

CLAIMING THE SHIELDS: LAW, ANTHROPOLOGY, AND THE ROLE OF STORYTELLING IN A NAGPRA REPATRIATION CASE STUDY

*Debora L. Threedy**

INTRODUCTION

On August 16, 1926, a man named Ephraim Portman Pectol and his wife were out looking for “cliff dwellings” in an area just west of what would become Capitol Reef National Park in south central Utah. As they were starting home at dusk, they rounded a large rock and found the mouth of an alcove, “perhaps 30 feet long and 13 feet wide, and 4 feet high.”¹

Beginning to dig in the alcove, Pectol discovered “a cover apparently of some sort of rawhide.”² He and his wife decided to let their children share in the discovery, so they went home and returned later with them, as well as three neighbors who decided to tag along. Pectol later described what happened next:

We returned, built a bonfire in front of the cave, and at 10 o’clock at night we unearthed three of the most wonderful shields ever seen by man. As we raised the front shield, the design on two shields came to view. For the space of what seemed to me two or three minutes, no one seemed to breathe; we were so astonished. We felt we were in the presence of the one who buried the shields....³

The three shields had been stacked one on the other, with layers of juniper bark between each of the shields.⁴ Beneath the shields was another layer of bark, covering a “cone of earth”⁵ on which the shields had been placed to retain their shape.⁶ Nothing else was found in the alcove.

* © 2009 Debora L. Threedy, Professor of Law, S.J. Quinney College of Law, University of Utah. This project was supported in part by a Summer Research Grant from the S.J. Quinney College of Law. A portion of this paper was presented at the Feminist Legal Theory Workshop on Storytelling, at Emory College of Law, October 27, 2006. My thanks to Martha Fineman and the other participants in that workshop, as well as my colleagues at the S.J. Quinney College of Law who listened to an early presentation on the subject and gave encouragement. Special thanks to Alex Skibine, Daniel Medwed, Lee Kreutzer and Robert McPherson for reading portions of earlier drafts, and to Lee Kreutzer and Neal Busk for taking the time to discuss the case with me on many occasions over the years.

¹ Judy Shell Busk, *E.P. Pectol*, http://www.entradainstitute.org/local_history_2.htm (last visited Mar. 12, 2007).

² *Id.*

³ *Id.*

⁴ Lawrence L. Loendorf & Stuart W. Conner, *The Pectol Shields and the Shield-Bearing Warrior Rock Art Motif*, 15 J. CAL. & GREAT BASIN ANTHRO. 216, 216 (1993). The source says “cedar bark,” but there are no true cedars in the area, and that name is often applied to juniper trees, which are common in the area and which resemble in some respects cedar trees.

⁵ *Id.*

⁶ Two of the shields are convex; one is concave, at least in its present condition. *Id.* at 218-19.

The shields are made of bison hide.⁷ They are large in size; they would cover the bearer from the shoulder to the knees.⁸ All have arm bands or slings by which the shield was held.⁹ Because of their size, it is assumed that they were carried while walking, and not by men mounted on horseback.¹⁰ All were originally circular, although all three have in varying degrees been damaged around the edges.¹¹ All three of the shields have been painted.¹²

After some odd twists and turns¹³ by the end of the twentieth century the shields were in the possession of Capitol Reef National Park. At that point, three claims were filed for repatriation of the shields under the auspices of the Native American Graves Protection and Repatriation Act (NAGPRA or the Act).¹⁴

In this paper, I use the controversy surrounding the repatriation of the three shields as the basis for examining the question of who owns the past. In particular, I examine how the repatriation process under NAGPRA addresses that question. I do this through the methodology of a case study. Because of the fact-intensive inquiry required under NAGPRA, and because NAGPRA repatriation cases are not

⁷ Lee Ann Kreutzer, *The Pectol Collection, Capitol Reef National Park, Utah*, 7 UTAH ARCHAEOLOGY 104, 107 (1994).

⁸ *Id.*

⁹ Loendorf & Conner, *supra* note 4, at 218-19.

¹⁰ *Id.* at 222-23; Kreutzer, *supra* note 7, at 107.

¹¹ Loendorf & Conner, *supra* note 4, at 218-19.

¹² One shield has been divided into “four roughly equivalent triangular” sections. *Id.* at 218. One section is painted red, one is rust, one is black, and the last has a design that resembles feathers painted in colors of green, red and black. There is also a figure in the shape of an arch across the center part of the shield.

Another shield was painted on both sides. As this shield also has a tear that was repaired, apparently before it was buried, it has been suggested that the back of this shield was once the front, which would explain why it was painted on both sides. *Id.* at 219. The current “back” of the shield has red paint with two triangular designs. The “front” is also painted red, with a triangular, fan-shaped design with green and red bands on it.

The most complex and impressive pattern appears on the third shield. One part of the shield is covered with unpainted dots on a black background, while the other part is covered with a pattern of alternating rows of green lines and unpainted dots on a rust background. The unpainted dots were formed by painting over a circular stencil with the background color. *Id.* at 218. The overall effect is dazzling.

¹³ In 1932, the federal government received a complaint that individuals in Wayne County, Utah (where the shields were found) were collecting valuable artifacts from public lands, which make up approximately ninety-seven percent of the county. An agent was sent to investigate and Pectol admitted that he had collected the shields from public land. The agent formally “seized” the shields and other artifacts by placing a tag indicating federal ownership on them, but because he judged them of little value (he was a geologist, not an archaeologist) he left them in the physical possession of Pectol. In the late thirties, Pectol lent his collection of Native American artifacts, including the shields, to the Temple Museum in Salt Lake City. In the fifties, the federal government reclaimed the shields and two of them were eventually placed on display in the visitor center at Capitol Reef National Park. A detailed recounting of the shields’ journey from Pectol’s discovery to Capitol Reef National Park is set out in Shane A. Baker, *In Search of Relics: The History of the Pectol-Lee Collection from Wayne County*, in RELICS REVISITED: THE PECTOL-LEE ARTIFACTS FROM CAPITOL REEF: NEW PERSPECTIVES ON AN EARLY TWENTIETH-CENTURY COLLECTION 21, 28, 36-45 (Marti L. Allen ed., 2002).

¹⁴ 25 U.S.C. §§ 3001-3013 (2006).

typically resolved through court litigation,¹⁵ a case study seems an appropriate way to proceed with this examination.¹⁶

The paper is structured in this way. It begins in Part I with a brief overview of NAGPRA and a recounting of how the dispute moved through the NAGPRA process. Part II focuses on the disconnect between the two disciplines of anthropology and law which is built into the structure of the Act. Part III examines the problem of competing tribal claims of cultural affiliation and the unintended consequence that the Act might create or exacerbate inter-tribal tensions. The final section focuses on the role of storytelling in the repatriation decision, an example of how the metaphoric and literal meanings of owning the past came together in this case.

I. REPATRIATING THE SHIELDS UNDER NAGPRA

A. A Brief Overview of NAGPRA

This section will describe the purpose and structure of NAGPRA in very broad terms, as others have provided a thorough history and description of NAGPRA.¹⁷

For over two hundred years, white Americans have assumed rights of ownership over Native American human remains and other cultural items.¹⁸ In the second half of the nineteenth century, a period described as “America’s Golden Age of Natural History,”¹⁹ public and private museums collected human remains of all races and ethnicities.²⁰ Included in these collections were Native American

¹⁵ The official NAGPRA website lists over a thousand repatriation notices. Conversely, only a handful of repatriation cases have resulted in published judicial opinions. *See, e.g.*, C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL’Y 153, 180 (2002-03) (noting that, to date, nine civil cases involving repatriation had been filed in federal court).

¹⁶ *See, e.g.*, Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian “Cultural Property” Repatriation*, 20 U. HAW. L. REV. 261 (1998) (case study of the controversy surrounding repatriation of a wooden spear rest); Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109 (1993) (case study of the repatriation dispute over carved wooden posts and rainscreen).

¹⁷ There are over two hundred articles dealing with various aspects of and issues under NAGPRA. Two especially thorough overviews are found in Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Legislation*, 25 J. LAND, RESOURCES, & ENVTL. L. 259 (2005) (giving legislative history, overview, and summary of major litigation involving NAGPRA), and McKeown & Hutt, *supra* note 15.

¹⁸ In his 1787 treatise, *Notes on the State of Virginia*, Thomas Jefferson described what was probably the first scientific archaeological project in the United States: the excavation of an earthen mound on his property that was found to contain human remains. *See* DAVID HURST THOMAS, *SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY* 32-35 (2000).

¹⁹ *Id.* at 56.

²⁰ *Id.* at 119. *See also* James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 17-18 (1992) (discussing craniology and phrenology).

remains. Indeed, government agents, military personnel, and private collectors aggressively sought out Native American remains, recent as well as ancient.

In 1868, the U.S. Surgeon General directed army personnel to collect Indian crania for the Army Medical Museum.²¹ That order resulted in the collection of more than four thousand Native American heads.²² One army surgeon recounted how he had obtained the skull of an elderly Sioux man:

[The man] died at this post on the seventh day of Jan. 1869 and was buried in his blankets and furs in the ground about a half mile from the Fort, within a few rods of the tippes [sic] occupied by his friends. I secured the head in the night of the day he was buried. From the fact he was buried near these lodges, [I suspected] it was their intention to keep watch over the body. Believing that they would hardly think I would steal his head before he was cold in the grave, I early in the evening with two of my hospital attendants secured this specimen.²³

Other “specimens” were collected alive. Admiral Peary returned from one of his Arctic explorations with six Eskimos from Greenland. Within a year, four of them had died of tuberculosis.²⁴ One of the men, Qisuk, had brought his six year old son along. When Qisuk died a funeral was held for him and he was supposedly buried. What his son would learn some ten years later, however, was that the grave contained no body; after Qisuk’s death, an autopsy was performed on his body, his brain was removed and preserved, and his bones were defleshed, numbered and archived in the American Museum of Natural History.²⁵

Seventeen years ago Congress took steps to redress this history of cultural insensitivity and abuse by passing NAGPRA. A common misperception is that NAGPRA applies to anything Native American, but this is not the case. Initially, the Act only applies to remains and items found on federal or tribal lands, or held by federal agencies or federally-funded museums.²⁶ Consequently, the Act does not apply to remains or items found on private property or those that are currently held by private individuals or organizations, unless it can be proven that the individual or organization illegally obtained the items.²⁷

Moreover, the Act only applies to “cultural items,” which includes five categories. The first is human remains.²⁸ The Act also applies to two classes of

²¹ Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992).

²² *Id.*

²³ THOMAS, *supra* note 18, at 57.

²⁴ *Id.* at 80.

²⁵ *Id.* at 77-78.

²⁶ 25 U.S.C. § 3001.

²⁷ The limited scope of NAGPRA has been criticized by some. *E.g.*, Rebecca Tsosie, *Indigenous Rights and Archaeology*, in NATIVE AMERICANS AND ARCHAEOLOGISTS: STEPPING STONES TO COMMON GROUND 64, 71 (Nina Swidler et al., eds., AltaMira Press) (1997). Indeed, the whole concept of “ownership” as applied to human remains and sacred objects is rejected by some. *Id.* at 66.

²⁸ 25 U.S.C. § 3001(3).

“funerary objects,” meaning objects placed with individual human remains as part of a death rite or ceremony.²⁹ Funerary objects can be either “associated,” which means that the individual is known and the remains are in the custody or control of a federal agency or federally-funded museum, or “unassociated,” which means that, while it can be shown that the items were removed from a specific burial site, the objects have been separated from the individual human remains and the remains are not in the custody or control of a federal agency or federally-funded museum.³⁰

The Act also applies to two classes of items not connected with burials. It applies to “sacred objects.” This category is narrowly defined as including only “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.”³¹ The final category is objects of “cultural patrimony.” An object of cultural patrimony is one which has “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual” and which cannot be “alienated, appropriated, or conveyed by any individual.”³²

²⁹ 43 C.F.R. §10.2(d)(2)(2005) (defining funerary objects as “[I]tems that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains”).

³⁰ The definition of unassociated funerary objects is as follows: [T]hose funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. 43 C.F.R. § 10.2(d)(2)(ii).

³¹ 25 U.S.C. § 3001(3)(c). *See also* 43 C.F.R. §10.2(d)(3) (defining sacred objects as “[I]tems that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery shards to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony”).

³² 25 U.S.C. § 3001(3)(D). *See also* 43 C.F.R. § 10.2(d)(4) (defining objects of cultural patrimony as “[I]tems having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include such items as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole”). To my mind, this category is the most problematic under NAGPRA. The first part of the definition is potentially very broad; almost any archaeological artifact could be said to have historical importance. The second part of the definition, the requirement of inalienability, can be interpreted as a significant narrowing of the category, but it includes background assumptions of concepts of ownership that may or may not be appropriate for Native American groups. The definition has been challenged twice for vagueness, but has so far been upheld. *See* U.S. v. Corrow, 119 F.3d 796 (10th Cir. 1997) (upholding antiquities dealer’s conviction for selling Navajo ceremonial masks); and U.S. v. Tidwell, 191 F.3d 976 (9th Cir. 1999) (upholding dealer’s conviction for selling Hopi ceremonial masks and robes).

The operative part of NAGPRA consists of two major sections, one of which is forward looking and one of which addresses the past.³³ The first section, the forward looking section, addresses the ownership of human remains and other cultural objects found on federal or tribal lands after the effective date of the Act, which was November 16, 1990. The second section of the Act, the one looking to the past, addresses the issue of repatriation to Native American claimants of human remains and other cultural objects found prior to the passage of the Act and now held by federal agencies and museums that receive federal funding.

The first section, dealing with the ownership of human remains and cultural objects found post-1990, applies to both “intentional excavation,” in which case a permit and consultation are required, and “inadvertent discovery.”³⁴ In either case, the Act prioritizes claims of ownership. Priority varies depending upon the category of the item claimed and the location of the find. For human remains and associated funerary objects, first priority is given lineal descendants.³⁵ In the absence of lineal descendants, and in all cases involving unassociated funerary objects, sacred objects, and objects of cultural patrimony, if the remains or objects are found on tribal land, first priority goes to that Native American tribe.³⁶ Second priority goes to the Native American tribe “which has the closest cultural affiliation.”³⁷ If the cultural affiliation cannot be “reasonably” ascertained and the cultural items are found on federal land that has been adjudicated the aboriginal land of some Indian tribe, then the next priority is given to that tribe, unless another tribe shows, by a preponderance of the evidence, that it has a “stronger cultural relationship” with the items, in which case that tribe has the next priority.³⁸

Claims for repatriation of cultural items obtained prior to 1990 but now held by federal agencies and federally-funded museums are handled differently than claims of ownership of post-1990 discoveries. Initially, to facilitate the making of such claims for repatriation, federal agencies and federally-funded museums are required to compile and disseminate two types of notices. For human remains and associated funerary objects, the agencies and museums are required to produce an item-by-item inventory providing detailed information about each item.³⁹ For the other categories of cultural items—unassociated funerary objects, sacred objects and objects of cultural patrimony—the agencies and museums are only required to produce a more general summary for each collection.⁴⁰

Once a claim for repatriation is made, NAGPRA provides a much simpler prioritization scheme than that for ownership claims to post-1990 discoveries, although the scheme is not without ambiguities. Where cultural affiliation is established in the process of preparing the inventory or summary, then repatriation of human remains, associated funerary objects, and sacred objects is made to a

³³ NAGPRA also includes an often overlooked criminal section.

³⁴ 25 U.S.C. § 3002(c)-(d).

³⁵ 25 U.S.C. § 3002(a)(1).

³⁶ 25 U.S.C. § 3002(a)(2)(A).

³⁷ 25 U.S.C. § 3002(a)(2)(B).

³⁸ 25 U.S.C. § 3002(a)(2)(C).

³⁹ 25 U.S.C. § 3003(a).

⁴⁰ 25 U.S.C. § 3004(a).

lineal descendant or to the tribe.⁴¹ In the case of a claim to an unassociated funerary object or object of cultural patrimony, if the survey establishes cultural affiliation with a particular tribe, then repatriation is made to that tribe.⁴²

Repatriation gets more complicated if the inventory or summary was not able to establish cultural affiliation. In such cases, repatriation is made to the tribe that “can show cultural affiliation by a preponderance of the evidence” based upon a variety of factors such as geography, linguistics, oral tradition or expert opinion.⁴³ If there are competing tribal claimants, then a section on competing claims would govern.

In the case of competing claims for repatriation under NAGPRA, the federal agency involved must determine who is the “most appropriate claimant.”⁴⁴ Presumably, this means the tribe with the closest cultural affiliation to the cultural item, although the Act does not explicitly set out the standards to be used in making this determination. Regulation 10.14(d) does provide that cultural affiliation should be “based upon an overall evaluation of the totality of the circumstances.”⁴⁵ The statute and the implementing regulations also set out the types of evidence to be considered: geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.⁴⁶ The standard of proof to be applied is that of “a preponderance of the evidence.”⁴⁷ The regulations specifically state that a finding of cultural affiliation does not require “scientific certainty.”⁴⁸

The Act does anticipate, however, that there may be cases in which “the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant.”⁴⁹ In that situation, the Act provides that the agency or museum may retain the item until one of three alternative scenarios occurs: 1) “the requesting parties agree upon its disposition”; 2) “the dispute is otherwise resolved

⁴¹ 25 U.S.C. § 3005(a)(1), (4), (5). *But see* 43 C.F.R. § 10.10(a)-(b). The regulations provide that all cultural items, including objects of cultural patrimony, may be repatriated to either a lineal descendant or the tribe.

⁴² 25 U.S.C. § 3005(a)(2). *But see* 43 C.F.R. § 10.10(a)-(b), which provide for repatriation to a lineal descendant as well as the tribe. In the case of unassociated funerary objects, it seems appropriate to include lineal descendants, if they can be determined. But as the definition of objects of cultural patrimony states that to qualify as such the object cannot be the personal property of any individual, including lineal descendants as appropriate claimants is problematic.

⁴³ 25 U.S.C. § 3005(a)(4).

⁴⁴ Section 3005(e) of the Act provides, “[W]here there are multiple requests...and...the federal agency or museum cannot clearly determine which...is the most appropriate claimant, the agency or museum may retain such an item until the requesting parties agree...or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.” 25 U.S.C. § 3005(e). *See also* 43 C.F.R. §§ 10.10(c)(2) and 10.17.

⁴⁵ The section provides: “A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed should not be precluded solely because of some gaps in the record.” 43 C.F.R. § 10.14(d).

⁴⁶ 25 U.S.C. § 3005(a)(4); 43 C.F.R. § 10.14(e).

⁴⁷ 25 U.S.C. § 3005(a)(4).

⁴⁸ 43 C.F.R. § 10.14(f).

⁴⁹ 25 U.S.C. § 3005(e).

pursuant to the provisions of this chapter”; or 3) the matter is resolved by a court.⁵⁰

Finally, the Act and its implementing regulations do not deal with the situation where cultural items are “culturally unidentifiable.” The legislative history of the Act suggests that the drafters considered the problem but were unable to agree on how to address this situation and so left it for the regulations to address.⁵¹ But to date no regulations on the subject have been adopted.

B. Repatriating the Shields

As the shields were found by Pectol many years prior to the passage of NAGPRA, it is the second section of the Act dealing with repatriation that applies. The shields were not originally included in the Park’s NAGPRA inventory or summary. It was known that they were not found in a burial; thus, they were not funerary objects. They were not considered as either sacred objects or objects of cultural patrimony because it was assumed they comprised an individual’s personal armaments and not a ceremonial object. Thus, the shields remained on display at the Park visitors’ center through the mid-1990s.

The Park archaeologist, however, routinely brought the shields to the attention of Native American consultants and during one consultation it was suggested that the shields might be sacred objects.⁵² This prompted the Park to contact representatives of all of the tribes that might have an interest in the shields.⁵³ A series of consultations with tribal representatives confirmed that there were likely to be competing claims to the shields, so the Park also commissioned three experts to prepare analyses of the cultural affiliation of the shields.⁵⁴ Later, a fourth report was commissioned when additional funding became available.⁵⁵ The experts did not agree on the cultural affiliation of the shields.

Ultimately, on June 11, 2001, the Navajo Nation formally requested repatriation of the shields.⁵⁶ The Navajo claim alleged that the shields were sacred objects needed for the proper practice of the Protection Way Ceremony, as well as objects of cultural patrimony.⁵⁷ The filing of the Navajo claim prompted other tribes to make repatriation requests. Eventually, several of the tribes submitted two additional, collaborative requests. One request came from the Ute Indian Tribe of

⁵⁰ *Id.*

⁵¹ Trope & Echo-Hawk, *supra* note 21, at 64.

⁵² Email from Lee Ann Kreutzer to author (October 15, 2007).

⁵³ The Notice of Intent to Repatriate lists thirty-seven tribes that were contacted and or consulted.

⁵⁴ Benson L. Lanford, Tribal Attribution of the Pectol Shields, Capitol Reef National Park, Utah (2001) (manuscript on file with author); Lawrence Loendorf, The Pectol Shields: A Repatriation Study (2001) (manuscript on file with author); Barton A. Wright, Professional Evaluation of Cultural Affiliation of Three Buffalo Hide Shields from Capitol Reef National Park, Utah (2001) (manuscript on file with author).

⁵⁵ Polly Schaafsma, The Pectol Shields: A Cultural Evaluation (2002) (manuscript on file with author).

⁵⁶ Lee Kreutzer, Summary of Historical Research and Evaluation of the Repatriation Request Submitted by the Navajo Nation, for the Capitol Reef Shields 1 (July 1, 2002).

⁵⁷ *Id.* at 2-3.

the Uintah and Ouray Agency,⁵⁸ the Paiute Tribe of Utah, and the Kaibab Band of Paiute Indians (the “Ute/Paiute claim”).⁵⁹ The other claim was made by the Southern Ute Tribe and Ute Mountain Tribe (the “Southern Ute claim”).⁶⁰ Thus, the Park was faced with the problem of resolving competing tribal claims for repatriation of the shields.

Because tribes were making the request for repatriation and not a direct lineal descendant,⁶¹ the Park was required first, to determine whether any of the tribes had a “cultural affiliation” with the shields, and secondly, if more than one tribe did have such a cultural affiliation, to attempt to determine which tribe had the closest cultural affiliation with the shields. On July 1, 2002, the Park archaeologist recommended repatriation to the Navajo Nation.⁶² Administrative appeals were taken by the Pectol family⁶³ and the Southern Ute claimants.⁶⁴ These appeals were denied. In August of 2003, the shields were turned over to the Navajo Nation. It was reported that they are now being stored in a vault in the tribal museum at Window Rock and are available for traditional healers’ use.⁶⁵

The repatriation of the shields reveals three inter-related issues that the remainder of this paper will address. First, the repatriation process in this case reveals a fundamental disconnect between law and archaeology. Second, it

⁵⁸ Although in casual conversation references are often made to the “Utes,” after whom the state of Utah is named, in the mid-1800s there were at least eleven separate bands identified as Ute. Today, there are three separate federally recognized Ute tribes. See T. J. Ferguson, *Ethnographic Study of Ten Tribes: Cultural Affiliation with the Uinta and Great Salt Lake Variants of Fremont in Northern Utah* 1, 23-25 (2003) (manuscript on file with the author).

⁵⁹ Both of these Paiute tribes belong to what anthropologists call the Southern Paiute. Historically, there were sixteen bands within the Southern Paiute. Today, both of these groups are separate, federally recognized tribes. *Id.* at 26-28.

⁶⁰ These are the other two federally recognized Ute tribes.

⁶¹ It appears that John Holiday, the singer or medicine man who provided the oral history in support of the Navajo claim, could have individually requested repatriation, as the administrative decision states that “he has established...that he is a lineal descendant of one of the last owners of [the shields].” Kreutzer, *supra* note 56, at 39.

⁶² *Id.*

⁶³ The Pectol family was disturbed by the decision because they wished to see the shields remain in a museum, preferably on display at Capitol Reef National Park. Their progenitor and the finder of the shields, Ephraim Portman Pectol, had lobbied for the creation of the Park. The Pectols requested reconsideration of the decision to repatriate the shields to the Navajo Nation from the Park superintendent and the regional director, both of whom declined to do so. Lee Kreutzer, *Consideration of Supplemental Information Concerning the Capitol Reef Shields 1*, (June 6, 2003). The Pectols also considered taking the case to the NAGPRA Review Committee, but did not do so after the Review Committee, in another case, determined that only federally-recognized tribes, federal agencies, or museums had standing to come before the Review Committee. *Id.*

⁶⁴ *Id.* at 3-4.

⁶⁵ Robert Begay, Navajo Historic Preservation Department, and Timothy Begay, Navajo Cultural Specialist, *Relics Revisited Seminar*, February 7, 2004. The continued use of fragile artifacts such as the shields gives some preservationists pause. “Objects curated in museums for as long as a century are not likely to hold up to any significant use. For example, a nineteenth century medicine bundle, curated in a temperature and humidity-controlled environment, probably will deteriorate rapidly if put back into active use.” Thomas H. Boyd & Jonathan Haas, *The Native American Graves Protection and Repatriation Act: Prospects for New Partnerships Between Museums and Native American Groups*, 24 ARIZ. ST. L.J. 253, 265 (1992).

highlights an unintended consequence of NAGPRA, the creation or exacerbation of tensions between different Native American groups. Finally, the case presents an opportunity to examine the role of storytelling in the repatriation process.

II. THE DISCONNECT BETWEEN LAW AND ANTHROPOLOGY

The controversy surrounding the repatriation of the shields puts into stark relief the fundamental disconnect between anthropology and law. Anthropologically speaking, it is not possible to assign a cultural affiliation for the shields. Arguably, however, the legal standard for cultural affiliation is less rigorous than that used in anthropology. Under NAGPRA, cultural affiliation need only be established by a preponderance of the evidence. It does not require scientific certainty.

The identity of the makers of the shields has “been the subject of debate since their discovery” in the mid 1920s.⁶⁶ Because of his belief in *The Book of Mormon*, which recounts the story of a pre-Columbian Hebrew people who lived on the American continent,⁶⁷ Pectol thought they were about 3,000 years old and perhaps carried by these people from Egypt to Peru, and then to Utah.⁶⁸ He attributed religious significance to the designs on the shields: “He interpreted their designs as representing creation, the peopling of the earth, and the conflict between good and evil.”⁶⁹

The first two archaeologists to inspect the shields believed that they were historical, i.e., post-Columbian artifacts.⁷⁰ They based this judgment upon several factors: the uniqueness of the shields in the archaeological record; their resemblance to modern Apache shields;⁷¹ and their resemblance to post-Columbian pictographs of shield-bearing warriors that appear with figures of horses at rock art sites in Utah.⁷² Later archaeologists disagreed.⁷³ Several different origins were postulated: one of the Plains tribes; one of the Puebloan tribes; or perhaps the Fremont, who inhabited the area from approximately 1 A.D. to approximately 1300 A.D.⁷⁴

⁶⁶ Loendorf & Conner, *supra* note 4, at 218.

⁶⁷ See THE BOOK OF MORMON: ANOTHER TESTAMENT OF JESUS CHRIST (Joseph Smith, Jr. trans., Intellectual Reserve, Inc.) (1981) (1830).

⁶⁸ Loendorf & Conner, *supra* note 4, at 216.

⁶⁹ Busk, *supra* note 1.

⁷⁰ Loendorf & Conner, *supra* note 4, at 216.

⁷¹ This noted resemblance with Apache shields is interesting, as Apaches and Navajos are both Athabaskan speakers and it is believed that both tribes descended from the same Athabaskan ancestors. Nancy Maryboy & David Begay, *The Navajos in A HISTORY OF UTAH'S AMERICAN INDIANS* 265, 271-72 (Forrest S. Cuch, ed., Utah State University Press 2000).

⁷² One such site, which has been attributed to Utes, appears in Capitol Reef National Park, within ten miles of the alcove where the shields were found.

⁷³ Loendorf & Conner, *supra* note 4, at 216-17.

⁷⁴ See, e.g., Richard K. Talbot, *In Search of the Ancient Utahns: The Prehistory of the Fremont River Drainage, AD 1-1800, in RELICS REVISITED: THE PECTOL-LEE ARTIFACTS FROM CAPITOL REEF: NEW PERSPECTIVES ON AN EARLY TWENTIETH-CENTURY COLLECTION 1* (Marti L. Allen, ed., 2002). But see Loendorf & Conner, *supra* note 4, at 223 (arguing for a later ending date of 1500 for the

In 1967, one of the shields was radiocarbon-dated and the results indicated that the shields were 300 years old, or from circa 1650, or possibly of even more recent manufacture.⁷⁵ This date removed the possibility of the shields being Fremont in origin, using 1300 as the end date for the Fremont life way. Another of the shields was again radiocarbon-dated in 1992 and, while the dates obtained were earlier, circa 1500, the results again indicated the shields were of post-Fremont manufacture, using the generally accepted dates for the Fremont lifeway.⁷⁶ It should be pointed out, however, that some researchers argue that the ending date for the Fremont culture might be as recent as 1500, which would overlap with the second set of radiocarbon dates for the shields.⁷⁷ Thus, as of the mid-1990s, the issue of the cultural affiliation of the shields remained unresolved.⁷⁸

Two factors primarily contribute to this uncertainty. One factor is the uniqueness of the shields in the anthropological record. There are simply no other shields at all like them, so it is not possible to deduce their origin based on similarities with known equivalent objects—because there are none.

The other factor contributing to this uncertainty is that too little is known about the various groups in the Four Corners area during the period of the shields' manufacture. The shields have been dated to approximately 1500. That was a time of transition. Up until approximately 1300, southern Utah had been inhabited by two groups, often called the Anasazi and the Fremont.⁷⁹ For reasons that are not completely understood, by about 1300 these two groups had abandoned their settlements. At about that same time two separate language groups were entering the area: Athabaskan speakers were migrating into the area from the north and Numic (a branch of the Uto-Aztecan language family) speakers were migrating into the area from the south and west.⁸⁰ Eventually, the Athabaskan speakers would form what today we recognize as the separate tribes of Navajo and Apache, but the timing and process for that separation is still unresolved. Similarly, the Numic speakers evolved over time into what we today recognize as the Ute and the Paiute tribes.⁸¹

In other words, at the time of the shields' manufacture, the social groupings in the Southwest were in a state of flux, making it impossible, given the incomplete state of our knowledge today, to attribute the shields authoritatively to one group or another. Moreover, there is evidence that these groups intermarried.⁸² There is a

Fremont).

⁷⁵ Loendorf & Conner, *supra* note 4, at 217.

⁷⁶ *Id.* at 221-22.

⁷⁷ *Id.* at 223.

⁷⁸ Kreutzer, *supra* note 7, at 108.

⁷⁹ Robert S. McPherson, *Setting the Stage: Native America Revisited*, in *A HISTORY OF UTAH'S AMERICAN INDIANS* 3, 12-13 (Forrest S. Cuch ed., Utah State University Press 2000).

⁸⁰ *Id.* at 14-16.

⁸¹ RONALD L. HOLT, *BENEATH THESE RED CLIFFS: AN ETHNOHISTORY OF THE UTAH PAIUTES* 4 (Utah State University Press 2006).

⁸² ROBERT S. MCPHERSON, *THE NORTHERN NAVAJO FRONTIER 1860-1900: EXPANSION THROUGH ADVERSITY* 15-16 (2001) (Ute-Paiute and Paiute-Navajo intermarriages creating weak kinship ties among all three groups).

real possibility that the shields were manufactured by someone who was both Navajo and Ute or Paiute.

Given the uncertainties surrounding the cultural affiliation of the shields, the question arises why the Park did not opt to invoke Section 3005(e) of the Act:

where there are multiple requests...and...the federal agency or museum cannot clearly determine which...is the most appropriate claimant, the agency or museum may retain such an item until the requesting parties agree...or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.⁸³

The section thus provides a loophole that allows the federal agency or museum in essence to throw up its hands and pass the problem onto someone else.

While at first blush, this provision may appear attractive, especially in a case such as this where the question of cultural affiliation is politically charged due to pre-existing tensions between the claimants,⁸⁴ as a practical matter it poses some problems. If the agency or museum cannot determine cultural affiliation, the artifacts will remain in bureaucratic limbo. The agency or museum “may” retain possession, but if it does, it will also retain the expense and liability of storing the artifact.⁸⁵ The more fragile and unique the artifact, the more expensive that storage will be. Moreover, due to the sensitive nature of artifacts covered by the Act, the agency or museum most likely will refrain from displaying the item until the repatriation claim is resolved one way or the other. The Act does not require the agency or museum to retain an artifact where the cultural affiliation cannot be determined, but in the politically-charged arena of competing repatriation claims it is hard to imagine that the artifact would be turned over to one of the claimants without that action giving rise to an outcry from the disfavored claimant.⁸⁶

In the case of the shields, the Park archaeologist, while acknowledging that the issue could not be definitively resolved, determined that the Navajo Nation’s submission had met the legal standard of establishing them as “clearly” the most appropriate claimant. The repatriation decision provided: “Given the detail and specificity of the Navajo claim, in addition to historical and ethnographical evidence that is consistent with (though not proof of) that claim, I consider the

⁸³ 25 U.S.C. § 3005(e).

⁸⁴ For a discussion of the inter-tribal tensions between the claimants, see text accompanying notes 116-120, *infra*.

⁸⁵ Artifacts composed of organic materials, such as the bison-hide shields, must be stored in temperature, light, and humidity controlled environments. When the shields were removed from display at the Park’s visitor center, the nearest facility capable of providing such storage was outside of Tucson, Arizona.

⁸⁶ In the dispute between two Oneida tribes over repatriation of a wampum belt, the belt was left with the Field Museum of Chicago (which had possession of the belt at the time repatriation was requested) until the two claimants could work out a settlement of the dispute. See McKeown & Hutt, *supra* note 15, at 193; see also, Lawrence Hart, *Indigenous Renaissance: Law, Culture & Society in the 21st Century*, 10 ST. THOMAS L. REV. 7, 11-13 (1997).

Navajo claim to be clearly superior to the competing claims currently under review.”⁸⁷

This decision has been highly controversial.⁸⁸ Dissatisfaction with the decision may be related to the critic’s own preferred outcome. Some critics want to see the shields reburied, while others want the shields placed in a museum; both groups are unhappy that the shields have been turned over to the Navajo. To some extent, however, criticism of the decision may reflect a lack of understanding of the differences between an anthropological attribution of cultural affiliation and a legal decision.⁸⁹

III. INTER-TRIBAL TENSIONS AND COMPETING NAGPRA CLAIMS

Up to this point in time, the most notorious case under NAGPRA is that of Kennewick Man, a nearly complete skeleton that has been radio carbon dated at more than 9,000 years of age.⁹⁰ The skeleton was discovered eroding out of a bank of the Columbia River and was the subject of a lawsuit, *Bonnischen v. Army Corps of Engineers*,⁹¹ brought by a group of scientists seeking to prevent repatriation of the skeleton to a coalition of Northwestern tribes, which had stated its intent to rebury the remains.

As a result of the widespread attention paid to this case, it is easy to assume that all NAGPRA controversies are between Native Americans seeking to reaffirm their traditional beliefs and scientists seeking to further the goals of Western knowledge. This assumption, however, would be erroneous. NAGPRA disputes can also arise among competing Native American claimants.⁹²

Indeed, this has caused some to criticize the design of NAGPRA. These critiques argue that the concept of “ownership” legalized in NAGPRA is both contrary to Native American beliefs⁹³ and has the potential to set tribe against tribe.⁹⁴

⁸⁷ Kreutzer, *supra* note 56, at 41-42.

⁸⁸ See Joe Bauman, *Navajo Custody of Shields Fueling Discontent*, DESERET MORNING NEWS, Oct. 10, 2005, at B1.

⁸⁹ The Park archaeologist on more than one occasion expressed discomfort with her role of mediating the two disparate standards. She referred to the whole experience as “Death by NAGPRA.”

⁹⁰ See THOMAS, *supra* note 18, at xix-xxi.

⁹¹ 357 F.3d 962 (9th Cir. 2004), *amended on reh’g*, 367 F.3d 864 (9th Cir. 2004).

⁹² See text accompanying notes 107-115, *infra*.

⁹³ For example, the Southern Paiutes have argued some cultural items covered by NAGPRA cannot be “owned” by a human, as they belong to the spiritual beings. Kreutzer, *supra* note 63, at 8. See also Tsosie, *supra* note 27, at 66.

⁹⁴ For example, the Hopi once occupied a much larger area than their current reservation. As a result of actions by the United States, much of their ancestral land lies within the Navajo reservation and it contains thousands of archaeological sites. NAGPRA’s provisions give “ownership rights and the determination of the final treatment and disposition of Hopi ancestral human remains and cultural items to a culturally unrelated tribe.” Kurt E. Dongoske, *NAGPRA: A New Beginning, Not the End, for Osteological Analysis – A Hopi Perspective*, in REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 282, 285 (Devon A. Mihesuah ed., University of Nebraska Press 2000). From a Hopi perspective, this situation is problematic due to tensions between the Navajo and Hopi arising out of a land dispute involving Black Mesa. CHARLES WILKINSON, FIRE ON THE PLATEAU: CONFLICT

Three examples not covered by NAGPRA illustrate how goals and attitudes can differ from tribe to tribe. In the GE Mound case, the controversy involved artifacts found on privately owned land.⁹⁵ In that case, pothunters had looted a Hopewell burial mound. When many of the artifacts were recovered, the property owner (General Electric) offered to repatriate the items.⁹⁶ However, the connection between the Hopewell culture and modern tribes is not currently understood. Various tribes claimed the items; some of them wanted the items reburied while others wanted them placed in a museum. Ultimately, the items were reburied in the mound.

The controversy surrounding Ishi's brain also implicated tensions within the Native American community. Ishi was the last known member of his tribal group, which anthropologists have called the Yahi. After his death, his brain was removed and preserved, despite his wish to be cremated.⁹⁷ In the late 1990s when it was discovered that the Smithsonian still had possession of Ishi's brain, two different Native American groups sought repatriation, a group from the Maidu and another group claiming descent from the northern Yana.⁹⁸

In the absence of direct lineal descendants, the next priority is the tribe with the closest cultural affiliation, and that is where the controversy arose. Anthropologists have concluded that the Yahi were linguistically related to several other tribal groups called, collectively, the Yana, with subdivisions into northern, central and southern Yana.⁹⁹ One group claiming the right to repatriate Ishi's brain were descendants of the northern Yana.¹⁰⁰

But because Ishi lived at a time when his tribal group had been horribly decimated, the possibility exists that one of his parents may have belonged to another nearby group. Ishi recorded a number of songs and stories; most of them were Yahi, but four belonged to the Atsugewi and another four belonged to the Maidu. And when Ishi finally surrendered to the whites, he had left his ancestral

AND ENDURANCE IN THE AMERICAN SOUTHWEST 287-93 (Island Press 1999) (discussing the Black Mesa land dispute).

⁹⁵ Cheryl A. Munson, Marjorie M. Jones, and Robert E. Fry, *The GE Mound: An ARPA Case Study*, 60 AMERICAN ANTIQUITY 131, 146-54 (1995).

⁹⁶ This was a voluntary repatriation, as NAGPRA does not apply to remains and artifacts found on private property. See text accompanying notes 26-27, *supra*.

⁹⁷ THEODORA KROEBER, ISHI IN TWO WORLDS: A BIOGRAPHY OF THE LAST WILD INDIAN IN NORTH AMERICA 234-35 (University of California Press 1961); ORIN STARN, ISHI'S BRAIN: IN SEARCH OF AMERICA'S LAST "WILD" INDIAN 28-29, 158-59, 164, 171 (W.W. Norton & Company 2004).

⁹⁸ The Smithsonian's repatriation obligations are governed, not by NAGPRA, but by a similar, earlier legislative act, which like NAGPRA gives first priority for repatriation of human remains to lineal descendants. Ishi has no known direct descendants, although the possibility exists that there are other descendants of Ishi's tribal group, as there are historical accounts of Yahi children being adopted by whites and, in one case from the 1880s, being sent to a reservation. STARN, *supra* note 97, at 207-09.

⁹⁹ KROEBER, *supra* note 97, at 14-17, 24-26 & 28.

¹⁰⁰ STARN, *supra* note 97, at 213-14.

territory and was in the territory of the Maidu.¹⁰¹ The other group claiming the right to repatriate Ishi's brain were Maidu.¹⁰²

The Maidu, and in particular a man by the name of Art Angle, were the first to seek repatriation, starting in 1997. They knew that Ishi's ashes were in a cemetery outside of San Francisco (his body had been cremated) but they also knew of a rumor that his brain had been removed and had not been cremated with his other remains. They wanted to bring Ishi "home" to the Sacramento Valley and bury him on his ancestral lands, but they did not want to do that until his brain was reunited with his ashes. Art Angle joined up with Orin Starn, an anthropologist who was researching Ishi's life and who ultimately tracked down Ishi's brain at the Smithsonian. The publicity surrounding that event led the Yana descendants to also claim repatriation.

Ultimately, the Smithsonian decided to repatriate to the Yana descendants.¹⁰³ This decision has been criticized as ignoring the Smithsonian's own guidelines, which "allowed for and even encouraged" joint repatriation where multiple claimants had a legitimate basis for repatriation.¹⁰⁴ Unlike the situation in the GE Mound case, both groups wanted the same outcome: reburial. Nevertheless, the Smithsonian's decision left bad feelings between the two groups.¹⁰⁵ The case seems to confirm the fear that federal involvement in repatriation will only serve to drive a wedge between Indian communities.

In another case, filed in Montana U.S. District Court, self-identified descendants of a group of Native Americans killed at Fort Robinson, Nebraska, opposed the Smithsonian's repatriation of the remains to the Northern Cheyenne Tribe and sought an injunction prohibiting reburial of the remains.¹⁰⁶

Although none of the preceding cases involved NAGPRA, there have been instances of competing tribal claims for repatriation under NAGPRA. For example, in 1994, the Marine Corps Base Hawaii sought to repatriate the remains of some 1,582 individuals which had been recovered from the Mokapu peninsula on the island of O'ahu.¹⁰⁷ The Corps "found the NAGPRA procedures of little help in resolving multiple competing claims from culturally affiliated Native Hawaiian individuals and organizations."¹⁰⁸ It took over four years "of intensive effort" to

¹⁰¹ *Id.* at 211.

¹⁰² *Id.* at 95-96, 187-99.

¹⁰³ *Id.* at 215; *see also* The Executive Summary of the Repatriation Report, <http://www.nmnh.si.edu/anthro/repatriation/reports/regional/california/ishi.htm> (last visited Aug. 9, 2006).

¹⁰⁴ STARN, *supra* note 97, at 217.

¹⁰⁵ Although not an unbiased observer as he had been helping the Maidu, Starn's account can be interpreted as hinting that the Smithsonian's decision may have been affected by personalities. Starn notes that his contact with the Smithsonian's director of repatriation had been marked by "mutual suspicion"; although Starn doesn't say this explicitly, perhaps that personality conflict could have influenced the decision against the Maidu with whom Starn was working. *Id.* at 270.

¹⁰⁶ *Sooktis v. Brady*, No.93-168 (D. MT. Oct. 16, 1993) (order denying injunction). *See also* McKeown & Hutt, *supra* note 15, at 180-81.

¹⁰⁷ James G. Van Ness, Cultural Resource Management in the Department of Defense, ALI-ABA Federal Lands Law Conference (October 18-19, 2001).

¹⁰⁸ *Id.*

bring the twenty-one claimants to agreement on the ultimate disposition, which was reburial on the peninsula.¹⁰⁹

Another inter-tribal dispute involved an Oneida Wampum Belt that was in the possession of the Field Museum of Chicago.¹¹⁰ The wampum belt consisted of purple and white shells that had been woven into a panel about three feet long by a half a foot wide, bound with buckskin and having buckskin fringe at each end.¹¹¹ In 1995, the Field Museum filed a Notice of Intent to repatriate the belt to the Oneida Nation of New York. That tribe's right to the belt was contested by the Oneida Tribe of Wisconsin. Historically, both federally recognized tribes had been one nation, the Oneida Nation.¹¹² The dispute was referred to the NAGPRA Review Committee, which urged the two tribes to work out a solution.¹¹³ Until that time, the belt would remain in the possession of the Field Museum.¹¹⁴

Currently ten tribes have claimed Northern Fremont remains and cultural items that are held by the Bureau of Reclamation in Utah.¹¹⁵ At present, archaeologists are unsure whether the culture we call "Fremont" was a single group, several groups, or just a regional adaptation of the Anasazi or Ancestral Puebloan culture. Moreover, the relationship between the Fremont (whoever they were) and modern tribes is unclear.

In the case of the shields, it would be inaccurate to say that the case created division; rather, it exacerbated existing divisions. Historically, the Navajo and the Utes have more often been enemies than allies,¹¹⁶ and both groups have a history of preying upon or exploiting the Paiutes.¹¹⁷ Southeastern Utah was territory claimed and used by all three tribes,¹¹⁸ and oral history records many skirmishes and slaving raids involving the tribes.¹¹⁹ Add to this historical bad blood the fact that the Navajo Nation today is one of the largest, best organized, and most

¹⁰⁹ *Id.*

¹¹⁰ See Notice of Intent to Repatriate a Cultural Item in the Possession of the Field Museum of Natural History, Chicago, IL, 60 Fed. Reg. 11,109 (Mar. 1, 1995). See also Hart, *supra* note 86, at 11-13 (discussing the dispute from the perspective of a Cheyenne Peace Chief and member of the NAGPRA Review Committee).

¹¹¹ Hart, *supra* note 86, at 11 n. 54.

¹¹² *Id.* at 12.

¹¹³ *Id.* at 13.

¹¹⁴ McKeown & Hutt, *supra* note 15, at 193.

¹¹⁵ Ferguson, *supra* note 58, at 1. This is not the first time, and probably will not be the last, that multiple tribes have claimed cultural affiliation with the Fremont, who inhabited much of Utah and parts of Nevada, Idaho, Wyoming and Colorado from approximately 100 A.D. to 1300-1500 A.D. In 1998, the U.S. Forest Service had determined that there was a shared group identity between the Fremont and the Hopi, Paiute, and Uintah-Ouray Ute tribes, and the Pueblo of Zuni. *Id.* at 15. Francis P. McManamon, Notice of Inventory Completion for Native American Remains from Gooseberry Valley, Utah in the Control of the Fishlake National Forest, Federal Register 63 (92): 26623. In all, twenty modern tribes claim descent from the Fremont. Marti Allen, Highlights of the Pectol-Lee Collection, at Relics Revisited Seminar, February 7, 2004 (BYU).

¹¹⁶ McPHERSON, *supra* note 82, at 7-11.

¹¹⁷ *Id.* at 7, 11 (noting Ute slave raids against the Paiutes) and 11 (noting that Navajo looked down on Paiutes and bought Paiute children to be used for labor).

¹¹⁸ *Id.* at 6-7 (area used by Utes, Navajos and Paiutes).

¹¹⁹ *Id.* at 2-19.

politically powerful Native American tribes and it is easy to understand why the Utes and Paiutes might feel some resentment towards the Navajo.¹²⁰

For example, “the Navajo Nation was the first tribe in the country to establish a historic preservation program ..., which has grown to become larger than the historic preservation program of any state.”¹²¹ It established one of the first tribal archaeology programs in the 1950s to prepare for and litigate its claims before the Indian Claims Commission.¹²² In 1996, the Navajo Historic Preservation Department had a staff of seventy and an annual budget of more than four million dollars.¹²³

The Park had to decide the disposition of the shields based on the claims presented to it, and the Navajo claim was the best supported, but the relative resources available to the claimants leads one to wonder if the Utes and Paiutes were simply out-litigated by an opponent with more resources. It is certainly possible that, whether that is the case or not, some might perceive it to be. As the Park archaeologist noted in one of her reports, some tribes, for economic reasons, will always be disadvantaged in multiple-claim NAGPRA disputes.¹²⁴

IV. TELLING NAGPRA STORIES

The question of who owns the past has both a metaphoric and a literal meaning.¹²⁵ We have come to realize that the official version of the past—that is, history—is written by those in power, which for the last two thousand years or so has meant white males. As marginalized groups, such as women and ethnic minorities, have grown in consciousness and political involvement, they have begun the task of reclaiming their histories. This task has involved both rediscovering the ignored history of the marginalized, and rewriting or correcting the official history. Metaphorically, then, “owning the past” has become a way of telling one’s story.

But “owning the past” has a literal meaning as well. It involves the legal and ethical question of who “owns”—that is, has rights of possession and control over—the material remnants of the past, be they human remains or artifacts. Societies have not always agreed on the basic principles that should govern this question.

The case of the shields presents an instance in which the two meanings of “owning the past” come together, the metaphoric “owning” of the past through the telling of one’s story and the literal “owning” of a venerable artifact. The dispute

¹²⁰ The Navajo reservation covers some 250,000 square miles and is the largest in the country, comprising approximately one fourth of all tribal lands in the lower forty-eight states. At approximately 200,000 members, it is also the largest tribe. Alan S. Downer & Alexandra Roberts, *The Navajo Experience with the Federal Historic Preservation Program*, 10 NAT. RESOURCES & ENV'T 39 (1996).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Kreutzer, *supra* note 63, at 11.

¹²⁵ THOMAS, *supra* note 18, at xxxvii.

as to the legal ownership of the shields is ultimately resolved on the basis of the persuasiveness of the story the Navajos told about the shields.

This section of the paper will address the role of stories in the context of NAGPRA. First the role of stories as evidence in NAGPRA disputes will be examined. Then, the role of the specific story told by John Holiday, a Navajo elder and singer, or medicine man,¹²⁶ is examined in light of the theory that a story's persuasiveness is evaluated in the context of its internal consistency and its external corroboration. Finally, the other two claims are examined from a narrative perspective.

A. *Telling Stories as Evidence under NAGPRA*

One of the most interesting aspects of thinking about the role of stories under NAGPRA is that the statute explicitly incorporates storytelling into the adjudicative process. In their influential study of how juries decide cases, Bennett and Feldman offer support for their theory that storytelling is the basis for judgment in our system of adjudication.¹²⁷ In other words, they posit that the best description of what goes on in a trial is storytelling. But this is an implicit use of storytelling, as the means of organizing the evidence in a coherent manner.

NAGPRA does something different. The Act lists oral tradition as a relevant category of evidence.¹²⁸ In fact, the Act lists oral tradition along with "scientific" evidence, such as linguistic, historical, archaeological, and genetic evidence, with no indication that one type of evidence is worth more weight than any other. The Act thus incorporates as evidence the stories that indigenous peoples tell one another outside of the courtroom.

The Act, by doing this alters a basic rule of evidence in the adversarial system of justice. An axiom of traditional evidentiary hearings is that "hearsay" is excluded and is not considered competent evidence.¹²⁹ "Hearsay" is testimony that is based on what someone told the witness out of court, offered to prove the truth of the matter asserted.¹³⁰

The justification for excluding hearsay is that there is no opportunity to test the credibility of the out-of-court speaker. The trier of fact can assess the credibility of the witness, to be assured that the witness is not misrepresenting either intentionally or inadvertently what the witness was told, but the trier of fact cannot assess the credibility of the out-of-court speaker whose speech the witness will recount. Accordingly, A cannot testify that B said, "I saw Johnny do it," because

¹²⁶ Kreutzer, *supra* note 56, at 4-5. See also JOHN HOLIDAY & ROBERT MCPHERSON, A NAVAJO LEGACY: THE LIFE AND TEACHINGS OF JOHN HOLIDAY (University of Oklahoma Press 2005).

¹²⁷ W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (Rutgers University Press 1981).

¹²⁸ 25 U.S.C. 3005(a)(4) and 43 C.F.R. §10.14(e). The Act also lists folklore as another category of competent evidence. The difference between oral tradition and folklore is beyond the scope of this paper, as only oral tradition is relevant to the shields controversy, but much of what is said here would be equally applicable to folklore.

¹²⁹ FED. R. EVID. 802.

¹³⁰ FED. R. EVID. 801.

the trier of fact observing A can only assess A's credibility, that is, whether A is honestly and accurately recounting what B said. But B herself must testify, "I saw Johnny do it," if the trier of fact is to be able to assess B's honesty and ability to accurately observe Johnny's actions.¹³¹

NAGPRA, however, explicitly incorporates a certain type of hearsay as competent evidence, contrary to the traditional prohibition. NAGPRA provides that, in assessing the strength of a claim of cultural affiliation, the decision maker must consider "oral tradition." Oral tradition, of necessity, is hearsay. It is information based, not on what the witness saw or experienced first hand, but on what someone else told the witness. Moreover, oral tradition is proffered to prove the truth of the matter asserted. That is, with oral tradition, A testifies as to what B told A for the express purpose of proving that what B said is true.

A fundamental purpose of NAGPRA is to redress historic wrongs done to Native Americans.¹³² It has been said that the Act "is concerned not with non-Indian science or federal property, but predominantly with Indian civil rights, cultural preservation, and statutory entitlements."¹³³ Recognizing oral tradition is a way of respecting the culture of a non-literate people. But does it undermine truth seeking?

There are two ways of looking at oral tradition and oral history. On the one hand, proponents will argue that oral history "is premised on fact rather than imagination, and that both the nature and necessity of accurate recounting within oral societies makes these histories invaluable indicators of the past."¹³⁴ On the other hand, critics will point out that, depending on the age of the oral tradition, it may have been "conveyed through perhaps hundreds of intermediaries over thousands of years" and that the "opportunity for error increases when information is conveyed through multiple persons over time."¹³⁵ Such inadvertent errors must be combined with changes in language that can alter the meaning of the story and the incorporation of religious beliefs into the narrative that can blur the line between historical fact and myth, resulting in narratives "of limited reliability."¹³⁶

¹³¹ The hearsay prohibition does not exclude all out-of-court statements, but only those that are proffered to prove the truth of the matter asserted in the out-of-court statement. Thus, in the above example, if A's statement is proffered, not to prove the truth of the matter asserted, namely, that Johnny did it, but for some other purpose, it may be admissible. For example, it may be admissible to prove that B knows Johnny, if B's knowledge of Johnny is in dispute. Moreover, there are exceptions to the rule against hearsay in situations where there are other reasons to trust the reliability of the statement. See FED. R. EVID. 803.

¹³² "The Act was in part an effort to reverse past injustices towards indigenous minority cultures." John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL. L. & POL'Y J. 349, 417 (2004).

¹³³ John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archaeological and Anthropological Theory*, 70 UMKC L. REV. 1, 47 (2001).

¹³⁴ *Id.*

¹³⁵ Cohan, *supra* note 132, at 396.

¹³⁶ *Id.*

B. *Telling the Story of the Shields*

This section will focus on the specific story that was determinative in the decision to repatriate the shields to the Navajo Tribe. The park archaeologist who resolved the repatriation dispute surrounding the shields did so in significant part on the basis of the persuasiveness of the story told by John Holiday. In this section, the story is analyzed in light of two factors that affect credibility and thus persuasiveness: story structure and the existence of corroborating evidence. Moreover, the story told by the Navajo is contrasted with the stories told by the other two groups claiming the shields.

1. *The Navajo Story*

There are actually several slightly different versions of the story, as the teller, John Holiday, has been interviewed on different occasions by different interviewers.¹³⁷ Moreover, John Holiday is a traditional Navajo singer or medicine man, speaking in Navajo to Anglo interviewers through an interpreter. He is, however, considered a man of impeccable integrity and highly respected both by Navajos and anthropologists. Here, I am going to focus on the story as told to and understood by the archaeologist who made the repatriation decision, as this was the story that mattered in terms of the outcome of the controversy.¹³⁸

The shields were made by a man called Many Goats White Hair, nine generations ago. The shields were sacred ceremonial objects.¹³⁹ When the Navajos were being rounded up by war parties,¹⁴⁰ the shields were in the care of two men, Man Called Rope (perhaps also known as Ropey) and Little Bitter Water Person. Man Called Rope was John Holiday's grandfather. Concerned about the shields' safety, the two men decided to hide the shields "in the area we call the Mountain With No Name [Henry Mountains] and Mountain With White Face [Boulder Mountain]."¹⁴¹ The location of the hidden shields was then lost.¹⁴²

¹³⁷ See Kreutzer, *supra* note 56, at 18. See also HOLIDAY & MCPHERSON, *supra* note 126, at 191-92 and n. 22 at 352-54 (where two more versions appear). Yet another version of the story appears in Kreutzer, *supra* note 56, at 19-20, but this version was told by a different speaker, based on his understanding of John Holiday's story.

¹³⁸ This version of the story was based on a personal interview conducted on May 7, 2002, with translation by Timothy Begay and Marklyn Chee. Kreutzer, *supra* note 56, at 18.

¹³⁹ On another occasion John Holiday described the shields this way: "These shields were huge and had strings attached to them on the inside. The earth shield had the mountains and vegetation depicted on it. The mountain shield had lightning, sunrays, and rainbows, while the sky shield had all the heavenly bodies and stars on it. These shields were big, and nothing could penetrate them – neither bullets and arrows, nor evil and witchcraft. They are shields against all things that can harm a person." HOLIDAY & MCPHERSON, *supra* note 126, at 352-53 n. 22. I do not know whether this description of the shields was recorded before or after John Holiday viewed the shields.

¹⁴⁰ During the 1860s, the U.S. Army rounded up some 8,000 Navajos (estimated at about half of the tribe) and drove them to Fort Sumner in New Mexico, where they were incarcerated until 1868. MCPHERSON, *supra* note 82, at 6-11.

¹⁴¹ Kreutzer, *supra* note 56, at 18.

(a) *Story Structure*

According to Bennett and Feldman, we can assess the persuasiveness of a story by examining its structure.¹⁴³ Specifically, the more ambiguities in the connections between the central action of the story and the key symbols for the elements of the story, the less persuasive the story is. “The hypothesis is that as structural ambiguity increases, story credibility decreases.”¹⁴⁴

In the Navajo’s story, the central action is the shields being hidden. As I understand the authors’ use of the term “key symbols,” it is referring to discrete statements about events in the story, what lawyers might refer to as “facts.” Feldman and Bennett suggest that these symbols can be organized by the elements of a story: scene, agent, act, agency, and purpose. They then suggest examining the connections between the central action and the key symbols surrounding that action, as well as between the various symbols, to assess their internal consistency and completeness. Those connections are labeled ambiguous where there is a lack of consistency or incompleteness. Finally, they posit that ambiguities between peripheral symbols are less significant than ambiguities between the central action and key symbols.

The following figure maps out the connections between the central action and the various story elements:

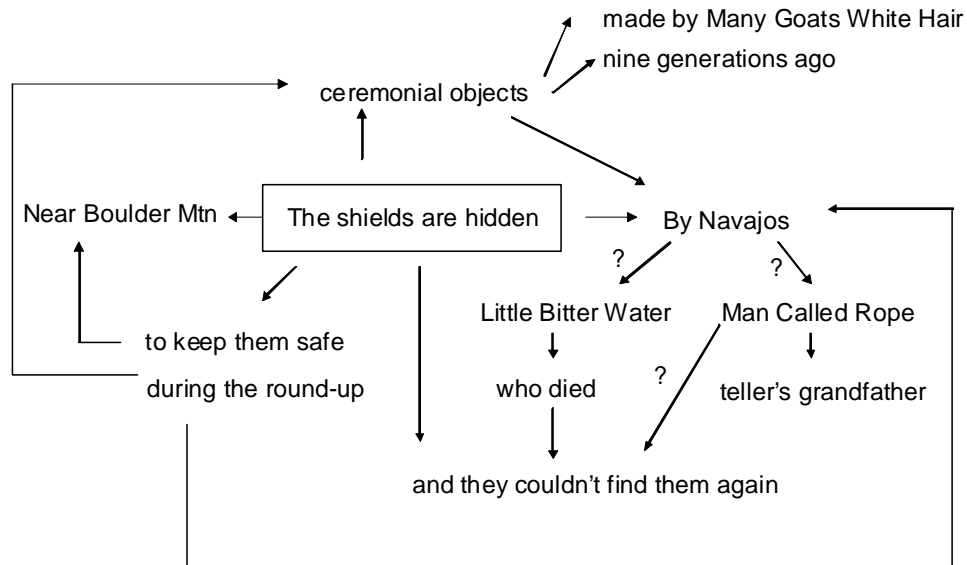
¹⁴² The Capitol Reef archaeologist recounts this version: “There was some confusion over who actually placed the shields in the cache, but evidently it was Little Bitter Water Person. Before the shields could be recovered, Mr. Holiday said, Little Bitter Water Person grew sick and died. Nobody knew how to find the shields.” *Id.* In another version told to a historian, John Holiday suggests that “Ropey,” perhaps another version of the name of Man Called Rope, hid the shields: “When he went back to get it, he could not find it, so it was lost.” HOLIDAY & MCPHERSON, *supra* note 126, at 353 n.22.

John Holiday also relates the loss of a sacred buffalo-hide object, which he said acted like a “protective shield.” At one point he refers to it as a “round shield.” *Id.* at 191-92. It is not clear to me whether this is another way of referring to the three shields or whether it relates to a separate object. This object was in the safe keeping of a man named Yellow Forehead, who had hidden it during the Fort Sumner years near White-Face Mountain but when he went to retrieve it, he could not find it. *Id.*

There is some indication that there were two separate sacred objects, the shields and a “sacred bundle,” which was also lost or stolen near White-Face Mountain during the Fort Sumner years. *Id.* at 352 n. 19. According to John Holiday, Little Bitter Water and Ropey were suspected of taking this bundle. *Id.* However, at one point John Holiday seemed to refer to the shields as a sacred bundle. *Id.* at 353 n. 22. So it is ultimately unclear whether there were two instances of sacred objects being lost under similar circumstances, or whether all of these versions are referring only to the shields.

¹⁴³ BENNETT & FELDMAN, *supra* note 127, at Ch. 4

¹⁴⁴ *Id.* at 72.



The diagram reveals that there are only three ambiguous connections out of a total of seventeen connections, and that none of the ambiguous connections relate to the central action, which is the hiding of the shields. The ambiguities relate to the exact identity of the Navajos who hid the shields and the reason they could not be found again by Man Called Rope.

What is not ambiguous, however, are the relations between hiding the shields (the central action) and the various other story elements: the Navajos (the agents) do it to protect the shields during the round-up (purpose) because the shields are important ceremonial objects (agency) and they choose the area because it is far from the Army war parties (scene).

As Bennett and Feldman caution, however, determining whether a connection is ambiguous is not an exact science and depends upon the interpretive skills and knowledge of the audience for the story. It could be argued that there is an ambiguous connection involving the central action, and that is the connection with the scene. In other words, it could be argued that there is a lack of information as

to why the Boulder Mountain area was chosen over any number of other locales that were also “safe” from the Army search parties. Whether a listener found this connection to be ambiguous may explain why some who heard this story have not been persuaded by it. As will be discussed below, the park archaeologist found this link to be consistent and unambiguous due to external corroboration for Navajo presence in the Capitol Reef area in the 1860s.

In summary, analyzing the story using the methodology proposed by Bennett and Feldman suggests that the story structure was primarily unambiguous, which in turn provides an explanation for why the story was persuasive. It must be pointed out, however, that the research done by Bennett and Feldman also indicated that there is no necessary correlation between truth and persuasiveness.¹⁴⁵ That is to say, just because a story is persuasive does not mean that it is true and, conversely, a poorly constructed story is not necessarily a false story.

(b) Corroborating Evidence

Bennett and Feldman posit that, in addition to assessing the internal consistency and completeness of a story, listeners will consider whether the story is consistent with what is known about how the world works. In the case of the shields, the question thus becomes whether the Navajo account of the hiding of the shields is consistent with what is known about the Navajos from the anthropological and historical perspectives.

This question is one to which the written decision justifying repatriation to the Navajos devotes much attention. The analysis of anthropological and historical sources to determine whether they corroborate or call into question the Navajo’s story of the shields can be organized around two subsidiary questions: Were there “Navajos” in 1500? Were the Navajos in the area where the shields were hidden in the 1860s?

i. Did the Navajos exist as a tribe in 1500?

The short answer to this question is maybe. According to anthropologists, both Navajos and Apaches are Athabaskan language speakers who are descended from the Northern Athabascans of Canada and Alaska.¹⁴⁶ Recent linguistic analysis suggests the Athabascans reached the Southwest by about 1400 A.D.¹⁴⁷ The archaeological evidence of early Athabaskan habitation in the Southwest is meager and there is no consensus as to its interpretation among archaeologists.

¹⁴⁵ BENNETT & FELDMAN, *supra* note 127, at 89 (“the way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story”).

¹⁴⁶ According to the Navajo, the Northern Athabascans are descended from them. That is, instead of the proto-Navajos splitting off from the Northern Athabascans and migrating south, the Northern Athabascans split off from the Navajo and migrated north. *See* Kreutzer, *supra* note 56, at 5-6.

¹⁴⁷ *Id.* at 6.

The subsidiary question of when these Southern Athabascans split into Navajos and Apaches is also subject to debate. Linguistically, the Navajo dialect may have begun diverging from other Athabascan-speakers around the same time, 1400 A.D.¹⁴⁸ Historically, the first Spanish reference to the Athabascans may have been in 1541, when a Spanish report referred to the nomadic “Querechos.” By 1608, the Spanish were referring to the nomadic, non-Puebloan inhabitants of the Southwest as “Apaches.” It is not until 1626 that the Spanish distinguish a sub-group of the Apaches; they refer to this sub-group as the “Apaches del Nabaxu,” meaning Apaches of the Cultivated Fields, the source of the tribe’s current name, Navajo.¹⁴⁹

Thus, due to the unsettled state of current anthropological knowledge, the question of when the Navajos came into existence as a separate tribal group cannot be definitively answered. However, such evidence does not negate the possibility that Navajos or at least the Athabascan ancestors of present-day Navajos were in the area by the time the shields were made. That the makers of the shields may have been Athabascan ancestors of both the Navajo and Apache is irrelevant in this controversy, as none of the Apache tribes filed a claim for the shields.¹⁵⁰

ii. Were the Navajos in the Capitol Reef Country in the 1860s?

The location of the hidden shields in Wayne County in south-central Utah, just outside of Capitol Reef National Park, is a primary source of doubt for those who question the decision to repatriate the shields to the Navajo. The area is not considered part of the aboriginal or traditional lands occupied by the Navajo, which are located in the southeast corner of the state, primarily in San Juan County, and in Arizona and New Mexico. Conversely, the Capitol Reef area is considered part of the traditional use area of both the Utes and the Paiutes.¹⁵¹ There is no prehistoric evidence that conclusively establishes a Navajo presence in the area.

There is, however, historic evidence that puts Navajos in the Capitol Reef area in the 1860s. From 1863 through 1867, a Ute chief known as Black Hawk led groups of Ute, Paiute and Navajo warriors on a series of raids against the Mormon settlers. In 1866-67 a skirmish between Black Hawk’s men and Mormon militiamen occurred less than ten miles from where the shields were buried.¹⁵²

¹⁴⁸ *Id.* at 7.

¹⁴⁹ As the Evaluation notes, the fact that the Spanish were not able to distinguish between Navajo and Apache until the early seventeenth century suggests either that the two groups were not noticeably differentiated, or that the Spanish observers were not particularly discriminating. *Id.* at 7. Navajo refer to themselves as Diné, meaning “The People.” Maryboy & Begay, *supra* note 71, at 265.

¹⁵⁰ Interestingly, the Evaluation does not consider the possibility that the shields were made outside of the Southwest, possibly by migrating Athabascans, and later brought with them to the Four Corners area.

¹⁵¹ Kreutzer, *supra* note 56, at 12.

¹⁵² *Id.* at 14.

The Navajo story does not claim that the shields were buried in Navajo territory; to the contrary, the story is that the shields were taken away from Navajo territory for safe-keeping. The historical record tends to corroborate the Navajo claim in that it establishes the transitory presence of Navajo in the area, which is all that the story requires. Moreover, the round-up of the Navajos given in the story as the reason for the hiding of the shields is indisputably supported by the historic record.

2. *The Southern Utes Claim: A Less Persuasive Story*

So far the focus has been on the Navajo claim and the oral tradition that made up the basis for that claim. I will now examine the competing claim from the Southern Utes. This claim was based upon several strands of evidence, the strongest of which is that the shields were recovered from traditional Ute territory.¹⁵³ In addition, there was evidence that Utes traditionally used buffalo-hide shields in hunting and raiding, and that the design elements of the shields were not inconsistent with Ute traditions.

In assessing this claim, the Park archaeologist concluded that the Southern Utes had made a “plausible claim” of cultural affiliation, that the Southern Utes’ claim was “superior” to the Ute/Paiute collaborative claim, and that were the claim the “*only*” claim the ultimate decision might have been favorable to the Southern Utes.

The tribes’ claim is based on the fact that the dating and location of the shields are consistent with Ute/Paiute occupation, and that some favorable comparisons have been made between the shield motifs and known Ute shield pictographs. No link to particular individuals, groups, or specific ceremonies has been offered. While such generalities might be acceptable were this collaborative claim the *only* claim for the shields, they do not outweigh the specific and detailed information provided by the Navajo Nation regarding these shields.¹⁵⁴

Although it had been argued in support of the Southern Utes’ claim that “[t]he lack of Ute oral traditions in regard to the shields means nothing,”¹⁵⁵ and even though the Park archaeologist concurred with that statement to some extent, when contrasted with the detailed and specific oral tradition put forward by the Navajos, the absence of comparable narrative evidence damaged the Southern Ute claim.

¹⁵³ Lee Kreutzer, Summary of Historical research and Evaluation of Repatriation request Submitted by the Southern Ute Tribe and the Ute Mountain Tribe, for the Capitol Reef Shields 20 (July 1, 2002).

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *Id.* at 19.

3. *The Ute/Paiute Claim and the Problem of the Unspeakable*

Consideration of the Ute/Paiute story of the shields reveals what I call the problem of the unspeakable. Not all stories can be told. What if a tribe is forbidden to talk about the evidence necessary to document their claim?¹⁵⁶

A recent highly-publicized case from Australia exemplifies the problem. In 1994, under the Aboriginal and Torres Strait Islander Heritage Protection Act,¹⁵⁷ a group of Ngarrindjeri¹⁵⁸ women sought to prevent the construction of a bridge from the Australian mainland over the Murray River to Hindmarsh Island.¹⁵⁹ The women claimed that the island was the site of secret/sacred women's business.¹⁶⁰ The then Federal Labor Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, was faced with the problem of determining the legitimacy of the Ngarrindjeri claim even though the sacredness of the site precluded the women from discussing the site, except with authorized women.

This was not the first time that Australian legal proceedings had to contend with the problem of the unspeakable. According to some scholars, in land claim hearings and civil suits, there was an established policy of accommodating "the protocols of secrecy associated with Australian sacred sites" through closed hearings and unpublished opinions.¹⁶¹ Minister Tickner sought to achieve a similar accommodation by commissioning Professor Cheryl Saunders, a law professor, to review the confidential materials in support of the claim and report to him.¹⁶² He later issued a protective order prohibiting the construction of the bridge for twenty-five years.¹⁶³

On appeal by the developers who wanted to build the bridge, the Federal Court quashed the protective order.¹⁶⁴ According to Justice O'Loughlin, if the Aboriginal

¹⁵⁶ See, e.g., Tsosie, *supra* note 27, at 72: (process of proving eligibility for protection under NHPA "raises concerns for Native American people who are often held to norms of secrecy and confidentiality when dealing with sacred information").

¹⁵⁷ Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (Austl.).

¹⁵⁸ The Ngarrindjeri are an "Australian tribe or language group from the lower Murray area in South Australia." Stephen Pritchard, *Between Fact and Fiction: The Hindmarsh Island 'Affair' and the Truth About Secrets*, (2000), <http://social.chass.ncsu.edu/jouvert/v4i2/spritch.htm> (last visited October 1, 2007). See also Margaret Cordova, *The Hindmarsh Island Bridge Case and Matters of Secret Aboriginal "Women's Business"*, 129 COLO. J. INT'L ENVTL. L. & POL'Y 129, 129 (2000).

¹⁵⁹ Hindmarsh Island is a small island in Lake Alexandria on the southern Australian coast. Cordova, *supra* note 158, at 131.

¹⁶⁰ *Id.* at 130. See also Ken Gelder & Jane M. Jacobs, *Promiscuous Sacred Sites: Reflections on Secrecy and Skepticism in the Hindmarsh Island Affair*, AUSTRALIAN HUMANITIES REVIEW (1997), available at <http://www.lib.latrobe.edu.au/AHR/archive/Issue-June-1997/gelder.html> (last visited Oct. 30, 2007).

¹⁶¹ Gelder & Jacobs, *supra* note 160.

¹⁶² Cordova, *supra* note 158, at 133.

¹⁶³ *Id.* at 133-34.

¹⁶⁴ Meanwhile, allegations had arisen that the claim of sacredness had been fabricated, and a royal commission was appointed to investigate the allegations. The Ngarrindjeri women boycotted the hearings because they refused to divulge the secret/sacred knowledge, even though it had been leaked to the press by the opponents of the Labor Party. Ultimately, the commissioner upheld the

claimants wanted the protection of the Heritage Act, they had to abide by the requirements of the Act.¹⁶⁵

The idea that to obtain the protection promised by the government for sacred sites the claimants had to violate the sacredness of the site can be criticized as creating a Hobson's choice: maintain the secrecy of the sacred knowledge associated with the site and lose the protection of the site itself, or protect the site by disclosing the secret knowledge that makes the site sacred, thereby profaning the sacred. At best, what this conundrum reveals is incommensurability between Western law and indigenous law. The legal system is unable to accept indigenous truth claims on their own terms, without restructuring them according to legal narrative conventions.

A similar conundrum arose with the Ute/Paiute claim to the shields. Originally, the archaeologist investigating the competing claims to the shields was rather dismissive of the Ute/Paiute claim:

The [Ute/Paiute] tribes have constructed a *plausible*, but not persuasive or even adequate, claim of original Ute/Paiute control of the shields...[T]his claim is seriously lacking in credibility. In fairness to other claimants and the general public, the National Park Service cannot simply accept a tribe's unexplained, unelaborated, and unjustified request for repatriation. That is where this joint claim stands at present.¹⁶⁶

After the Park determined to repatriate the shields to the Navajo, and while administrative appeals were proceeding, the Park received further information pertinent to the Ute/Paiute claim to the shields. In late 2002, the Skull Valley Goshute Tribe contacted the Park and in early 2003 submitted a report from Goshute Tribal Historic Preservation Director Melvin Brewster. The Goshutes were not themselves submitting a claim, but they consider themselves closely related to the Paiute and Ute tribes, as all are Numic-speaking groups, and they were supporting the Ute/Paiute claim. Because the report contained sensitive cultural information, however, the tribe did not want to make it part of the public record. The Park resolved the impasse with a process akin to that used by the Minister deciding the Ngarrindjeri claim regarding Hindmarsh Island. The Park archaeologist read the report, made notes, and then returned the document to the Goshute tribe.

The report, according to the archaeologist's notes, made the argument that the shields were a permanent, on-going prayer offering, and that disinterment interrupted that on-going ceremony. The Goshute information both clarified the Paiute position and illuminated a NAGPRA problem:

charge of fabrication, despite the fact that the secret/sacred knowledge itself was never put in evidence. Pritchard, *supra* note 158, at ¶3; Cordova, *supra* note 158, at 135.

¹⁶⁵ Pritchard, *supra* note 158, at ¶5.

¹⁶⁶ Lee Kreutzer, Summary of Historical Research and Evaluation of Collaborative Repatriation Request Submitted by the Paiute Tribe of Utah, Ute Indian Tribe of the Uintah and Ouray Agency, and the Kaibab Band of Paiute Indians, for the Capitol Reef Shields 22-23 (July 1, 2002).

Mr. Brewster's discussion of Punown religious thought clarified for me what Southern Paiute consultants tried to communicate to me earlier in the process. Most would confide no information whatsoever, except that the shields should be repatriated to the Utes and Paiutes; they responded negatively when asked for information that could be weighed against the Navajo claim. For instance, one consultant replied that her people are not Navajos and unlike them do not share any information about their religion. Another consultant, however, told me directly that the shields were not Paiute, Ute, or Navajo..., and needed to be reburied. Whereas I originally thought he was conceding that the shields are not culturally affiliated with the Utes or Paiutes (as affiliation is defined by NAGPRA), I now understand that he was trying to tell me, without divulging confidential details of his religious belief, that objects belonging to the sacred realm cannot legitimately be claimed by any particular tribe or individual. ... Even though the consultants might be convinced that the shields and offering were created by a direct ancestor, they refuse to objectify or diminish the shields' spiritual significance by claiming them on that basis.¹⁶⁷

Added to the refusal to claim ownership of the shields, as they belong to the spirits, is the problem that traditional Paiutes and Utes "may not speak the names of deceased relatives" because they are in a different realm and to do so would be to interfere with that realm.¹⁶⁸ In other words, assuming the Paiutes or Utes knew who manufactured and buried the shields (and also assuming that NAGPRA would recognize such a static offering as either a sacred object or an object of cultural patrimony), that information could not be shared. Both the report and the Park archaeologist note "the drafters of NAGPRA and its implementing regulations do not appear to have taken this kind of complexity into consideration."¹⁶⁹

CONCLUSION

The repatriation dispute surrounding the shields reveals a number of competing stories. From Pectol's perspective, the story is one of discovery: the finding of these remarkable objects through his own diligence and knowledge of the area. From the perspective of his descendants, however, the story is one of loss. Not the loss of the shields themselves, as the family recognizes that they do not "own" the shields. They mourn, however, the loss of the shields from the public eye, the loss of the opportunity for future generations of visitors to the Capitol Reef area to view the shields and appreciate them culturally and aesthetically, and to appreciate their progenitor's role in the preservation of the shields. Similarly,

¹⁶⁷ Kreutzer, *supra* note 63, at 8.

¹⁶⁸ *Id.* at 9.

¹⁶⁹ *Id.* at 7.

some archaeologists see the story of the shields as a loss, of potential information arising from future study of the shields.

The disappointed claimants, the Southern Utes and the Northern Utes and the Paiutes, also understand the story of the shields as a story of loss times two. They lost in the administrative proceedings under NAGPRA, that is, their claims to the shields as part of their culture were ultimately rejected. Moreover, they lost the shields themselves and the right to do with them as they saw fit, whether to rebury them, as the Utes and Paiutes wished to do, or to place them in a museum, as it is rumored the Southern Utes proposed to do.

Conversely, from the Navajo point of view, the story of the shields is a story of redemption and restoration. From this point of view, the shields, or the power embodied in the shields, can be seen as an active participant in the return of the shields, consenting to be found by a man who appreciates their power and preserves them rather than selling them for profit. This story is one of hope for the future, vindicating the sacredness of the shields and their power to protect the People.