

## SECTION IV

# Chapter 2. STRATEGIES AND PROCEDURES FOR THE REPATRIATION OF MATERIALS FROM THE PRIVATE SECTOR

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ART AUCTION HOUSES, dealers, private collectors, corporations and other non-federally funded institutions are not bound by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). They have not been required to notify Native Nations<sup>1</sup> of potentially repatriable materials in their collections. Nonetheless, Native Nations regularly learn of materials in these kinds of collections that they would like to have returned. Though private sector individuals and institutions are under no legal obligation to repatriate these materials, there have been a number of occasions in which they have done so.

This chapter describes specific instances in which individuals and corporations have been encouraged to return sacred objects to tribes. In particular, this chapter relates the experiences of the Repatriation Foundation in developing strategies and procedures for the repatriation of objects from the private sector. Examples of returned materials include unassociated funerary objects, ceremonial objects, and objects of cultural patrimony. Human remains will not be discussed in this chapter because there are federal and state laws which apply to human remains in the private sector. See Jack Trope's discussion in Chapter One, "NAGPRA: Prohibitions Against Trafficking" (Page 8).

## PRIVATE COLLECTIONS

The market for Native American art has only recently been driven by high prices and a desire to own high status material. Accordingly, individuals who have owned these objects for more than a few years probably bought them for less materialistic reasons—out of appreciation for the object's beauty, or in response to a genuine interest in Native American peoples and cultures. As collectors have become more informed about the sensitive nature of certain materials, many have initiated the return of objects in their possession. This has been especially true in cases involving ceremonial materials.

### *When Private Collectors Offer to Repatriate Materials*

The Repatriation Foundation has found that, after the publication of articles favoring repatriation (for example, in *The New York Times*, *Reader's Digest*, *Art & Antiques*), there is an increase in the number of phone calls from private collectors asking whether or not items in their possession should be returned.

1. The term "Native Nations" is intended to include Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations. The term "tribe" is also occasionally used for the sake of simplicity. It is also intended to be inclusive of the above-named entities, as well as traditional clans and societies.

When the staff receives such an inquiry, we ask that the individual send a photograph and background information regarding the object(s) in question to the Foundation. We then forward this information to members of our Provenance Committee (made up of Native leaders, scholars and elders across the country), who make recommendations about which tribe/clan/individuals should be contacted. If the tribe/clan/individual requests repatriation of the object in question, the Repatriation Foundation can do one of two things:

1. The American Indian Ritual Object Repatriation Foundation can act as a liaison, introducing the individual collector to Nation representatives, and assisting in the transfer of material directly from the collector to the Native Nation or individual. In these cases there is almost infinite flexibility in the manner in which the transfer can be completed.
2. The American Indian Ritual Object Repatriation Foundation can act as a conduit, legally and physically accepting title and possession of an object from a donor, and then transferring title and possession to the tribe/clan/individual. In these cases, the donor signs a Deed of Gift, transferring title of the object to the Repatriation Foundation. The president of the Repatriation Foundation also signs this deed, expressing the intent of the Repatriation Foundation to return the item, naming the tribe/clan/individual that will receive it (see Appendix K, p. 150). When the Repatriation Foundation transfers title of the material to the tribe/clan/individual, the receiving entity also must sign the Statement of Transfer, stating that the object will not be re-sold (see Appendix K, p. 151). Note that the Deed of Gift records a monetary value of the transferred object. Although it may be offensive to place a monetary value on ceremonial material, a certifiably appraised value (discussed below) is required by law if the donor of the object wishes to receive a tax deduction for his/her donation.

### *Requesting the Return of Items in Private Collections*

The Repatriation Foundation has conducted an informal survey of private collectors of Native American objects, questioning them about incentives for repatriating items in their possession. Most who were interviewed stated that the initial contact from a tribe requesting the return of an item will set the tone for all subsequent negotiations.

Whether a Native Nation chooses to contact a collector directly or requests the assistance of the Repatriation Foundation, the Foundation recommends the following course of action:

#### **Step One: Formal Letter**

A Native Nation initiating a repatriation request should consider writing a formal letter to the collector. (Initially, phone calls are not recommended.) This letter is best written by a tribal officer or designated repatriation representative. The more official this person and his/her request is, the better.

The initial request letter serves as an introduction, informing the collector of a tribe's interest in a particular object. The Native Nation should assume that the individual collector knows nothing at all about repatriation. Assuming also that the collector acted in good faith in acquiring the objects originally, the letter might explain why a particular item is being sought for return. The initial contact letter should not be too long, or contain so much information that it overwhelms the collector.

Lastly, the initial contact letter should clearly identify either the Repatriation Foundation or a representative of the Native Nation whom the collector can contact directly with a response to the request.

### **Step Two: Following Up With Respect to the Initial Approach Letter**

The second contact with a collector (especially if he/she has responded to the first letter) can be less formal. It might include a phone call or a letter offering to send more detailed information about repatriation. The Repatriation Foundation can provide copies of many newspaper articles that favorably describe repatriation cases, as well as copies of eloquently stated arguments for repatriation that have been printed.

### **Step Three: Further Negotiations**

As negotiations ensue, Native Nations may want to explain to the collector some of the many options for, and benefits of, repatriation. These are listed below.

#### *Using Tax Deductions As Incentives*

Most private sector entities (corporations, businesses, and individuals, including dealers and collectors) that decide to return materials to Native Nations are eligible to receive tax deductions on those donations. The dollar amount of the deduction itself is determined by a number of factors, including the appraised value of the items, the contribution base (adjusted gross income) of the donor, and the kind of organization or individual that receives the donation.

*In every case, it is the responsibility of the donors to determine what deduction they will claim on their income taxes.* However, Native Nations might want to know something about the process of claiming tax deductions on donations, in order to better negotiate with potential donors.

The first step in the process involves the determination of “fair market value” of the material. A certified appraiser must be hired to determine the value of the object. Again, because the donor is solely responsible for all matters related to claiming a deduction, he/she is also responsible for hiring (and paying) an appraiser. The recipient cannot, by law, provide an appraiser, and probably should not even recommend one. If asked, a Native organization might provide the name and address of an appraisers association, such as the American Society of Appraisers or Appraisers Association of America.

Once the dollar value of the material has been established, the percentage of that amount that a donor can claim as a deduction is determined by three things: 1) the donor’s contribution base or adjusted gross income; 2) the kind of organization or individual that will receive the donation; and 3) the express charitable purpose of the receiving organization. Other factors may be considered, but they change from year to year as the tax code is amended (see Appendix N, p. 154).

If a Native group or individual does not wish to use the Repatriation Foundation as a conduit, it will have to provide potential donors with information about what kind of organization will receive the donation. The Native group or organization will need to provide a tribal government, a public charity, private operating foundation, or private non-operating foundation as defined by the Internal Revenue Code. (Internal Revenue Service Publication 78 lists all of the recognized public charities in the United States.) Again, the dollar amount of the allowable deduction will be determined by the non-profit status of the organization receiving the material, and by the “exempt purpose” of that organization (exactly what the organization was designed to do). For example, tribal governments may accept gifts or bequests for “exclusively public purposes.” On the other hand, though a community health service may have public charity status, the receipt of communal or ceremonial items probably is outside its stated purpose. In this case, the donor might be granted a smaller tax deduction than if the “exempt purpose” of the recipient organization were directly involved with ceremonial objects.

The American Indian Ritual Object Repatriation Foundation is a public charity that is designed specifically to act as a conduit for the return of ceremonial materials to Native Nations. As a result, potential donors may be more likely to repatriate materials through the Repatriation Foundation than directly to a Native Nation because it is a simplified process. Further, potential donors are likely to receive the maximum tax deduction allowable by law when they donate material directly to the Repatriation Foundation.

### *Alternatives to Outright Donation of Materials to Native Nations*

In some cases, private individuals and corporations have been reluctant to donate objects directly to Native Nations. The private sector collectors interviewed by the Repatriation Foundation reported that their principle concern is for the physical care of repatriated objects. In some cases, Native Nations may wish to repatriate items with the intent to re-bury, dismantle, or allow them to decompose naturally. The Native American Graves Protection and Repatriation Act recognizes and affirms the rights of Native Nations to make these decisions regarding repatriated materials. Private collectors, however, may be unwilling to return objects that they know will be destroyed. Also of concern to private collectors is the possibility that a repatriated object will be re-sold, or that a single individual or Nation might restrict the access of other Native Peoples to the material.

In cases in which a private sector entity has been reluctant to return materials directly to Native Nations, creative compromises have been made. The following are examples of these arrangements.

#### **Alternative One: Donation to Tribal Museum**

In 1992 the Institute for American Indian Arts in Santa Fe (IAIA) contacted the Repatriation Foundation about eleven Anasazi pots that had been on loan to its museum. IAIA had declined the owners' offer to donate the pots to the museum, however, both parties wanted to see the pieces returned to Native Peoples. The Repatriation Foundation arranged for the final donation of all eleven pots to the Southern Ute Indian Cultural Center, where they are accessible to the many descendants of the Anasazi.

#### **Alternative Two: Joint Custody—Tribes and Museums**

The Arizona State Museum and the Gila River Pima-Maricopa Nation have entered into a kind of partnership to care for an entire collection of Gila River area materials. The collection was offered as a donation to the museum by a private collector, but the museum recommended that the materials be given instead to the Nation. The donor was concerned about the Nation's long-term commitment to care for the objects, so he proposed joint ownership between the Nation and the Arizona State Museum. Ultimately, the collection was deposited in the museum, which will assume permanent responsibility for conservation and curation. When the Nation's cultural center is built, the collection will be made available in its entirety as a foundation for the Nation's museum.

#### **Alternative Three: Trade / Replication of Objects / Gifts**

In 1992 the Wounded Knee Survivors Association requested the return of a collection of objects taken from the Wounded Knee Massacre site to a small library in Barre, Massachusetts. Because the library did not receive federal funds, and was therefore not bound by NAGPRA, the Board of Directors was resistant to returning the substantial collection. In particular, the library

Board stated that they were “reluctant to repatriate items that were likely to be reburied.” During the negotiations between the library and the Wounded Knee Survivors Association, it was suggested that the original items be replaced in the library with replicas made by traditional Lakota artists (see Appendix M, p. 153). In effect, the Wounded Knee Survivors Association offered to trade sacred for non-sacred objects. The *Indian Trader* quoted Wounded Knee Survivors Association lawyer Mario Gonzalez as saying, “This way everyone will win. We would get the originals, the Indians would get employment and the museum will get duplicates.” Both sides have agreed on the repatriation of the entire collection of objects, and funding for the duplication project is being sought from the National Endowment for the Arts.

In similar situations, tribes might also enlist the support of Native contemporary artists in offering artworks in thanks for the return of sacred or communally-owned objects.

## CORPORATE COLLECTIONS

Many large corporations amass collections of artworks, both as interior decorations and as investments. Corporations have traditionally collected works by European and contemporary artists, but a few have collections of Native American materials. Tribes may wish to consult the *Art News International Directory of Corporate Art Collections* (see Appendix O, p. 156) for general information on corporate collections.

The initial contact with private corporations holding materials that a tribe wishes to have returned follows the same procedure as in the initial contact with private collectors. Like private collectors, corporations may receive tax deductions for their donations. Further, good public relations have always been of concern to businesses, and the potential for good press may provide incentive for private corporations to repatriate objects in their collections. Because some corporations consider Native materials as both investment and decoration, a tribal offer to create duplicates or replacements by Native artists, as discussed above, may be especially effective.

## NATIVE MATERIALS AT AUCTION

Auctions have been and continue to be the central component of the Native American art market. Each year there are 40-50 major “tribal arts” auctions, and at least as many smaller

Descendants of *Cheyenne* Chief Dull Knife also known as Morning Star, who led their exodus from Indian Territory (now Oklahoma) to their Montana homeland in 1878, came to NMNH to participate in repatriation ceremonies. Pictured from left to right are Rosie Eagle Feather, Beatrice Small, Martha Wolfname and Annie Brady. Photo by Chip Clark, courtesy of the *Smithsonian Runner*.



auctions involving Native American materials. These auctions generate as much as \$10 million in annual sales. Fortunately, the larger auctions are lavishly advertised, providing tribes an opportunity to learn of the imminent auction of objects they may wish to have returned.

### *Monitoring the Auction Market*

General announcements and advertising for auctions of Native American materials can be found in many local newspapers, antiquities publications and trade journals. The most complete listings and advertisements are located in *The Indian Trader* and *American Indian Art Magazine*, both of which are available by subscription. In addition, large auction houses such as Sotheby's, Christie's, Skinner, and Butterfield and Butterfield publish catalogs in advance of their major auctions. Though these catalogs are generally expensive (\$30), they can be ordered in advance (see Appendix P, p. 157) and are far more informative than advertisements placed in magazines. In addition, when buying a major auction catalog, either in advance or on the day of a sale, one can request that a follow-up report on the auction be sent to the person who purchases the catalog. These "Sale Results" list exactly what was sold, and for what price. They do not, however, identify the buyers. Summary information about major and minor auctions (after the fact) also can be found in *American Indian Art Magazine* (see Appendix Q, p. 158): Harmer Johnson's "Auction Block" column lists the highest prices paid at auction during the auction season and sometimes identifies an unusual trend or occurrence. Rarely does this column list what did **not** sell.

### *Requesting the Removal of an Object in Advance of the Auction*

Because negotiations for the removal of an object from auction are time-consuming and often involve many parties, it is imperative that such a request be made as much in advance of the auction as possible. Whether a Nation chooses to contact an auction house directly or requests the assistance of the Repatriation Foundation, the Foundation recommends the following course of action:

#### **Step One: Formal Letter to the Auction House**

A letter should serve to inform the auction house that a tribe objects to the potential sale of an item. The most effective request is one that is generated from an official tribal entity—either a tribal officer or appointed committee. The letter might include newspaper and magazine articles pertaining to the removal of objects from previous auctions. Copies of such articles and case studies are available on request from the Repatriation Foundation.

#### **Step Two: Formal Letter to the Consignors**

Though the auction house will generally consult the consignors (sellers) of the specific object, it is a good idea for the tribe to write a separate letter to the consignors stating their position. This letter will need to be sent in care of the auction house, as the house will generally not give out consignors' names, but are under obligation to forward any related correspondence to them.

#### **Step Three: Negotiations**

Once negotiations ensue, Native Nations may wish to enlist the aid of legal counsel and/or the assistance of a liaison group, such as the Repatriation Foundation.

### *Requesting the Return of Materials From Auction Houses*

Objects that go unsold at an auction are returned by the auction house to the original consignors. At this point, negotiations for the repatriation of these items follow much the same course as described in the section, "Objects in Private Collections." The main difference is that correspondence may have to continue to be forwarded by the auction house if the consignor(s) wish to remain anonymous.

### *Repatriation of Objects at Auction: A Case Study*

In the Spring of 1993, the American Indian Ritual Object Repatriation Foundation received the advance catalog for Sotheby's "Fine American Indian Art" auction of May 25, 1993. Among the objects slated for auction were four False Face Masks. Repatriation Foundation President Elizabeth Sackler brought the matter to the attention of the Chairman of the Haudenosaunee Standing Committee, who in turn informed Sotheby's of the sacred nature of the False Face Masks consigned for auction. Though the Haudenosaunee requested that Sotheby's remove the Masks from the sale, the auction house declined to do so, and the auction took place on May 25. Four representatives of the Haudenosaunee Standing Committee attended the auction and, as the Masks came on the block, the representatives walked silently down the aisle and sat in the fourth row. The Masks went unsold.

Through Sotheby's, the Repatriation Foundation contacted the consignors of the False Faces to propose that the Masks be repatriated to the Seneca. The consignors of three of the Masks agreed, stating that they wished to remain anonymous, but would donate the Masks to the Repatriation Foundation in order that they be returned. On November 10, 1993 custody of three False Face Masks was transferred to the American Indian Ritual Object Repatriation Foundation. Ten days later, fifteen members of the Haudenosaunee Nations, along with members of the Native and non-Native press, Repatriation Foundation staff and members of the curatorial staff of the National Museum of the American Indian looked on as Tonawanda Chief Emerson Webster received the Masks on behalf of his Seneca Band.

## **NATIVE MATERIALS OFFERED FOR SALE BY DEALERS**

Procedures for requesting the return of objects from dealers or traders are basically the same as those concerning private collectors. However, because dealers are primarily interested in profit, they often propose to sell the objects in question to the Native Nation. Nations may consider this option; however, the American Indian Ritual Object Repatriation Foundation and many Nations have adopted policies not to buy sacred material under any circumstances. Doing so supports the "market" for these materials.

Negotiating a trade for non-sacred materials or contemporary artworks such as those discussed in the "Private Collectors" section may be effective with some dealers. Again, there are pros and cons of participating in the market in this way.

### *Dealers and Traders: A Case Study*

In October of 1993, Denise Vigue, Director of the Oneida Nation Museum, learned that Sherwoods Spirit of America, "dealers in antique firearms, American Indian art, and Americana," was offering for sale a large number of False Faces. With the support of her Nation's Council,

Ms. Vigue called the President of Sherwoods, Michael Kokin, and requested the return of the Masks. Mr. Kokin claimed that he could not afford to donate such a large amount of material, but offered the Oneida a discount on the purchase of the False Faces.

The Repatriation Foundation assisted the Oneida Nation in explaining to Mr. Kokin both the importance of repatriation and the possibility of receiving a tax deduction for such a donation. (See letter from Ms. Sackler to Mr. Kokin, Appendix S, p. 162.)

In early 1994, representatives of the Oneida Nation flew to Beverly Hills to meet with the dealer. Mr. Kokin was still interested in selling the Masks to the Nation, offering a further discount, which he would call a donation to the Museum and for which he would receive a tax deduction. The Oneida again refused to pay for the False Faces, and again explained to Mr. Kokin that it would be inappropriate for them to buy what they consider sacred.

A few weeks later, Mr. Kokin informed the Oneida Nation that he had “disposed” of the Masks in question, though it is unclear whether or not he sold them.

## CONCLUSIONS

With all four entities discussed above—private collectors, corporations, auction houses, and dealers—strategies must take into account the motivations of the individual or group in possession of the object. For instance, it has been mentioned that tax deductions are incentives to some individuals but not to others. Offering to provide a replacement for a requested item may be effective, especially when the donors’ particular interest in the material—*aesthetic, romantic, monetary, historic, or sentimental*—is understood.

It has been the Repatriation Foundation’s experience that education is the most important part of the process of requesting the return of an object. In most cases, the simple act of informing an individual or institution that a tribe has a legitimate interest in the repatriation of an object is enough to engender favorable negotiations. Tribal repatriation committees might wish to establish and distribute guidelines for collectors and auction houses, informing them of what materials the tribe considers inappropriate to sell. Like most museums, private individuals and corporations desire good relations with Native Peoples; much can be gained from an optimistic approach and good-faith communications.

### *Involvement of Donors*

Once the return of an object has been agreed upon, the tribe might want to consider including the donor in some kind of repatriation ceremony. This gesture can vary from a small ceremony concurrent with the signing of a Deed of Gift (Appendix K, p. 150), to an invitation to the donor to attend or participate in a reintroduction ceremony.

### *Publicity*

The Repatriation Foundation has found that the value of publicity cannot be underestimated. Bad publicity, or the threat of generating it, is a tool that should be used sparingly. More often, the potential for good publicity (especially with respect to auction houses, corporations and dealers) is a motivating factor in the return of Native property. The cause of repatriation itself has been furthered when people have been willing to share their repatriation experiences with the press. The more the general public has been made aware of the issues surrounding repatriation, the better the climate has been for seeking the return of Native materials.