all legal struggles. Doing so may not always be easy, but it keeps double silence, and all its negative effects, from creeping into the process.

Some (Seidemann 2003) have proposed that demonstrating cultural affiliation with ancient remains as old as Kennewick Man is not possible, and thus NAGPRA should contain a temporal cut-off point that would automatically classify ancient remains as

"culturally unaffiliated." Seidemann admits that "no year can be given as to when the cultural link is too attenuated to allow a living group to speak to the disposition of the remains of deceased individuals" (2003:156), but he ultimately concludes that a temporal limit is needed in order to "ensure that the remains of ancient peoples are not buried according to a tradition that does not resemble their own" (2003:157).

Seidemann's temporal boundary proposal is problematic for three reasons. First, this argument appears, at first glance, very reasonable, as many contemporary tribes would balk at the notion of subjecting their members to foreign burial traditions. However, the need for a temporal cut-off presumes that ancient remains such as Kennewick Man are "culturally unaffiliated," which eschews tribes' deeply felt connection to remains found on their traditional land. Second, adding a temporal demarcation to NAGPRA would undermine one of the law's primary goals: recognizing the validity of native religious beliefs. Seidemann admits that deciding the exact date for the cut-off point is difficult. This is an astute assumption, for at what age do religious beliefs no longer apply? Tribes reject the possibility of a temporal limit, arguing that they possess "universal and unending relationships with Native American dead" (Nason 2008:118). Their spiritual traditions, like those of many peoples, do not suddenly become irrelevant at some point in history. They are eternal concepts that outline the very origins of humankind. Adding a temporal boundary to NAGPRA would undermine its founding principles, and create an avenue by which archaeologists could avoid discussing the treatment of ancient remains with descendant tribes. This proposal does not align with the spirit of NAGPRA and is not an effective way in which to resolve the problems Kennewick Man brought to the fore.

Third, Seidemann argues that a temporal cut-off protects individuals from foreign burial traditions. Not only is the logic inherent to such an argument suspect, the putative

concern he has for the remains comes across as less than sincere. Of course, if Kennewick Man had been reburied, he may have been subjected to burial traditions that were not his own; however, as Kennewick Man was not buried in the first place, Seidemann has no way of knowing what his burial practices may have entailed. Thus, it is equally possible that the burial traditions of the claimant tribes were similar to those of Kennewick Man. Moreover, by excluding cultural affiliation from the process, as the temporal boundary would permit, ancient remains would likely be subjected to extensive scientific testing. By taking the same line of reasoning, tribes could argue that Kennewick Man should not undergo scientific examination, as this conflicts with his cultural beliefs. Tribes cannot prove such a claim, but archaeologists cannot refute it either. The temporal boundary is, therefore, a problematic proposition I do not believe should be added to NAGPRA. The law may have its share of problems, but constructing amendments on such logical fallacies will not help resolve these complex culturally sensitive issues.

NAGPRA is a significant piece of legislation, but it is not the only repatriation law in the United States. Indeed, many state legislatures, those fully aware of NAGPRA's problem areas, have taken legislative action in order to clarify its language, extend its scope, and avoid prolonged legal battles between tribes and archaeologists. In California, for instance, the California NAGPRA of 2001 extends NAGPRA's burial protections to all nonfederal public and private property and includes a mechanism by which non-federally recognized tribes can file for repatriation (Seidemann 2010:203). Montana's Human Skeletal Remains and Burial Site Protection Act is similar in this regard. It protects burials, marked or unmarked, of individuals regardless of ethnicity on state and private lands (Seidemann 2010:204). As discussed previously, the constitutionality of extending these laws into private property has been upheld (Trope and Echo-Hawk 2000:135). Finally, numerous states, including Nevada,

Louisiana, South Dakota, and Missouri, have reburial laws that protect graves on state land (Seidemann 2010:200).

These laws help resolve one of NAGPRA's more significant flaws: its limited scope. Congress' reluctance to extend NAGPRA's burial protections to state and private lands is understandable, but in light of these remedial state laws, Congress should expand NAGPRA's burial protections. Native American graves on private property are no less sacred, and they deserve equal protection. Additionally, NAGPRA contains stiff penalties for excavating, selling, or purchasing illegally obtained native artifacts, but does not prohibit looters from creating private collections and omits private collections from the repatriation process. As stated in chapter 3, I do not believe the government should interrogate people on the origins of their belongings, but adding a clause that entreats private collectors to voluntarily repatriate human remains and burial objects would help reunite many sacred items with their affiliated tribes.

Indeed, such voluntary repatriation has already occurred. For many years, the Zuni were against disseminating photographs of their sacred war gods, the Ahayu:da, but they eventually decided that publishing pictures of the statues would help generate publicity and, in turn, facilitate the return of the war gods. A private collector who happened to own an Ahayu:da but was unaware of the items' sacredness, saw one of these photos. Consequently, he contacted the Zuni and repatriated the statue (Bernstein 1991:20). Thus, adding language to NAGPRA that encourages voluntary repatriation from private collectors would be consistent with the spirit of the law. It would not bring all sacred remains and burial objects home, but by bringing all public and private lands, as well as private collections, under the purview of NAGPRA, this goal would come one step closer to reality.

Ethical Changes

From a legal standpoint, NAGPRA forced archaeologists to alter their behavior; including and consulting Native Americans is no longer an admirable choice of a few archaeologists, it is a legal requirement. However, the values that guide such behavior, those integral to ending double silence, have not completely permeated some of archaeology's most powerful societies. As discussed in chapter 1, I believe examining ethics statements represents an effective way by which to gauge the values of archaeology as a discipline. Though these codes say nothing about the thoughts or behaviors of individual members, they nevertheless establish groups' positions and set the tone for how they approach important issues such as repatriation. In chapter 1, I examined the pre-NAGPRA ethics statements of various archaeological societies. Here, I return to these organizations in order to see what changes, if any, have occurred in the NAGPRA era. I pay particular focus to the degree in which these ethics statements promote virtue ethics; that is, are they mere lists of what archaeologists ought not to do, or declarations that entreat scholars to create connections and cultivate trust with Native Americans?

An ethics code that attempts to limit the effects of double silence and encourage virtuous action would perhaps be most instrumental in the United States' largest archaeological society, the SAA. Recall that before the passage of NAGPRA, Native Americans were entirely absent from the SAA's code of ethics. Though the society acknowledged Native American concerns in its "Statement Concerning the Treatment of Human Remains," the document did not advocate any significant changes in archaeological practice. Indeed, when the repatriation debate reached Congress, the SAA was firmly opposed to the passage of NAGPRA. Despite their resistance, NAGPRA became law, and in the prevailing years, the SAA came to terms with the fact that their code of ethics was in

dire need of revision. In 1993, the SAA's Committee on Ethics began drafting a new set of ethics that served to outline the discipline's core principles. The result of their work, the "SAA Principles of Archaeological Ethics," was adopted by the organization on April 10, 1996, and stands unchanged to this day. The code contains eight principles, three of which deserve mention here: stewardship, accountability, and public education and outreach. The Society urges all archaeologists to employ these principles when "negotiating the complex responsibilities they have to archaeological resources, and to all who have an interest in these resources or are otherwise affected by archaeological practice" (Lynott and Wylie 1995:8). However, as I show below, "complex responsibilities" are not created equal, as the ethics statement has a propensity to favor the preservation of data over interested groups.

The principle of stewardship states that "it is the responsibility of all archaeologists to work for the long-term conservation and protection of the archaeological record," which is "irreplaceable" (Kintigh 1996:9). Described as stewards of the past, archaeologists are the "caretakers of and advocates for the archaeological record," which should be used "for the benefit of all people" (Kintigh 1996:9). This is the code's first and most important principle. The archaeological record is a precious resource that merits protection from looting, wanton destruction, and unscientific excavations. Archaeologists, as scholars with decades of experience and training, possess unique skills with which they investigate and interpret the past. The principle of stewardship is vitally important because it clearly articulates archaeologists' "specialized knowledge" (Kintigh 1996:9) and their role in advocating for long-term preservation of archaeological material.

Nonetheless, I find this principle problematic, not because of what it says, but in how it goes about saying it. The SAA is specific in casting archaeologists not as owners of archaeological material, but as stewards. A steward's basic obligation lies in overseeing a

particular entity—in this case, archaeological material—according to the wishes of the object's masters. However, the stewardship principle is unclear in that, beyond "all people," it does not identify these masters (Groarke and Warrick 2006:135). This begs the question: whom do archaeologists serve? The principle of accountability provides a possible answer. It challenges archaeologists to "make every reasonable effort, in good faith, to consult actively with affected group(s), with the goal of establishing a working relationship that can be beneficial to all parties" (Kintigh 1996:9). This passage suggests that archaeologists are obligated to serve in the interests of all those who are affected by archaeological investigations, which would seem to include Native Americans (Groarke and Warrick 2006:165).

This principle is admirable but nearly "impossible to apply in practice, for it falsely assumes that it is possible to manage the archaeological record in a way that serves the interests of all stakeholders" (Groarke and Warrick 2006:165). Whom do archaeologists serve when the masters of archaeological material—affected groups—possess contrasting concerns and desires? A single archaeological site may enjoy numerous interested parties, including landowners, archaeologists, native peoples, and looters. Clearly, archaeologists should not serve looters, those who destroy archaeological material, but are archaeologists obligated to Native Americans who seek reburial of valuable collections and, in doing so, destroy archaeological data? When conflicts between affected groups come to the fore, the SAA code is silent on how archaeologists should proceed.

Another reading of the stewardship principle is possible; that is, archaeologists are obligated not to the masters of archaeological material, but to the archaeological record itself. However, as stewards, archaeologists serve "the interests of something that has interests" (Groarke and Warrick 2006:168). Does the archaeological record have interests? It is

composed of inanimate artifacts, objects that are indifferent as to whether they are excavated, curated, or destroyed. Thus, how can archaeologists "[advocate] for the archaeological record" (Kintigh 1996:9) when the archaeological record does not articulate its interests? Indeed, it is not "artifacts, but people, who care whether [archaeological materials] are preserved, forgotten, or destroyed" (Groarke and Warrick 2006:169). Archaeologists are obligated to the interests of people, not things, but given the stewardship and accountability principles' failure to outline these peoples' identity, scholarly obligations remain difficult to pin down.

Native Americans are mentioned only once in the SAA code. The principle of public education and outreach defines Native Americans as a cultural group "who find in the archaeological record important aspects of their cultural heritage," but it also describes them as one of "many publics that exist for archaeology" (Kintigh 1996:9), a group that includes lawmakers, journalists, teachers, and government officials. The principle goes on to say that archaeologists have a duty to enlist support for archaeological projects, explain archaeological methods and techniques, and disseminate archaeological interpretations of the past (Kintigh 1996:9).

Without a doubt, archaeologists have a responsibility to engage in public outreach, particularly when it comes to conveying the importance of the archaeological record and preventing it from wanton destruction and looting. At the same time, the principle of public education and outreach groups Native Americans with other publics and describes education as a one-way street, never entertaining the possibility that affected groups can also teach archaeologists something about the past. In doing so, the code casts native peoples as passive receivers of their culture who "should stand back and wait as their own cultures are curated, interpreted and displayed for them" (Bendremer and Richman 2006:106). Like the

other SAA principles, public education and outreach is commendable in that it recognizes Native American connections to their past and calls for vital education regarding the value and preciousness of the archaeological record. Together with the principle of accountability, the SAA implores archaeologists to work in concert with Native Americans so as to ensure mutually beneficial studies of the past but comes up short in truly appreciating native peoples' profound connections to their histories.

The SAA code of ethics makes significant strides in establishing virtue ethics and minimizing double silence. It advocates for sustained contact and communication between scholars and tribes regarding archaeological research and methods of analysis, and in doing so, injects a degree of collaboration into archaeological investigations that help build long-lasting partnerships based on trust and equality. Even so, these significant gains should not preclude the SAA from continually improving their ethics code. In particular, the principle of stewardship requires clarification. It should specify archaeologists' obligations or, better yet, acknowledge that "all people are stewards of the past" (Zimmerman 1995:66).

Of course, archaeologists are among these stewards, but their interests in the past are not superior to those of others. This does not imply that all interests in the past are valid, for there are those who "find no value in the past other than dollars and cents" and "despoil the archaeological record simply for personal gain and profit" (McGuire 1997:84). Nonetheless, acknowledging that stewardship is a collective endeavor implies that parties must work together to celebrate the past in mutually beneficial ways. Education between archaeologists, Native Americans, and all interested publics must be two-way, grounded in dialogue, understanding, and respect. Committing to such a position serves to end double silence by equalizing the archaeologist-Native American relationship and encourages trust and sustained cooperation—in essence, virtue ethics.

Archaeology organizations' ethics codes are critical because "they simultaneously reflect and shape the discipline's values and ideals" (Colwell-Chanthaphonh and Ferguson 2006:117). Post-NAGPRA, the values of American archaeology are rapidly changing. The SAA is a microcosm of this shift, bringing their ethics code up to date in the nascent NAGPRA era. All the same, the Society's code would benefit from further changes. The principle of stewardship is important because it passionately calls for the preservation of irreplaceable artifacts. Missing from this principle and the rest of the code, however, is a call for the protection of human interests, especially those of descendant groups. With that in mind, Groarke and Warrick propose that the stewardship principle read:

> Archaeologists have a duty to [practice] archaeology in a way that respects the rights of individuals and groups and societies affected by their work; to [recognize] that the goals of archaeological research may be superseded by these obligations; and to respect and [recognize] the right of communities to regulate archaeology in this interest. [2006:176]

This proposed change improves the stewardship principle because it brings to the fore the people to whom archaeologists are responsible and clearly outlines the parameters of this relationship. Altering the SAA code's most important principle would reframe the group and the discipline as more culturally conscious, attuned to and accepting of native beliefs and committed to collaborative investigations of the past.

In contrast to the constructive yet ambiguous SAA code, other organizations' ethics statements unequivocally support the right of native peoples to their cultural histories. As discussed in chapter 1, the RPA's code of ethics, which predates NAGPRA, directs it members to be "sensitive to, and respect the legitimate concerns of, groups whose culture histories are the subjects of archaeological investigations" (Watkins 2000a:28). The World Archaeological Congress' (WAC) First Code of Ethics goes even further in protecting native interests. Passed just two months before NAGPRA, the overarching theme of the WAC

code is simple: "indigenous control over indigenous heritage" (Zimmerman 1996:301). Within the code's eight obligations and seven rules to adhere to, the WAC is clear: "indigenous cultural heritage rightfully belongs to the indigenous descendants of that heritage" (WAC 1991:22). With this passage, the WAC code portrays the archaeological record very differently from the SAA code. Unlike the latter, which suggests that Native Americans are passive receivers of their culture via archaeologists, the former situates native peoples at the heart of their cultural histories, indicating that decisions regarding excavation and interpretation of their histories ultimately rest with tribes.

Furthermore, the WAC code also stresses the validity of "indigenous methodologies for interpreting, curating, managing and protecting indigenous cultural heritage" (WAC 1991:22). Again, this does not imply that native beliefs should supersede those cherished by American archaeology, only that native epistemologies constitute legitimate meaningful ways of knowing the past. Finally, the WAC code repeatedly stresses "the important relationship between indigenous peoples and their cultural heritage exists irrespective of legal ownership" (WAC 1991:22). Museums may legally own Native American artifacts, but this does not negate the very real bonds tribes feel—and have always felt—toward items of their cultural heritage. Native input regarding the excavation and display of cultural material should therefore be standard practice.

Taken together, the RPA and WAC present an ethical framework significantly different from that of the SAA, as they explicitly encourage equality, trust, and sustained cooperation between archaeologists and native peoples. Indeed, Groarke and Warrick's proposed amendment to the SAA's stewardship principle echoes the RPA and WAC codes in many respects. Even so, altering the SAA principles to resemble these more virtuous ethics codes would likely meet considerable resistance within the Society, especially by those

who view respecting and empowering Native Americans as a loss of power for archaeologists. However, these critics have only to look at archaeologists in other countries who prove that appreciating native peoples' right to their cultural heritage strengthens archaeology as a discipline.

Archaeologists in Australia and Canada have engaged with their large native populations in a host of meaningful ways. In Australia, federal law states that "all pre-1700 remains are by definition Aboriginal and must be controlled by Aboriginal authorities" (Watkins 2000a:159). Though some have questioned this somewhat arbitrary date (Pardoe 1992:133), Australian archaeologists are committed to an engaged culturally conscious archaeology, a fact no more clearly illustrated than by their verbatim adoption of the WAC code of ethics (Bendremer and Richman 2006:110).

Similarly, archaeologists in Canada have relatively strong relationships with First Nations, in part because consultation with native peoples is a prerequisite for obtaining any archaeological permit. No case better exemplifies the Canadian archaeologist-First Nation relationship better than *Kwäday Dän Ts'ínchi*, or "long-ago person found." In 1999, three people hunting in a remote area of British Columbia discovered the partially mummified remains of *Kwäday Dän Ts'ínchi* along with his hat, fur cloak, walking spear, spear, and leather pouch (Watkins 2000a:157). After consultation between archaeologists and local Champagne and Aishihik First Nations, tribal elders permitted scientific examination of the individual. After two years of study, during which the individual was determined to be around 600 years old, archaeologists repatriated the remains to the Champagne and Aishihik First Nations who, in July 2001, cremated his remains and returned them to the glacier in which he was found (Sydney Morning Herald 2002). Tribal elders did not unanimously approve scientific study of "long ago person found," but the majority eventually decided that learning about

the man's life and culture outweighed immediate repatriation (Sorenson 1999). Both parties benefited from this experience: archaeologists obtained intriguing new data while tribes learned about and reconnected with one of their ancestor in culturally sensitive ways.

With the passage of NAGPRA, the remnants of archaeology's colonial past began to erode, enlightening scholars to alternative practices and worldviews. If these positive interactions are to continue, the problematic and ambiguous aspects of NAGPRA and organizational ethics codes demand revision. Doing so will ensure that the Native American-archaeologist relationship is one of continual improvement resulting in an archaeology that is engaged, inclusive, and virtuous.

An Archaeology Built to Last:

The Future of Native American-Archaeologist Relations

In this thesis, I have attempted to show that the Native American-archaeologist relationship is tremendously complex, especially in the context of repatriation. In many ways, NAGPRA is responsible for this complexity, for it requires contact between tribes and scholars and integration of their respective worldviews. NAGPRA remains a positive force for resolution, but it cannot solve all issues between Native Americans and archaeologists. In courtroom settings, for instance, the law ceases to function as a meaningful bridge between the two sides, transforming into a mechanism that facilitates one-sided control of the past. As Larry Zimmerman observes, "reliance on law, historical precedent, or arguments of science versus religion are poor substitutes for real understanding" (1996:305). If the past decade has shown Native Americans and archaeologists one thing, it is that a mutually beneficial study of the past necessitates a commitment to resolution beyond legal recourse. Legal amendments and alterations to ethical codes are important, but alone they cannot bring about a culturally conscious archaeology. The discipline must also reexamine its attitudes toward NAGPRA and archaeological practice.

NAGPRA as Human Rights Legislation

The purpose of NAGPRA is perhaps no better expressed than by Sherry Hutt who, in testimony before the Senate Select Committee on Indian Affairs in 1999, stated that "permission to pursue scientific research must come from the party with the right to grant it" (Thomas 2000:234). With the passage of NAGPRA, native control over their sacred human remains and burial objects was, for the first time, legally acknowledged and protected. In just nine pages, NAGPRA loosened archaeologists' ironclad grip over the past, forcing them to recognize and include the interests of native peoples in their work. Many within the

discipline decried this loss of power, saying "an entire field of academic study may be put out of business" (Meighan 1994:68). It is from this anxiety that archaeologists began to argue that NAGPRA is a balance, seeking to protect the interests of both scholars and Native Americans. As Smith's (2010) recent criticism of CFR 43 aptly demonstrates, this view is alive and well in the discipline. By conceptualizing NAGPRA as a balance, archaeologists imply that before the law's passage, scholars and tribes were grappling for control of the past and each enjoyed a relative amount of power in that struggle. Of course, history tells a different story, as archaeologists enjoyed essentially unmitigated access to and interpretation of native histories. Thus, when archaeologists claim that NAGPRA is a balance, they refocus the repatriation debate away from inclusion of a long alienated minority to protection of hardly endangered scholarly practices.

The notion that NAGPRA serves as a balance is problematic, for it eschews the actual intent of the law and establishes a false us-vs.-them dichotomy (Fine-Dare 2002:160). Claiming that NAGPRA is a balance implies that archaeologists and Native Americans are always on opposite sides of the repatriation debate. However, as seen in previous chapters, Native Americans and archaeologists often work together, even amid NAGPRA's most contentious disputes. Many Native Americans are also archaeologists and oversee cultural preservation offices on their reservations (Ferguson 2000:27); the SAA backed claimant tribes' view that Kennewick Man is, under NAGPRA, Native American (SAA 2000); many archaeologists stood with native peoples long before and long after the passage of NAGPRA (Kluth 2000:139-140; Sprague 1974); and tribes hold a range of views regarding scientific testing and are not wholly opposed to the study of human remains (Killion and Molloy 2000:115; Nason 2008:123). Though it is easy to discuss repatriation in a dichotomous

manner, it is important to remember that repatriation is a complex issue, with supporters and detractors that resist such easy classification.

Those who argue that NAGPRA is a balance also fail to consider the painful history between Native Americans and archaeologists, between "the possessors and the dispossessed" (Fine-Dare 2002:161). NAGPRA is human rights legislation born from decades of native activism that problematized centuries of scholarly practices and government policies that stripped sacred histories from tribal land. As Fine-Dare persuasively argues, NAGPRA's intent lies with:

> "the human bodies and body parts and cultural treasures and burial offerings and clothing stripped from the dead [that] must be repatriated to those people who continue to suffer the legacies of colonialism: genocide, ethnocide, cultural disintegration, and territorial degradation and dispossession." [2002:161]

For centuries, archaeology regarded Native Americans as scientific specimens at best, an inferior race at worst, and did not involve native peoples in the study of their culture. NAGPRA sought to correct this unequal relationship, bestowing upon Native Americans the power to regulate the study of their sacred histories. Nonetheless, when archaeologists argue that NAGPRA is a balance between native and scholarly interests, they resurrect the remaining vestiges of this historically unequal relationship.

Setting aside the view that NAGPRA is a balance will not be easy for archaeologists, as many would likely claim that doing so threatens the viability of the discipline. However, these scholars fail to recognize what archaeology stands to gain by rejecting this skewed interpretation of the law. By focusing on NAGPRA's true intent, archaeologists respect the primacy of native views regarding the treatment of their culture and acknowledge that Native Americans are an important partner in scholars' study of the past. This encourages communication, helps alleviate double silence, and leads to solutions that are reasonable to

all parties involved that do not rest on narrow cultural assumptions. As a result, archaeologists and tribes are more likely to work together in the future, paving the way for sustained virtuous action. As renowned native activist Vine Deloria Jr. eloquently writes: "[tribes and scholars] can look forward, therefore, to creating a more constructive relationship…if [they] look at the present and future and make an effort to leave the past behind" (1992:598).

Cultural Relativism

Throughout the repatriation movement, archaeology has had to come to terms with not only the rights of descendant populations, but to the very basis of archaeological work. Over the past few decades, archaeologists have come to the realization that, contrary to the assumptions of their predecessors, their work is not value-free or completely objective. Archaeology has become increasingly reflexive, aware of the fact that its scientific investigations do not constitute absolute truth, but are culturally bound ways of knowing the past. In turn, many have called for increased respect toward alternative worldviews, particularly those held by native peoples (Ferguson 1996:70). "Science is just one perspective among many" (Klesert and Powell 1993:349) and does not represent a superior or more accurate method of studying the past, it is simply the one most familiar to Euro-American scholars. Again, validating the beliefs of others "does not require that [archaeologists] embrace these values, just that [they] understand them" (Klesert and Powell 1993:349). Such validation is also a two-way street, for by "respecting the values of Native American oral traditions, archaeologists…lay the foundation for Native Americans to respect the values of scientific knowledge" (Anyon et al. 2000:64), leading to an archaeology whose benefits transcend cultural boundaries.

Cultural relativism is easy to accept on a theoretical plane, but incorporating it into archaeological practice is infinitely more difficult, especially when it comes to human remains that hold immense research potential. Some resist amending archaeological research in accordance with native concerns, arguing that scholars have a right to conduct archaeological investigations. According to Goldstein and Kintigh: "to claim that archaeologists have no right to excavate or examine [human remains] is to deny [their] background and training" concluding that archaeologists have "an obligation to past cultures to tell their story" (1990:587). Meighan disputes the notion that archaeologists must be cognizant of native epistemologies in their work, arguing that this necessitates the "abandonment of scholarly imperatives…[and accepting] the right of nonscholars to demand the destruction of archaeological evidence" (1992:704). Clark believes native worldviews, which he defines as "absurd origin myth[s]" (2001:3) should have no bearing on archaeological practice.

This presumed scholarly right has its share of detractors. Klesert and Powell aver that "it is a perilous delusion to ever believe that archaeologists have a natural 'right' or overriding 'mandate' to dig up anything at all" (1993:350), a stance echoed by Mihesuah (2000:98). When it comes to repatriation, the right to dictate the treatment of human remains does not rest with interested Euro-American scholars, but with culturally descendant Native Americans. Archaeologists spend the majority of their educational and professional careers immersed in a field of study that privileges scientific inquiry. Of course, this approach enjoys vast potential in learning about the past, but it should not lead archaeologists to ethnocentric notions that they possess some inalienable right to study culturally sensitive aspects of native culture.

Thus, archaeology would do well to remember that their research is not just archaeological, but also anthropological. Though archaeologists' work differs greatly from that of their colleagues in other anthropology subdisciplines, they would nevertheless benefit from applying one of their parent discipline's key principles; that is, "the rights and wishes of the people [anthropologists] study supersede [their] own research needs" (Zimmerman 1989:66). The AAA ethics statement articulates this simple yet powerful idea:

> Anthropological researchers have primary ethical obligations to the people, species, and materials they study and to the people with whom they work. These obligations can supersede the goal of seeking new knowledge, and can lead to decisions not to undertake or to discontinue a research project when the primary obligation conflicts with other responsibilities. [AAA 1998:19]

Archaeology must not forget that it studies people—not things—and thus is obligated to treat the cultures it studies with respect and sensitivity (Watkins 2000a:171). At times, this will require the destruction of scientifically viable data with respect to the wishes of Native Americans. Though this loss may be difficult for some archaeologists to accept, it is ultimately the ethical—and right—thing to do.

Conclusion

Throughout this thesis, I have considered the following two questions: how can cultures with disparate and ostensibly irreconcilable worldviews share and learn from the past without alienation or subjugation; and how can repatriation continue to generate productive dialogue and cultural understanding? Through consultation, grave protection, and repatriation, NAGPRA represents a powerful answer to these questions. The law transformed the Native American-archaeologist relationship, helping to ensure that archaeology is beneficial not just to Euro-American scholars, but to its cultural descendants as well. It did not seek to balance the competing interests of scholars and tribes; it forced archaeology to alter its practices and listen to the long excluded voice of native peoples. In

doing so, it confronted the painful historical treatment of Native Americans, particularly the archaeological and museum practices that alienated native peoples from their sacred histories.

The results have been, on the whole, positive, as tribes and scholars have repeatedly proven that archaeology is capable of integrating disparate worldviews and interests. Such culturally conscious archaeology serves to improve the current Native American-archaeologist relationship, heal historic wounds, "establish and reinforce a sense of history and cultural unity" (Klesert 1992:21) among tribes, and lay the groundwork for future partnerships. Such positive interactions are seen no more clearly than in the Vancouver case as FOVA officials and VITC members tackled complex sensitive issues with grace and respect. With the reburial of the Vancouver Ancestors, FOVA and the VITC forged new alliances that are sure to continue. That the case was deeply meaningful to individuals on both sides was plain to see, and exemplifies the power repatriation holds in bridging cultural divides and creating an archaeology defined by inclusion rather than alienation. Fortmann does not "see a way forward without [working with tribes]" (pers. comm.), a message that speaks as much to FOVA as it does to archaeology as a discipline.

However, as the Kennewick Man case clearly demonstrated, the Native American-archaeologist relationship is far from perfect, as is the germinal piece of legislation that helped bring them together. The Kennewick Man debacle exposed NAGPRA's litany of problems, including its cultural assumptions, definition of Native American, limited scope, and method for establishing cultural affiliation. Some of these issues, such as the definition of Native American, possess simple fixes, while others, such as those surrounding cultural affiliation, resist easy solutions. NAGPRA is a crucially important document in the history of the United States, and if it is to remain as such, its problematic areas must be addressed through regulatory and, if need be, legislative action.

CFR 43 represents the most significant amendment of the law to date, and though I disagree with its reburial requirement, I believe the regulations represent an effective solution to one of NAGPRA's most controversial issues, that of "culturally unaffiliated" remains. As stipulated by NAGPRA, cultural affiliation can be established by a number of sources, including geography. When all other lines of evidence fail and remains are classified as "culturally unaffiliated," geography can and should be used in order to repatriate human remains; and although tribes are divided about the repatriation of sacred objects to non-federally recognized tribes, CFR 43's inclusion of these groups is appropriate and serves to remedy one of NAGPRA's more glaring oversights.

Archaeologists must never forget that NAGPRA is not an isolated event. Like the native peoples for whom it was intended, the law has a past, present, and future. The passage of NAGPRA was a climactic moment for native activists and ushered in a new era in American archaeology. Recalling this history reminds archaeologists that before the passage of NAGPRA, double silence reigned between scholars and tribes. By keeping this less than positive history in mind, archaeologists are more likely to see NAGPRA for what it really is: not as a balance, but as a law that serves to empower native peoples by involving them in the study of their history. As a result, archaeologists are more likely to collaborate with tribes, work to end double silence, generate mutually reasonable solutions, and engage in virtuous action. Indeed, these types of actions satisfy the three theoretical perspectives employed in this thesis and, in turn, reveal that answers to this work's overarching questions exist. It is possible for different cultures to share the past in mutually agreeable ways, so long as both sides come together as equals and are willing to listen, validate, and respect each other's views. The archaeological record is a complex, intriguing, and ultimately precious resource,

and it demands united investigations that work to celebrate, cherish, and learn from the past in ways that are beneficial to all.

NAGPRA's story is not over. Both sides have much to gain through collaboration and mutual respect, and it is my firm belief that despite its setbacks, NAGPRA will remain an important transformative law that, through cooperative partnerships, will eradicate double silence once and for all. I am confident that future archaeologists and Native Americans will look back on the dawn of the NAGPRA era with pride, as the beginning of a lasting alliance that augmented scholars' study of the past, strengthened tribes' cultural traditions, and generated permanent cooperation between the two.

That NAGPRA could lead to such a relationship speaks to the power and potential of the law and calls to mind the words of Congressman Morris Udall, who, after its passage, observed: "in the larger scope of history, this is a very small thing. In the smaller scope of conscience, it may be the biggest thing we have ever done" (McKeown 2008:145). Archaeologists will eventually divide the history of their discipline into two categories: the time before NAGPRA and the time after it. The law may have its problems, but the importance of NAGPRA must never be forgotten. It freed American archaeology from the shackles of its racist predecessors and started the discipline down a new path, one that will transform archaeology into a discipline that works to celebrate the past, inform the present, and provide for the future in ways that resonate with Euro-Americans as well as native peoples.

Acknowledgments

I am deeply indebted to officials at Fort Vancouver and the Vancouver Inter-Tribal Council, especially dAVe Burlingame, Tracy Fortmann, Tessa Langford, Eirik Thorsgard, Ed Arthur, and Fred York, without whose generous help this thesis would not have been possible. I offer them my sincerest thanks for showing me the meaning and importance of repatriation and, above all, for allowing me to tell the story of the Vancouver Ancestors.

Appendix A

Acronyms used in this thesis are as follows:

American Anthropological Association (AAA)

American Association of Physical Anthropologists (AAPA)

American Indian Movement (AIM)

American Indian Religious Freedom Act (AIRFA)

American Indians against Desecration (AIAD)

Archaeological Resources Protection Act (ARPA)

Code of Federal Regulations, Title 43, Subpart C, Section 10.11 (CFR 43)

Cultural Resource Management (CRM)

Fort Vancouver, Washington (FOVA)

Hudson's Bay Company (HBC)

National Historic Preservation Act (NHPA)

National Museum of the American Indian Act (NMAIA)

National Park Service (NPS)

Native American Graves Protection and Repatriation Act (NAGPRA)

Native American Rights Fund (NARF)

Nebraska State Historical Society (NSHS)

Nebraska Unmarked Human Burial Sites and Skeletal Remains Act (LB 340)

Register of Professional Archaeologists (RPA)

Society for American Archaeology (SAA)

Vancouver Inter-Tribal Consortium (VITC)

World Archaeology Congress (WAC)

Wounded Knee Survivors Association (WKSA)

Appendix B

PUBLIC LAW 101-601—NOV. 16, 1990 NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Public Law 101-601
101st Congress
An Act

[104 stat. 3048 public law 101-601—nov. 16, 1990]

Nov. 16, 1990
[H.R. 5237]

To provide for the protection of Native American graves, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled

Native American Graves Protection and Repatriation Act.
Hawaiian Natives.
Historic Preservation.
25 USC 3001 note.
25 USC 3001.

SECTION 1. SHORT TITLE.

This Act may be cited as the `Native American Graves Protection and Repatriation Act'.

SEC. 2. DEFINITIONS.

For purposes of this Act, the term--

(1) `burial site' means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) `cultural affiliation' means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) `cultural items' means human remains and--

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

(B) `unassociated funerary objects' which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, 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,

(C) `sacred objects' which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) `cultural patrimony' which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by 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.

(4) `Federal agency' means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) `Federal lands' means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

(6) `Hui Malama I Na Kupuna O Hawai'i Nei' means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) `Indian tribe' means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) `museum' means 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. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) `Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) `Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) `Native Hawaiian organization' means any organization which--

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and

shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) `Office of Hawaiian Affairs' means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) `right of possession' means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group

with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1491 in which event the `right of possession' shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) `Secretary' means the Secretary of the Interior.

(15) `tribal land' means--

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

SEC. 3. OWNERSHIP.

(a) NATIVE AMERICAN HUMAN REMAINS AND OBJECTS- The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed)--

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony--

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe--

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS- Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8, Native American groups, representatives of museums and the scientific community.

(c) INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS- The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if--

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS- (1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of

enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) RELINQUISHMENT- Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

SEC. 4. ILLEGAL TRAFFICKING.

(a) ILLEGAL TRAFFICKING- Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

`Sec. 1170. Illegal Trafficking in Native American Human Remains and Cultural Items

`(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

`(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.'.

(b) TABLE OF CONTENTS- The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

`1170. Illegal Trafficking in Native American Human Remains and Cultural Items.'.

SEC. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) IN GENERAL- Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS- (1) The inventories and identifications required under subsection (a) shall be--

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term `documentation' means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or

other means of acquiring or preserving additional scientific information from such remains and objects.

(c) EXTENSION OF TIME FOR INVENTORY- Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) NOTIFICATION- (1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information--

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) INVENTORY- For the purposes of this section, the term `inventory' means a simple itemized list that summarizes the information called for by this section.

SEC. 6. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

(a) IN GENERAL- Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or

museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) REQUIREMENTS- (1) The summary required under subsection (a) shall be--

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

SEC. 7. REPATRIATION.

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS- (1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and

pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where--

> (A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;
>
> (B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or
>
> (C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) SCIENTIFIC STUDY- If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items 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. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

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

(d) SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS- Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) COMPETING CLAIMS- Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) MUSEUM OBLIGATION- Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 8. REVIEW COMMITTEE.

(a) ESTABLISHMENT- Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7.

(b) MEMBERSHIP- (1) The Committee established under subsection (a) shall be composed of 7 members,

> (A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;
>
> (B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and
>
> (C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including

per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) RESPONSIBILITIES- The committee established under subsection (a) shall be responsible for--

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to--

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act.

(e) RECOMMENDATIONS AND REPORT- The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(f) ACCESS- The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(g) DUTIES OF SECRETARY- The Secretary shall--

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) ANNUAL REPORT- The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) TERMINATION- The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

SEC. 9. PENALTY.

(a) PENALTY- Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) AMOUNT OF PENALTY- The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors--

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

(c) ACTIONS TO RECOVER PENALTIES- If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been

issued under subsection (a) and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) SUBPOENAS- In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

SEC. 10. GRANTS.

(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS- The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) MUSEUMS- The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

SEC. 11. SAVINGS PROVISIONS.

Nothing in this Act shall be construed to--

(1) limit the authority of any Federal agency or museum to--

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on the date of enactment of this Act;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

SEC. 12. SPECIAL RELATIONSHIP BETWEEN FEDERAL GOVERNMENT AND INDIAN TRIBES.

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

SEC. 13. REGULATIONS.

The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

SEC. 15. ENFORCEMENT.

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

Appendix C

43 CFR 10.11 – Disposition of culturally unidentifiable human remains.

Title 43: Public Lands: Interior

PART 10: NATIVE AMERICAN GRAVES PRTOECTION AND REPATRIATION REGULATIONS

Subpart C: Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections

10.11 – Disposition of culturally unidentifiable human remains.

(a) *General.* This section implements section 8(c)(5) of the Act and applies to human remains previously determined to be Native American under §10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

(b) *Consultation.* (1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:

(i) Within 90 days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or

(ii) If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.

(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:

(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed; and

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:

(i) A list of all Indian tribes and Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains and associated funerary objects;

(ii) A list of any Indian groups that are not federally-recognized and are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.

(4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:

(i) The name and address of the Indian tribal official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;

(iii) Temporal and geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;

(iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or Indian groups that are not federally-recognized who should be included in the consultations; and

(v) A schedule and process for consultation.

(5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.

(6) If consultation results in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains and associated funerary objects must be completed as required by §10.9(e) and §10.10(b).

(c) *Disposition of culturally unidentifiable human remains and associated funerary objects.* (1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at §10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or

(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:

(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or

(ii) Upon receiving a recommendation from the Secretary or authorized representative:

(A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or

(B) Reinter culturally unidentifiable human remains according to State or other law.

(3) The Secretary may make a recommendation under paragraph (c)(2)(ii) of this section only with proof from the museum or Federal agency that it has consulted with all Indian tribes and Native Hawaiian organizations listed in paragraph (c)(1) of this section and that none of them has objected to the proposed transfer of control.

(4) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.

(5) The exceptions listed at §10.10(c) apply to the requirements in paragraph (c)(1) of this section.

(6) Any disposition of human remains excavated or removed from Indian lands as defined by the Archaeological Resources Protection Act (16 U.S.C. 470bb (4)) must also comply with the provisions of that statute and its implementing regulations.

(d) *Notification.* (1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) of this section may not occur until at least 30 days after publication of a notice of inventory completion in the Federal Register as described in §10.9.

(2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:

(i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice's publication; and

(ii) Make the revised Review Committee inventory accessible to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

(e) *Disputes.* Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects should do so through informal negotiations to achieve a fair resolution. The Review Committee may facilitate informal resolution of any disputes that are not resolved by good faith negotiation under §10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

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