

BEFORE THE REVIEW COMMITTEE

IN THE DISPUTE BROUGHT BY THE HOONAH INDIAN ASSOCIATION, A
FEDERALLY-RECOGNIZED INDIAN TRIBE, AND THE HUNA TOTEM
CORPORATION ON BEHALF OF THE TLINGIT T'AKEDEINTAAN CLAN OF
HOONAH, ALASKA, AGAINST THE UNIVERSITY OF PENNSLVANIA MUSEUM
FOR THE REPATRIATION OF THE MT.FAIRWEATHER/SNAIL HOUSE &
RAVEN'S NEST HOUSE COLLECTION

CLAIMANTS' REPLY TO UPM'S LETTER OF OCTOBER 15, 2010

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INTRODUCTION

This memorandum is the claimants' reply to the University of Pennsylvania Museum ("UPM") letter of October 15, 2010, which responds to the Dispute Letter material and questions posed by DFO David Tarler's letter of September 10, 2010. The UPM's response and attachments are referred to in this reply as the "UPM Brief." The UPM Brief identifies the facts and analyses used by the UPM to determine this repatriation claim for 39 catalogued items in the Mt. Fairweather/Snail House and Raven's Nest Collection (hereinafter referred to as the "Snail House Collection") brought by the Hoonah Indian Association (which is a federally-recognized Indian tribe) and the Huna Heritage Foundation acting on behalf of the Huna Totem Corporation, on behalf of the Tlingit T'akdeintaan Clan of Hoonah, Alaska, who are collectively culturally affiliated with the requested objects.

The repatriation claim is for a total of 50 objects accessioned by UPM and subsequently assigned 39 catalogue numbers. Thirty-eight catalogue numbers for a total of 49 objects were catalogued by the UPM as the Mt. Fairweather Snail House Collection and one catalogue number for 1 object (The Marmot with Bat Frontlet) was catalogued as part of the Raven's Nest House Collection. The parties' dispute over 8 catalogued numbers may have been resolved by the October 15, 2010 Notice of Intent to Repatriate Cultural Items, which UPM submitted to the Department of Interior that will repatriate six catalogued numbers objects as "sacred objects," one as "cultural patrimony," and one as both a "sacred object" and object of "cultural patrimony;" but this leaves the remaining objects with 31 catalogued numbers still in dispute.

Based upon the facts and analyses presented in the UPM Brief, UPM concludes that of the entire collection of 50 objects with 39 catalogued numbers (1) only one item is "cultural patrimony," (2) only six are "sacred objects," (3) only one is both a "sacred object" and object of "cultural patrimony;" and (4) that UPM proved a "right of possession" to the entire collection. We disagree, because the entire collection must be repatriated for the reasons summarized below, and further explained in Sections 1-5 of this memorandum.

First, a faulty analysis is used in the UPM Brief to identify the objects, because the wrong standards are applied. UPM constructed a rigid, literature-based framework for

scrutinizing individual items. The approach applies alien and incorrect criteria to Tlingit culture. It discounts how traditional leaders actually view the items and imposes a stricter test than required by NAGPRA. As such, the analysis did not grasp the actual importance of the collection to Tlingit people of Hoonah, Alaska, causing it to determine that only a few items are “cultural objects” covered by the law. When the correct standards are applied and proper weight is accorded to the ongoing importance, religious significance and function of the items that is actually assigned by Tlingit leaders, the evidence easily proves that all items are “cultural patrimony” and “religious objects.”

Second UPM used a faulty “right of possession” analysis that is fatally flawed, because it ignores tribal law altogether and focuses on the wrong factors for determining the legality of the sale. *See, e.g., Cohen’s Handbook of Federal Indian Law* (2005 ed.) §20.01 [2] at 1231-32 for guidelines in determining and interpreting tribal law on the ownership and alienation of communally-owned cultural property belonging to Indian tribal groups. As a result of its failure to consider tribal law, the “right of possession” determination is based upon the mistaken belief that all clan property is alienable. This is incorrect. As a matter of fact, the Snail House Collection was not alienable to museum collectors in 1924. *See*, discussion in Section 3 *infra*. Rather, no single individual “owns” clan ceremonial property, including *at.óowu*, which was inalienable communal property throughout the 20th century by any individual (including clan members, housemasters, clan leaders, or caretakers of clan property), except in a few rare circumstances sanctioned by tribal law and custom that are not present in this case, and then the sanctioned “transfer” of that property was permissible *only* with the consent of the clan.¹

Even under the mistaken view of the museum that all clan ceremonial property and patrimony were alienable under tribal law in 1924 to on-rushing museum collectors (which it was not), the UPM could not establish a crucial threshold fact to support a valid sale--the seller’s identity. Without knowing who sold the collection, UPM stabs in the

¹ In these circumstances (such as ritual payment of a clan debt to another clan, certain kinds of customary gift-giving, diplomacy among the clans, etc.) the clan property *never left the culture*, but was simply *transferred* within the culture among various clans, so that the legal concept of “alienation” is not an entirely correct description of the transaction. Instead, the term “transfer “ more correctly describes this process than the Western concept of “alienation.” *See*, Dr. Charles W. Smythe, “The Ownership and Stewardship of Clan Possessions in Tlingit Property Law,” at 18-23 (attached to Dispute Letter). None of these sanctioned exceptions to the rule against alienation found in tribal law apply to the sale of ceremonial property to museum collectors.

dark and cannot prove with any confidence that an unknown person had the authority of alienation under tribal law, or that this mystery person had permission from the clan to sell clan property. UPM could not even provide any direct evidence that its *assumed* seller, Mr. Archie White, received clan permission, or that he otherwise possessed the requisite authority under tribal law to sell property belonging to the clan as if it were his own to dispose as he saw fit. These many infirmities are fatal to the museum's claim of title.

Moreover, when extant tribal law is actually considered, as it must under NAGPRA, *proof of voluntary clan consent to alienate clan property* is needed to sustain the UPM's burden of proving a right of possession. Because the museum sale, title, and accession records contain no evidence of clan consent, which is a key element vital to UPM's claimed title and alleged authority of alienation, the claimants established a *prima facie* case under 43 CFR 10.10(1) (iii). The records support a finding that UPM does not have a right of possession, when coupled with the clan's voluntary consent requirement imposed by tribal law before and after 1924, as shown in the dispute letter legal material.²

The burden then shifted to UPM under 43 CFR 10.10(1)(iv) to present contrary evidence that proves it does have a right of possession. That showing is simply not made from the facts presented in the UPM Brief. As will be seen, no hard facts are presented to show that the collection was obtained with the voluntary consent of clan owners. Nor does the line of speculation, assumptions, and surmise presented by UPM that Archie White had the voluntary consent of the clan and/or authority to alienate the collection amount to a scintilla of direct evidence, much less a preponderance of the evidence.

This memorandum contains five sections that will elaborate on the above points. Section 1 identifies the issues presented to the Review Committee. Section 2 outlines the elements of proof and burdens of proof under 43 CFR 10.10(a) for resolving the issues. Section 3 summarizes dispositive facts and identifies controlling principles of tribal law at the time the collection was alienated. Section 4 explains why the UPM analysis is

² See, e.g., Dr. Charles W. Smythe, "The Ownership and Stewardship of Clan Possessions in Tlingit Property Law," at 18-23 (attached to Dispute Letter); Dr. Rosita Worl, "Tlingit Property Law: Principles of Tlingit Property and the Dispute Settlement Process" (attached to Dispute Letter binder, item #46); Walter Echo-Hawk, MEMORANDUM OF LAW, July 23, 2010 (filed in Teeyhittaan dispute against Alaska State Museum) (attached to Dispute Letter binder, item #45) at 14-22; Rosita Worl, "Cultural Context of *Haa At.oowu*" (2009) (attached in Dispute Letter Binder as item #47).

faulty, because, among other reasons, it: (1) applied the wrong standards, (2) failed to give appropriate weight to the actual ongoing importance and religious significance assigned to the objects by Tlingit leaders themselves, and (3) did not sustain the museum's burden of presenting evidence to establish its right of possession. Finally, Section 5 shows that when correct standards are applied, repatriation of the entire collection is mandated, because (1) the clan's cultural patrimony and sacred objects were obtained by the museum from an unknown person with no documented right of alienation under tribal law, (2) there is no evidence that the clan owners of the collection voluntarily consented to the sale; and (3) UPM did not meet its burden of proving the collection was sold with the voluntary consent of the clan owners.

ARGUMENT

1. THE ISSUES PRESENTED.

This dispute is over two disagreements: (1) the identity of the items in the Snail House Collection that UPM denies are "cultural patrimony" or "sacred objects" under 25 USC §§3001(3)(C)-(D); and (2) whether UMP proved that it has a "right of possession" to the collection under 43 CFR 10.10(a)(1)(iv). *See*, DFO Tarler's Letter to UPM of September 16, 2010 at 2 (hereinafter "DFO Letter").

The DFO divided the dispute into two parts: Part I concerns the disputed identity of items in the collection; and Part II addresses the museum's right of possession. *Id.* at 3-4. Seven questions were posed to UPM. Under Part I (identity issues), he asked:

QUESTION #1: Did claimants show that the "Shaman's Drum, 'Old-Man-of-War' Drum Box" is a sacred object? ³

QUESTION #2: Did claimants show that any items are objects of cultural patrimony? If so, which items? ⁴

QUESTION #3: Did claimants show that any items are sacred objects? If so, which items? ⁵

³ UPM denies the drum is a sacred object. Based upon its analysis, UPM concludes the drum was not devoted to a ceremony and has no ceremonial function. UPM Brief at 6-7.

⁴ While UPM found six items qualify as sacred objects (but not cultural patrimony), it determined that none of the 37 items qualify as cultural patrimony. UPM Brief at 7-10. The framework and analysis for making that determination are described at pages 10-19.

Under Part II (right of possession), the DFO asked the following:

QUESTION #1: Did UPM prove the tribe “explicitly authorized” the *assumed* seller Archie White to sell the cultural patrimony?⁶

QUESTION #2: If the tribe did not explicitly authorize the sale, did UPM prove, more likely than not, that the tribe intended to give the seller “the authority to separate the objects of cultural patrimony from the tribe?”⁷

QUESTION #3: If the answer to Questions 1-2 is “yes,” did UPM prove that, more likely than not, the tribe “voluntarily gave the seller, Archie White, “the authority to separate the objects of cultural patrimony from the tribes?”⁸

QUESTION #4: Did UPM prove that “the owner voluntarily consented to transfer all interest” in items identified as sacred objects?⁹

There are two central issues to be decided in this case: (1) Did claimants establish by a preponderance of the evidence that the items in the Snail House Collection are sacred objects and/or objects of cultural patrimony?¹⁰ (2) Did the museum prove by a preponderance of the evidence that it has a right of possession to the collection?

⁵ UPM determined that six items are sacred objects, but none of the remaining 31 qualify, because the museum determined that they were not devoted to a traditional ceremony and have no function or significance in the observance or renewal of a ceremony. UPM Brief at 19.

⁶ The claimants strongly disagree with the way this question is framed. It assumes a fact not in evidence, namely that Archie White is the seller. That fact is unproven. Neither the sale or museum accession records, nor any direct evidence offered by UPM, establish the seller’s identity. We cannot gloss this over, as it forces us to guess who sold the collection and, even more remotely, wonder about that person’s authority. Brushing these problems aside, UPM claims it proved, more likely than not, that (1) White is the seller, (2) he had authority to sell it without unanimous clan consent, and (3) he sold it “with the knowledge and approval of clan members.” UPM Brief at 20. The facts and analysis used by UPM to support its answer is presented at pages 20-25. As will be seen, UPM is wrong: None of these points are established by its evidence or analysis.

⁷ UPM did not address this question, claiming it is unnecessary under the mistaken belief that it proved the answer to Question #1 is “yes.” UPM Brief at 25.

⁸ UPM says it proved the tribe “voluntarily” gave White authority to sell the objects, basing that contention on the same evidence and analysis used to answer Part II, Question #1 at pp. 20-25. UPM Brief, 26.

⁹ UPM claims that it proved that the owners of the collection “voluntarily consented” to the transfer, based upon its evidence and analysis presented at pp. 20-25 in answer to Part II, Question #1. UPM Brief at 26.

¹⁰ There is no dispute that the claimant federally recognized Indian tribes are culturally affiliated with the collection, because the collection was previously owned and controlled by members who belong to the Snail House and T’akeidaan Clan who are culturally related to and part of these Indian tribes as an earlier

2. ELEMENTS AND BURDENS OF PROOF FOR RESOLVING THE DISPUTE.

43 CFR § 10.10(a)(1)(i)-(iv) requires museums to repatriate sacred objects and objects of cultural patrimony when four criteria are met:

1. The object meets the statutory definition of a “sacred object” or object of “cultural patrimony;”¹¹
2. The “cultural affiliation” of the object is established by a preponderance of the claimants’ evidence;¹²
3. The claimant presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum . . . does not have a “right of possession” (defined as “possession obtained with the voluntary consent of an individual or group that had authority of alienation”); and
4. The museum is unable to present evidence to the contrary that it does have a “right of possession.”

The burden of producing evidence under these respective burdens of proof is satisfied when a party’s evidence amounts to a “preponderance of the evidence” (that is, when the weight of the evidence establishes the existence of a fact, more likely than not). Put another way, a reasonable man must be able to draw from the evidence the inference of

identifiable group within the meaning of §3005(a)(5); and that question is not a disputed issue to be decided by the Review Committee.

¹¹ “Sacred objects” is defined by § 3001(3)(C) as “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.” The legislative history recognizes that the ultimate determination of continuing sacredness must be made by the Native American religious leaders themselves because they must determine the current need for the object. *See*, Echo-Hawk and Trope, “The Native American Graves Protection and Repatriation Act: Background and Legislative History,” 24 Az. S. L. J. (No. 1, Spring 1992) 35 at page 66. By contrast, UPM uses much different, more rigorous criteria. It also requires that an object must have been specifically devoted to a particular ceremony before it was alienated and must have religious significance or function in the observance or renewal of that ceremony today. UPM Brief at 19. That additional criteria may be derived from unnecessary verbiage in 43 CFR §10.2(d) (3) that exceeds the statutory definition of “sacred objects.” Similarly, the act defines “cultural patrimony” as “an object having ongoing historical, traditional, and importance central to a Native American group or cultural” as opposed to purely private property, and was considered inalienable at the time it was separated from the group. *See*, §3001(D)(3). UPM imposes many and much more restrictive criteria for defining “cultural patrimony.”

¹² As stated in note 10, this element is not in dispute. The parties agree that the Snail House Collection is culturally affiliated with the Snail House of the T’akdeintaan Clan of Hoonah, who comprise the two co-claimant Indian tribes, the Hoonah Indian Association and the Huna Totem Corporation.

the particular fact to be proved. Speculation and conjecture alone are not evidence, nor can a simple “scintilla” of evidence, without more, amount to a preponderance.

3. SUMMARY OF DISPOSITIVE FACTS AND CONTROLLING TRIBAL LAW.

A. The Dispositive Facts are briefly summarized as follows:

1. The Snail House (also known as Mt. Fairweather House) is the leading house of the T’akdeintaan Clan of Hoonah, Alaska.¹³ Hoonah is located on Chichagof Island, which lies due west across the Icy Strait from Juneau, Alaska, and due south of Glacier Bay.

2. In 1924, the Snail House Collection consisted of “heirlooms” or highly valued things in the sense that they were handed down by clan ancestors as the accumulated ceremonial property of the Snail House and T’akdeintaan Clan. The heirlooms were communally owned clan property in the possession of the Snail House inherited from ancestors and held on behalf of future generations. It is evident from the claimants’ item-by-item description of the heirlooms that the collection has tremendous on-going importance to Tlingit members of the Snail House and T’akdeintaan Clan. Viewed as a whole, the collection is the sum of their ancestors’ accumulated material culture handed down to them, and their unborn generations, as the material embodiment of their history, cosmology, and cultural heritage; and their identity as members of house, clan, and tribe arises from the heirloom collection.

From a religious standpoint, uncontroverted evidence of the claimants establishes that each item is imbued with ancestral spirits of animals, places, shaman, leaders, caretakers, or family ancestors who can be *summoned* from these objects by present-day religious practitioners through traditional religious ceremonies today; and this remarkable spiritual quality endows each heirloom with an astounding religious significance and gives each object a profound religious function in present-day ceremonies. *See*, “Request for the Repatriation of Sacred Objects Associated with the Tsixaan Hit (Mt. Fairweather House) (aka Tax Hit (Snail House) of the T’akdeintaan Clan, Hoonah, Alaska, in the

¹³ The T’akdeintaan Clan of Hoonah currently consists of seven houses: T’akdein Hit (House of T’akdeintaan), Tsal-Xaan Hit/Taax’ Hit (Mr. Fairweather/Snail House), Yeil Kudee Hit (Raven Nest House), W’aakw Hit (Fresh Water Sockeye House), Gaanaxaa Hit (Seagull House), Kaa Shayee Hit (Man’s Head House), and the Kux Dise Hit (Half Moon House). *See*, Petition for Repatriation (Feb. 12, 1998) at 2 (Tab #3 in Dispute Letter Appendices).

Collections of the University of Pennsylvania Museum,” (Dec. 2, 2006) at 5 (the display of *at.óowu* during funerals and memorial ceremonies serve to evoke and make present the spirits of the animal, place, or spirit depicted on the images, as well as the spirits of clan ancestors involved in the acquisition of the object and of those who were stewards of the object in times past), 7-17 (overview of Tlingit religion and present-day ceremonies), and 17-61 (item-by-item description). As summarized in the Dispute Letter at 5:

All of these items are associated with the spirits of the clan ancestors who have acquired, used, preserved and passed them on to their descendents. These spiritual associations are evoked when objects are brought out (displayed or presented) at specific stages of funerals and memorial potlatches. The presence of spirits associated with clan *at.óowu* is a fundamental characteristic of Tlingit ceremonials, for it is believed that their presence “give weight” to the words of grief, or of condolence and comfort, expressed by the opposite side. . . . When the spirits are evoked, they are able to receive the spiritual essence of the food and material goods that are distributed by the bereaved clan to members of the opposite side who have assisted them in their time of mourning.

These religious objects are needed by T’akdeintaan religious leaders today “for their continued use in funerals and memorial potlatches to display their unique identity and history, and to evoke the spirits of clan ancestors who were involved in the acquisition of the item (and its crest, if applicable), of those who commissioned the item (or otherwise acquired it), as a memorial to these ancestors, and of those who preserved and used it in subsequent generations.” *Id.* at 5-6 (emphasizing that “[t]he ceremonial use of these objects call forth the spirits of these ancestors so they can be present and receive the spiritual counterpart of the food and material goods that are distributed to the guests” and “They are needed for the performance of mourning songs and oratory . . . to ‘give weight’ to their words.”). Thus, the claimants correctly reason that each item (whether specifically devoted to a particular ceremony originally or after it became part of the inherited collection of clan patrimony) was and/or could be “specifically devoted to traditional Tlingit funerary ceremonies” and has a very particular “religious significance or function in the continued observance of these ceremonies.” *Id.*

3. The evidence on tribal law establishes several well-established principles of Tlingit law in effect before and after 1924 (as will be described in more detail later in this Section): The clans are property-owning units in Tlingit society who own clan ceremonial property. That property is communal property owned by no individual person and can not be alienated by *any* single individual without clan consent. This rule against alienation applies to all individuals alike--whether they are clan members, clan leaders, caretakers of clan property, or housemasters.¹⁴ Clan leaders, house masters, and caretakers of clan property are simply fiduciaries with limited authority who hold clan property as trustees; and they have no authority to alienate that property, except in rare specified transfers with the consent of the clan.¹⁵ Houses, as sub-units of clans, have ownership interests in clan ceremonial property, such as, primary possessory rights of clan objects that the House commissioned and produced; but the clan retains residual ownership of the property and the house unit has no absolute property interest independent of the clan.¹⁶ Furthermore, clan property, including *at.óowu*, is inalienable under tribal law before and after 1924, except in rare instances sanctioned by tribal law when clan property could be transferred with clan consent; but those enumerated circumstances do not include the alienation of clan property to museum collectors.¹⁷

4. In 1924, the Snail House Collection was in the possession of the Snail House at the time that it was acquired by Louis Shotridge, a Tlingit Indian from a different clan in Klukwan, Alaska, and collector in the employ of the UPM.¹⁸ As summarized in the dispute letter, these items were clan property owned, inherited, and held as a single collection of clan possessions that relate to specific historical events or spiritual encounters from mythical times in the history of the clan; and the objects were associated

¹⁴ See, Dr, Charles W. Smythe, "The Ownership and Stewardship of Clan Possessions in Tlingit Property Law," at 18-23 (attached to Dispute Letter); Dr. Rosita Worl, "Tlingit Property Law: Principles of Tlingit Property and the Dispute Settlement Process" (attached to Dispute Letter binder, item #46); Walter Echo-Hawk, MEMORANDUM OF LAW, July 23, 2010 (filed in Teeyhittaaan dispute against Alaska State Museum) (attached to Dispute Letter binder, item #45) at 14-22.

¹⁵ *Id* (see in particular, Dr. Worl, *supra*, at 14-15; Echo-Hawk, *supra*, at 17-22).

¹⁶ Dr. Worl, *supra* at 10-13

¹⁷ See, note 14, *supra*.

¹⁸ See, Dispute Letter at 2.

with clan ancestors, clan history and identity, and had been preserved for use in Tlingit funerals, memorial potlatches, and other ceremonial use for present and future generations.¹⁹ Shotridge described the collection as “heirloom possessions,” “old relics,” “original things that had been in the possession of the chief’s ancestors,” and “ancestral objects handed down within the house group.”²⁰

5. In 1924, it is more likely than not that the items in the Snail House Collection were also *at.óowu*, which is a form of Tlingit communal clan property title and associated cultural concept well-described by Dr. Worl.²¹ This conclusion can be confidently drawn from the following facts and inferences reasonably arising from that circumstantial evidence: (1) the collection was in the possession of the Snail House at the time that it was acquired; (2) they were highly valued items representing the accumulated history and identity of the clan and house groups, with religious significance and a function in the ceremonies, as described above and shown in the claimants’ description of the items in the collection; (3) they were under the care and protection of a clan leader and housemaster; (4) we can infer that these items had been preserved as the assembled patrimony of the clan precisely *because* they were important, highly valued objects; (5) through long use in many clan ceremonies items came to be regarded as prized heirloom treasures that symbolize clan history and identity. or *at.óowu*. These circumstances strongly suggest that the objects had been transformed into *at.óowu*’ in times past by the steps prescribed by tribal law, or that by their long use in many ceremonies over several generations, they became prized heirlooms.²²

¹⁹ Dispute Letter at 5.

²⁰ *Id.* at 2

²¹ Dr. Worl, *supra*. See also, Dr. Rosita Worl, “Cultural Context of *Haa At.óowu*” (2009) (attached in Dispute Letter Binder as item #47).

²² See, Dispute Letter at 6. The UPM insists on specific evidence that each item went through every step required to transform the item into *at.óowu*’; however, those exacting procedural details is not the type of information that would be normally remembered in an oral tradition for old objects transformed into *at.óowu*’ long before 1924. The above circumstantial evidence strongly implies that the items are *at.óowu*’ sufficient to meet the claimants’ burden of proof, especially in the absence of any contrary evidence presented by the museum to rebut that assumption of fact.

6. Louis Shotridge acquired the collection from an unknown seller in 1924. Though he kept records of his expenditures regarding the acquisition of the collection, there is no bill of sale, and neither his collector notes nor the museum accession records document the identity of the seller.²³ The UPM speculates about the identity of the seller (UPM Brief at 21) but presented no title evidence showing who the seller was; and the parties presented inconclusive and contradictory speculation about that person's identity. On this record, no one knows who the seller is. Whatever occurred was done in secret by an unknown individual and there is no documentation establishing the knowledge, participation, or voluntary consent of the clan for a sale of its property.²⁴ Clan oral history discloses only that the sale was not done publically, the chest containing the clan *at.óowu* at the Snail House simply disappeared; and clan members had no idea what happened to the items or how they ended up in the possession of the museum. *See*, Oral history from clan member statement transcripts that are presented at pages 28-29 of the Hoonah Indian Association and Huna Heritage Foundation Letter to Dr. Jeremy A. Sabloff, dated May 2, 2001 (tab #8 in Dispute Letter Binder).

B. The Claimants' Evidence on Controlling Tribal Law is Summarized as follows.

This section summarizes the evidence before the Review Committee on applicable Tlingit property law at the time of alienation in 1924. As will be demonstrated,

²³ *See*, Dispute Letter at 6; UPM Brief at 21.

²⁴ *See*, Dispute Letter at 6; UPM Brief at 21. UPM speculation at 21 that Archie White was the seller is neither probative of the seller's actual identity, nor persuasive. The fact he was housemaster in 1924 does not mean he is the seller, that he "owned" the collection, or that he had permission to sell clan property obtained with the voluntary consent of the clan. Shotridge's insured check is not probative, because it does not identify the seller. Nor do his notes (they say only that "someone knowledgeable" about the items sold the collection, which could include *anyone* in Hoonah). UPM admits White may not have been present when Shotridge obtained the collection; but UPM nonetheless infers that the transaction involved the owner because of Shotridge's general practice *in other places* of dealing with owners "whenever possible," which is not convincing especially since UPM did not present evidence that White, or anyone else, actually "owned" this clan property. UPM's speculation about White's authority of alienation at 22-23 is also unconvincing. Even though his motive "may never be known," we are asked to assume White had voluntary clan consent, because there was no apparent adverse reaction to the sale. *Id.* at 23. We cannot draw that inference unless the transaction was a public event that put the clan on notice of the impending sale, but the sale was not done in public. Finally, UPM's assertion that the clan knew of the sale and gave its voluntary consent is not supported by Katherine Mills' statement (cited at 23-23 and appended as Exhibit C). She states that "*missionaries would force people to sell their old custom stuff so they sold this bronze hat.*" (UPM Ex. C at 2) (emphasis supplied). That does not suggest *voluntary* consent if missionaries "forced" people to sell. By contrast, NAGPRA requires evidence that the collection was obtained with "voluntary consent of an individual or group with authority to alienate such object." 43 CFR § 10.10(a)(2). Such evidence was not provided.

the evidence in the record documents a well-developed body of extant tribal law before and after 1924, including a MEMORANDUM OF LAW (July 12, 2010) prepared by attorney Walter Echo-Hawk in the Teeyhittaan dispute, which the claimants included in their Dispute Letter materials in this dispute.²⁵ That voluminous evidence was brushed aside by the UPM Brief, but must be taken into account by the Review Committee.

At the heart of this dispute is tribal ceremonial property that is owned in common. As noted in *Cohen's Handbook of Federal Indian law* (2005 ed.), there is no analogous counterpart to communally owned tribal property in the Anglo-American concept of private property law:

Tribal property is a form of ownership in common. It is not analogous to tenancy in common, however, or other collective forms of ownership known to Anglo-American private property law, because an individual tribal member has no alienable or inheritable interest in the communal holding. No tribal member has any vested property right that would permit claims to partition the tribal estate or to share pro rata in the proceeds of any sale. Absent contrary federal legislation vesting individual rights of ownership in tribal members, no tribal member can claim a federal right against the tribe to any specific part of the tribal property. Rather, tribal property interests are held in common for the benefit of all living members of the tribe, a class whose composition continually changes as a result of births, deaths, and other factors. The manner in which a tribe chooses to use its property can be controlled by individual tribal members only to the extent that the members participate in the governmental processes of the tribe.

Id., §15.02 at 966-67 [footnotes omitted]. The dispute over the ownership of the Snail House Collection concerns the validity of the alienation of communal tribal property by an unknown individual without any documentation that the seller followed Tlingit law or processes.

There are many forms of tribal property, including tribal land, tribal natural resources, tribal trust funds, and cultural property. Because the Snail House Collection is

²⁵ As mentioned earlier, Tlingit law is presented in the claimants' Dispute Letter and supporting binder material cited in footnotes 2, 14, and 21, *supra*. Instead of addressing this voluminous evidence, UPM brushes it aside, incredulously saying that the claimants provided no evidence on alienability! UPM Brief at 16. Rather than examining the body tribal law, UPM cites a single ethnographer who suggested that "under certain circumstances, all objects were alienable." *Id.* Thus, UPM looked only at non-legal criteria to try to understand extant tribal law, summarily declaring "in the absence of clearly defined and documented legal standards, UPM looked to the practice of the Tlingit at the time." *Id.* at 22. This section summarizes the evidence on Tlingit law that the claimants submitted which provides well-defined standards of ownership and alienation before and after 1924 which UPM should have applied in this case, but did not.

cultural property, we must first consult the general federal Indian law rule about the alienability of such tribal cultural property. That rule is expressed in *Cohen's* (2005):

Tribal peoples' conception of "ownership" and "property rights" vary with each group's customs and traditions, policy choices expressed in tribal legislation and common law, and the type and use of property at issue. In general, however, as a matter of tribal law cultural property is not individually owned, but is held in trust by an authorized caretaker or often for the tribe as a whole. Traditional expert witnesses testify that caretakers or trustees generally have no right under tribal law to sell or dispose of cultural property in their care. [footnote 22 omitted, citing *Chilkat Indian Village, IRA v. Johnson*, 20 Indian L. Rep. 6127, 6131, 6134-6135 (Chilkat Tribal Ct. 1993)]. To the contrary, they testify that trustees have a duty to safeguard the property in particular locations and for particular uses, which are often ceremonial. To ensure that those duties are met, some tribal courts have named the tribal council itself as trustee when the traditional trustee is incapable of performing the trust duties.

Id. § 20.01[2] at 1231 [footnotes omitted.] This leading treatise also provides helpful guidelines for determining and applying indigenous property law on the ownership, control, transfer, and alienation of tribal cultural property:

Tribal courts and traditional authorities have the power, authority, and expertise to identify and interpret tribal laws governing the definition, holding, use, and transfer of artifacts and resources within tribal land. Tribal courts generally reject the applicability of private property concepts with respect to the holding and transfer of cultural property, and instead engage in fact-finding to identify the group or subgroup with historical, ceremonial, and customary rights and responsibilities for the cultural property and the authorized individuals who act as trustees with respect to the property. If a tribal court has the requisite jurisdiction over the parties, disputes over the ownership of artifacts and resources found on tribal land are governed by the law of the tribe. Although state common law principles governing ownership of personal property have been applied in the past to artifacts and resources that had been removed from tribal lands, matters of cultural property should be determined according to tribal law regardless of the forum in which the case is heard.

Id. at 1232. Indeed, NAGPRA necessarily requires that tribal law be consulted to determine ownership and "right of possession" disputes over "sacred objects" and "objects of cultural patrimony." See, Echo-Hawk and Trope, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 *Az. S. L. J.*, No. 1 (Spring, 1992) 35:66.

Accordingly, Tlingit law on the ownership and alienation of tribal cultural property is examined below. The claimants' evidence of Tlingit law that was in existence before and after 1924 is cited in footnotes 2, 14, and 21. Four general rules emerge from that evidence which govern the ownership and alienation of clan religious objects and cultural patrimony, including *at.óowu*:

1. The clan is the owner of that cultural property, which is communal tribal property;
2. Caretakers of that property, including clan leaders and housemasters, are fiduciaries who care for such property as trustees;
3. Caretakers do not have authority to alienate that property, especially without clan consent; and
4. While various exceptions to the general rule against alienation allow the transfer of clan property with clan consent, none of those exceptions apply to the facts in this case where an unknown person with no documented clan consent sold clan property to a museum for unknown reasons, and without the knowledge or voluntary consent of the clan.²⁶

As discussed next, these four general rules were in effect in 1924 when Shotridge acquired the Snail House Collection. This is evident from (1) contemporaneous authoritative sources on Tlingit law that span the period beginning from before the beginning of the 20th century to the present date and (2) uniform judicial decisions of that period.

The Tlingit retain a complex and well-developed body of traditional tribal property law governing the ownership and alienation of tribal cultural property. *See*, Dr. Smythe and Dr. Worl's material provided by the claimants. Under that body of law, Tlingit clans function as the main property owners in the culture and almost all of the

²⁶ To the limited extent that ceremonial clan *at.óowu* can be alienated, the permissible circumstances for alienating *at.óowu* are laid out in the claimants, and they do not include the sale of clan property to a museum by a seller without the knowledge and voluntary consent of the clan. The sanctioned circumstances include the formal transfers from one clan to another for payment of a clan debt, the indemnification for wrongdoing, and the settlement of legal disputes among clans, or for various gifts to other clans for diplomatic purposes among the clans. These customary and traditional transfers are exceptions to the general rule against alienation, but do not invalidate the general rule against alienation that prevents caretakers, clan leaders, or individual clan members from alienating clan property without the consent of the clan.

formal property belongs to the clans, not individuals or caretakers of that property who administer clan property as trustees only. As both experts point out, that body of law has persisted into the present with surprising vitality, despite pressures placed upon the Tlingit culture by outside forces during the twentieth century, such as colonization, religious suppression, enforced government assimilation, and the conflicts between tribal and federal law.²⁷ During that process, Tlingit land rights and fishing rights were diminished by Supreme Court rulings, and Congress created a new statutory form of individual property rights for Tlingit Indians as shareholders in corporate assets paid to Alaska Natives in the settlement of aboriginal land claims and fishing rights.²⁸ Yet, despite these impacts on those forms of Tlingit property, tribal law governing cultural property survived largely intact, and persisted into the present aided by Commissioner of Indian Affairs John Collier, who in 1934 lifted the Department of the Interior's ban on tribal religion placed by the Code of Indian Offenses, and by the passage of the American Indian Religious Freedom Act in 1978. Since 1990, the federal law on Native American "cultural items" as defined by NAGPRA requires that ownership and right to possession determinations be made according to traditional tribal law applicable at the time the cultural property left Native American hands. As will be seen, a distinct body of Tlingit

²⁷ The impact of these forces upon Tlingit society and its largely successful efforts to resist them during the twentieth century and persist into the present is examined by Walter Echo-Hawk, *In The Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided* (Golden: Fulcrum Publishing Co., 2010) at 205-214, 359-394. During the period in which the United States policy sought to forcibly assimilate Native peoples enormous pressure was brought upon them to stamp out their traditional tribal religions, including the infamous and unprecedented Code of Indian Offenses promulgated by the Secretary of the Interior Teller in 1890, which banned the practice of traditional tribal religious practices until 1934, when Commission John Collier lifted the ban in 1934. *Id.* at 191-195, 298-306. During this period of unconstitutional religious suppression conducted by the federal government, many tribal religions and religious practices were driven underground and had to be practiced in secret. It is a testament to the amazing vitality of those traditional religions that they have survived and persisted into the present, when Congress repudiated that policy and instituted the current policy to protect and preserve those religions. NAGPRA seeks to facilitate the return of cultural objects improperly taken from the oppressed tribal communities in this period in violation of tribal law. *See*, Echo-Hawk and Trope (1992), *supra* at 43-45.

²⁸ *See, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (Teeyhiittaan aboriginal land rights were diminished by the doctrine of discovery as possessory rights that could be taken by the United States without the need to compensate the Teeyhiittaan); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (Tlingit aboriginal fishing rights are subject to state conservation laws); Alaska Native Claims Settlement Act, 43 USC 1601 *et seq.* (creating individual Tlingit shareholder interests in tribal settlement fund established by Congress); Alaska National Interest Lands Conservation Act, 16 USC 3101 *et seq.* (ANILCA) (federal protection of tradition Native subsistence practices).

law on cultural property was in effect among the Tlingit clans during the 20th century both before and after 1924.

The general rules governing ownership and alienation of clan property during the early decades of the twentieth century, including 1924, were documented by authoritative sources in a landmark study in 1946 (22 years after Shotridge acquired the Snail House Collection). *See*, Walter R. Goldschmidt and Theodore H. Haas, “*Haa Aani*, Our Land: Tlingit and Haida Land Rights and Use” (1946) (reprinted by Sealaska Heritage Foundation, 1998). Haas was a lawyer who was Chief Counsel for the Bureau of Indian Affairs and Dr. Goldschmidt was an anthropologist. *Id.* at xxv. After a summer of field work among knowledgeable Tlingit informants in the Tlingit communities of Angoon, Haines, Hoonah, Kake, Ketchikan, Klukwan, Juneau-Douglas, Saxman, Sitka, Wrangell, Yakutat, and the Haida community of Kasaan, the researchers published their landmark study on Tlingit possessory rights among the 44 Tlingit clans, including the T’Kakedeintaan Clan of Hoonah, to ascertain tribal land use rights in southeast Alaska. From information taken from knowledgeable tribal informants who were alive during the early decades of the 20th century, they found that that traditional Tlingit property law “was still poignant in memory and in the actions of the people of several communities” and that by 1946 “Native law remains a force in Tlingit and Haida daily life.” *Id.* at 17. Contrary to UPM’s contention that there are no clearly defined legal standards, the firsthand, region-wide research of Haas and Goldschmidt documented that the “Tlingit had well defined conceptions of property and legal rights.” *Id.* at 16 (emphasis supplied). These qualified researchers observed some weakening of Native culture due to the foreign influence of American customs over the past 80 years from the late 1800s, but they nevertheless found that this foreign influence “is not a denial of the old rights to land nor of the continued importance of these old rights” and that “the recognition of ancient clan rights to land, and the old status system based upon such ownership . . . are still poignant in the lives of the Natives of the southeastern portion of Alaska.” *Id.* at 16-17. Thus, there is no doubt that the restrictions against alienation of clan property by caretakers under tribal law obtained when Shotridge acquired the collection in 1924.

Goldschmidt and Haas (1946) found that clans are the basic property-holding units in Tlingit society, which fully corroborates the expert work provided by Dr. Symthe

and Dr. Worl in this case and demonstrates that clans were owners of clan property during the period covered by Goldschmidt and Hass from the late 1880s to 1946. The clans owned land and other valuable property. *Id. at 12*. Goldschmidt and Haas stated the general rule at 16:

The clan or house is an economic group in Tlingit society which, like a corporation in western society, controls the use of certain lands and other valued properties. The head of the clan or house group is the person directly responsible for administering the property, but according to custom, his rights are subject to certain restrictions. The most important of these are that (1) he cannot sell the right—though it may be transferred in legal settlement to another group, and (2) he must allow the use to appropriate members of his group.

The continuity of this rule is demonstrated by the interpretation of Tlingit law in 1959 by a federal court in *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452 (Ct. Cl. 1959), where the Tlingit sought compensation for the taking of aboriginal land. In awarding over 7 million dollars in damages for the taking of Tlingit aboriginal land in southeastern Alaska, the court found that the general rule of Tlingit law pertaining to clan land and natural resources was in effect at the time that the land was taken by the United States in the early decades of the twentieth century: After extensive hearings on Tlingit culture and traditional property rights, the court found that clans own the property rights to land in Tlingit society, with significant restrictions against alienation. The court stated at 456:

The modes of living and of dealing with property among these Indians were regulated by rigidly enforced tradition and custom, and except under special circumstances, there was no authority in a clan or clan division to sell, transfer, or otherwise dispose of, in whole or in part, any claimed area of land or water. [emphasis supplied.]

That the Tlingit continued to subscribe to that tribal property law principle from the beginning of the twentieth century into the 1950s is further evident from persistent clan efforts to protect clan land rights in cases such as *Tee-Hit-Ton Indians v. United States*, 348 U.S. 372 (1955) (involving a taking of clan property by the Forest Service in the early decades of the 20th century), and in the related land claims litigation carried on throughout the 1950's, including the *Tlingit and Haida* decision of 1959 (involving the

taking of clan property beginning in 1907 to establish the Tongass National Forest, which includes present-day national forest land surrounding Hoonah, Alaska).

Similarly, throughout the 20th century, the clans also own tangible tribal cultural property known as *at.óowu*, which includes the Snail House Collection, as demonstrated in the preceding factual section of this memorandum. Consistent with general federal Indian law property rules on cultural property described in *Cohen* (2005), *supra*, under Tlingit law, clan members own no individual property interest in ceremonial *at.óowu*, and they cannot devise, sell, transfer, or otherwise alienate that communal property, especially without the consent of other members of the clan. *See*, authorities discussed in footnote 14, *supra*. A Tlingit clan holds such cultural tribal property on behalf of future generations, which is a precept that is founded on the culture's notions that these clan objects (1) contain the spirits of ancestors, (2) are necessary to maintain the social and spiritual harmony of the clan through ceremonial display, and (3) clan survival depends upon continuity with future generations who will own and use that property. *Id.*

Importantly, the authority of clan caretakers of cultural property, or *at.óowu*, including housemasters such as Archie White, is carefully circumscribed by tribal law: The caretakers hold that property in trust with a fiduciary duty to use and protect the property for the benefit of clan members; and they lack the authority to alienate communally owned tribal cultural property of the clan, especially when the consent of the clan is not obtained.²⁹ This restriction on the alienation of clan property applies to all Tlingit Indians alike, even when a caretaker wants to sell clan cultural property.

The general rules pertaining to cultural property are for all practical purposes the same as those that govern clan land rights, as seen in Dr. Worl's material and in the protracted efforts by the Tlingit village of Klukwan to protect clan ceremonial *at.óowu* from unlawful alienation to art dealers, a legal struggle that spanned the 1970s to the

²⁹ *See*, these authoritative sources for this rule: Goldschmidt and Haas, *supra* at 17 (a clan leader cannot sell clan property); George Emmons, *The Tlingit Indians* (Seattle: Univ. of Wash. Press, 1991) at 27, 39 (While clan leaders are highly respected, their actual authority is limited, and major decisions that involve the interest of the clan are subject to clan consent); R.L. Olsen, "Social Structure and Social Life of the Tlingit in Alaska," *Anthropological Records*, Vol. 26 (Berkeley: University of California Press, 1967) at 37 (the trustee alone does not have the authority to alienate clan property)

1993 tribal court decision in *Chilkat Indian Village, IRA v. Johnson, et. al*, No. 90-01 (Chilkat Tr. Ct., Nov. 3, 1993).³⁰

In this case, the court examined extant Tlingit property law in a four-week evidentiary trial on the subject that gathered extensive expert and traditional evidence about the ownership and alienation of clan cultural property. The evidence compiled shows the continuity of traditional Tlingit property beyond 1924, including the vitality of the principles relied upon by the claimants in this dispute. The *Chilkat* decision involved the unlawful alienation of communally-owned clan ceremonial property by individual Tlingits. The court made several instructive findings and holdings. The property at issue in the case was similar to the Snail House Collection in this dispute, since it was “‘clan trust property’ with great spiritual significance to the Ganexteidi Clan.” Slip Opinion, at p. 6. The court found that under tribal law, the duty of a caretaker of that property is simply “to care for the property of the house and clan, and *has no right to sell or otherwise dispose of clan property.*” *Id.* [italics supplied]. Instead, the clan “as a whole would control decisions about the custody of the artifacts.” *Id.* at 10. The court found that a caretaker does not have “the right to unilaterally dispose of clan crest objects.” *Id.* Dr. Rosita Worl, who was considered by the court to be “a noted Tlingit anthropologist,” summarized the rule in her expert testimony, stating: “Under Tlingit law, such objects cannot be sold, unless for some reason (such as restitution for a crime) the entire clan decides to do so.” *Id.* She added, “[t]he participants in a clan decision such as this would include all adult males, and high-ranking women.” *Id.* at 10-11. The same principles of Tlingit property law established in this 1993 trial apply to the 1924 period when Shotridge obtained the Snail House Collection which had continuity throughout these decades spanning a sixty year period.

Based upon these findings, the *Chilkat* court held that the individual Tlingit Indians violated a tribal ordinance that codified Tlingit law by removing the clan artifacts without permission and ordered them to return the *at.óowu* to the village on behalf of the

³⁰ The related string of litigation in this matter includes, *Chilkat Indian Village v. Johnson*, 643 F. Supp. 535 (D. Alaska, 1986), *aff’d in part, rev’d in part*, 870 F. 2d 1469 (9th Cir. 1989), as well as a village ordinance enacted in 1976 to codify tribal legal protections of clan property against alienation contrary to Tlingit law.

clan. In so doing, the court rejected the defendants’ defense—which is similar to the UPM’s assumptions that tribal law and culture were dead in 1924, or unclear during the 20th century, and that Tlingit people stopped using their sacred objects and cultural patrimony during this period due to outside pressures placed upon the Tlingit nation—“that traditional Tlingit culture is dead, and thus tribal law is not valid.” *Id.* at 19. In rejecting that defense, the court stated:

The defendants’ argument that Tlingit culture is essentially dead was unsupported by the trial evidence. While the culture has been under assault from non-Indian outsiders and institutions, the lengthy testimony of many credible witnesses at trial confirmed the validity of Tlingit culture at Klukwan, and the continuing, important role of traditional law. The court finds that the Chilkat Indian Village maintains and nourishes its culture—even though that culture, like any, is dynamic and ever-changing as a function of time and changed circumstances.³¹

Id. at 20. The findings and holdings of the *Chilkat* decision demonstrate that the sale by an unknown seller without any documentation of clan consent was not a valid sale in 1924 under tribal law which continued its vitality and importance among the Tlingit clans through the end of the twentieth century, and beyond.

In sum, from evidence presented by the claimants for determining tribal law at the time of alienation, the general rules of Tlingit cultural property law remained in effect among the clans during the twentieth century, along with rigorous restrictions on the right of caretakers or clan leaders to alienate that property. This fact is illustrated by the continuity demonstrated from the early period studied by Haas and Goldschmidt through above cases, and also by the many successful Tlingit NAGPRA claims in similar situations, where “sacred objects” and “objects of cultural patrimony” were alienated during the twentieth century in violation of extant Tlingit law at the time of alienation.

4. THE UPM ANALYSES APPLIED THE WRONG STANDARDS.

This section explains why the UPM analysis is faulty. The manner in which it identified “cultural patrimony” and “sacred objects,” as well as its “right of possession” is skewed because, among other reasons, the museum: (1) applied the wrong standards in

³¹ This finding is consistent with and shows the continuity of the findings of Goldschmidt and Haas in 1946 that Tlingit property law remains important among the clans despite pressures from non-Indian outsiders and institutions.

identifying cultural items and determining tribal law; (2) failed to give appropriate weight to the actual ongoing importance and religious significance assigned to the objects by Tlingit leaders themselves, and (3) did not sustain its burden of presenting evidence to establish its right of possession.

A. UPM’s “cultural patrimony” analysis is seriously flawed, which explains why only two items qualified under its faulty analysis.

There are four principal reasons why the museum’s “cultural patrimony” analysis is flawed. That term is defined by the act as “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore cannot be alienated, appropriated, or conveyed by any individual regardless whether or not the individual is a member of the Indian tribe . . . and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.” 25 USC §3001(3)(D).

1. The analysis fails to consider the importance of the collection as a whole to the house, clan, tribe, and culture. By focusing solely upon a microscopic analysis of each individual item, on an item-by-item basis only, the UPM academics got “lost in the woods” and could not grasp the importance of the collection to the Tlingit. It is important to remember that the heirloom objects were accumulated and held by the clan and preserved for future generations as a single collection; and it was acquired as a collection by the museum. It is therefore relevant and important to evaluate the importance of the assembled patrimony as a whole, as a critical part of the “cultural patrimony” analysis, which UPM failed to do.

When we read the claimants’ item-by-item description of the collection, which is based on oral traditions and other evidence, the great importance of the collection to the Tlingit culture is inescapable: The Snail House Collection is irreplaceable cultural property, because it is quite literally the sum of these Indians’ accumulated material culture handed down to them, and their unborn generations, as the material embodiment of their unique and colorful history in an awesome land, their profound and powerful cosmology, and their cultural heritage amassed from centuries of living in the natural world; and for these reasons, their identity as human beings and as members of the Snail

House and T'akdeintaan Clan arises from, and is intimately tied to, this heirloom collection.

Furthermore, every item represents the spirits of revered animals, sacred places, shaman, leaders, caretakers, or other family ancestors who are central to the culture. These spirits can be summoned from these objects by present-day religious practitioners through traditional religious ceremonies today; and this remarkable power endows each heirloom object with importance central to the Tlingit culture and nation, invests each object that is woven with spirits an astounding religious significance, and gives each object a profound religious function in present-day ceremonies. To alienate such objects is to alienate the ancestral dead, something this culture would never allow, because the ancestors are central to a culture that continually invokes their presence through ceremonies; and, furthermore, it is inconceivable in this culture that the Tlingit nation would permit the alienation of its accumulated history, heritage, cosmology, and identity to East Coast museums.

The UPM analysis completely missed these points in its attempt to understand the ongoing importance of these items to the Tlingit, because its item-by-item analysis was conducted through a microscopic lens. That miniaturized focus is skewed and misleading, because the highly particularized analysis is like trying to discern which word in a song is more important than another, without listening to whole song; or like determining one page in the US Constitution is more important than another. We cannot say that just two items in the Snail House Collection are “cultural patrimony” while the others are not, without considering the importance of the collection as whole. When we consider the assembled collection of clan ceremonial property as a whole, a much fuller understanding of the collection’s ongoing historical, traditional, and cultural importance to the Tlingit emerges and the entire collection emphatically qualifies as “cultural patrimony” within the meaning of the act.

Second, the actual importance of the objects to the Tlingit people is grossly undervalued by the UPM analysis. See, UPM Brief at 10-15. UPM employed the wrong criteria and discounted the importance of the objects to tribal culture that is assigned by the practitioners of the culture. First, it incorrectly assumes that none of the items are *at.óowu* which flies in the face of the claimants’ evidence, and thereby fails to consider

the import of *at.óowu* in Tlingit culture. *See*, factual discussion of *at.óowu* in §3.A, *supra*. Second, it fails to take into account the fact that each item contains, and is associated with, important spirits who are evoked in ceremony, which further undervalues the ongoing importance of each item. *See*, factual discussion on religious objects in §3.A, *supra*. Third, UPM’s “centrality ranking system” is an artificial academic construct that imposes culturally alien standards on Tlingit culture and fails to give proper weight to the actual importance assigned to the items by the traditional leaders themselves. It presumes that NAGPRA imposes meaningless distinctions about the importance of objects upon the culture of a tribal group, which the act does not do. By focusing on and giving weight only to literature observation and collector notes as the sole means to divine cultural importance of objects in the Snail House Collection, while at the same time disregarding actual Tlingit statements from the practitioners of the culture regarding the importance of these objects to their culture, the UPM analysis makes a mistake frequently found in anthropology: Treating a living culture as if it was dead, with cultural values that are only capable of description by scholars from ethnographic literature. That skewed approach, however, is highly inappropriate for the vibrant Tlingit culture in southeast Alaska; and UPM should have given proper weight to the above factors to understand the ongoing importance of this collection. Moreover, even if some items of patrimony may be “more important” than others or “the most important of all,” that does not mean that other patrimony may not also be of central importance to the culture, even though they may not be the most important. UPM would allow only “the most important” to qualify under the statute, and not other patrimony that is also of central importance. This is like ranking the “liberty bell” as the most important cultural patrimony of the United States, and excluding all lesser objects, such as the original United States Constitution or Declaration of Independence as cultural patrimony simply because these objects of central importance to the American culture may not be quite as important. NAGPRA does not exclude such patrimony, nor confine its definition of “cultural patrimony” only to *the most important* object in a culture.

Importantly, UPM’s approach for ranking importance of objects in Tlingit culture also flies in the face of Review Committee precedent. When making “cultural patrimony” determinations, the Review Committee rightly places “considerable weight” on

traditional testimony regarding the ongoing historical, traditional, or cultural importance of tribal objects. For example, in *Review Committee's Findings and Recommendations Regarding Cultural Items in the Possession of the Field Museum*, 72 Fed. Reg. No.25, pp. 5738-5740 (Feb. 7, 2007), the Review Committee rejected a museum analysis that failed to give proper weight to tribal values. The Field Museum and White Mountain Apache Tribe disputed whether 33 items were cultural patrimony with ongoing historical, traditional, or cultural importance central to the White Mountain Apache Tribe. Like UPM, the Field Museum admitted the items had ongoing historical, traditional, or cultural importance, but denied they were "of central importance." It gave similar reasons for that determination, stating the items were not of central importance, because (1) many museums held similar masks; (2) many similar masks had been sold to collectors over the years by the Apache; (3) and no controversies occurred at the time of sale of the masks in question. By contrast, the Apache position, similar to the Tlingit in this case, was that the items are of "central importance" because they were needed to "channel the supernatural powers that serve to promote the general well-being and survival of the tribe."³² In that dispute, the Review Committee "placed considerable weight on the testimony of the traditional religious leaders who said that objects are of central importance" and found that the items qualify as "cultural patrimony." It rejected the Field Museum's contention that the masks are not of central importance because similar masks had been sold in the past, stating that such evidence shows only that "[v]iolations to rules occur among all societies, and White Mountain Apache are apparently no exception."

The Review Committee also rejected the Field Museum's contention that the items were "alienable" by individuals at the time they were sold, which was based upon ethnographic accounts suggesting that masks were individual property, because the Apache rebutted the museum's evidence with testimony from present-day elders and an anthropologist who testified that "such items could not be legitimately sold by individuals."³³ The Review Committee found the Apache evidence persuasive on this

³² This is very similar to each item in the Snail House Collection that embodies the spirits of clan ancestors who could be evoked in Tlingit religious ceremonies. The presence of those spirits are need to provide efficacy for those ceremonies which are of central importance to the Tlingit culture, history, and traditions.

³³ This is similar to the parties' evidence in this dispute where UPM contends that the Snail House Collection was alienable by an individual because of other sales of objects by other individuals and some

issue, as well in reaching its conclusion that the objects were cultural patrimony. By contrast, the UPM analysis completely discounts the evidence provided by the Tlingit about the ongoing importance of the objects in the Snail House Collection in favor of museum collector notes and snippet excerpts from the literature. That UPM analysis failed to give tribal evidence on the importance of the objects proper weight, something that the Review Committee must do in deciding this dispute.

The Tlingit explained that their culture does not draw the many fine distinctions or degrees of “centrality” concocted in UPM’s analysis. Rather, all crests, crest objects, and other items in a clan collection have the utmost ongoing significance to a clan; *any* heirloom can become a highly prized clan possession through its display at potlatches in the Tlingit culture; each requested item is associated with clan ancestors, was inherited from those ancestors, and is associated with clan history and identity and was preserved for ceremonial use. *See*, Dispute Letter at 5. For these reasons, the Tlingit claimants described the central importance of these objects as follows:

While every clan object and prerogative is unique depending upon the history of its acquisition, its continued importance to the clan is signified by the stewardship that has preserved it through generations and the fact that it has been preserved for ceremonial use by subsequent generations. Each of the requested items is of such central importance that they were passed down to the head of the Snail House/Mt. Fairweather House (and the T’akdeintaan Clan) as their custodian on behalf of all clan and house members.³⁴

The claimants’ evidence emphatically rejects the wooden “centrality” framework constructed by the UPM, with its many, fine degrees of relative importance somehow divined from literature, as alien to their culture and how they themselves assign importance to clan ceremonial property in their culture, as the practitioners of that culture. Their evidence, which was disregarded by UPM, clearly establishes the central importance of the objects by a preponderance of the evidence.³⁵

ethnographic literature, which is rebutted by present-day Tlingit traditional leaders, elders, and anthropologist evidence from Dr. Worl and Dr. Symthe who presented evidence of Tlingit property law that prohibited the sale in question.

³⁴ Dispute Letter at 5.

³⁵ *See*, Petition for Repatriation (Feb. 12, 1998) at 4-16 (Tab #3 in Dispute Letter material binder); Claimants’ Letter of December 15, 2006, page 2 (summarizing and referring to the historical, traditional, cultural, and religious information concerning the ongoing and central significance of the Snail House

3. The UPM “alienability” analysis is wrong, because it failed to examine tribal law, considered the wrong factors to determine alienability, and erroneously concluded that all items in Tlingit culture are alienable. As shown above in §3.B, the evidence presented by the claimants on Tlingit law before and after 1924 proves the existence, more likely than not, of a well-developed body of tribal property law concerning the ownership and alienation of clan ceremonial property. That body of law has specific rules against the alienation of such property by anyone, including clan leaders and housemasters, except for transfers among the clans in rare circumstances with the consent of the clan. In attempting to determine “alienability” as part of its “cultural patrimony” analysis, UPM disregarded this evidence and did not examine tribal law at all. *See*, UPM Brief at 16-19. Incredulously, UPM brushed that evidence aside stating wrongly that claimants provided “no historical evidence” that the items were considered inalienable in 1924. That flies in the face of the voluminous Dispute Letter binder material teeming with authoritative evidence on this point provided by Dr. Worl, Dr. Symthe, and attorney Echo-Hawk. *See*, §3.B, *supra*.

Instead, UPM proceeds to examine three wrong factors in making its “alienability” determination at 17-19: (1) the alleged “widespread practice of housemasters and chiefs selling objects like the Claimed Objects” (page 17); (2) Alaska Native Brotherhood (ANB) leaders were against Tlingit customs in the early days after 1912 when ANB was founded (page 17-18); and (3) churches were discouraging Tlingit ceremonies and the use of clan objects (18-19). None of these factors are probative of tribal law. All that the perceived “widespread practice” selling practice of housemasters and chiefs shows is that every society has folks who break the rules, as noted by the Review Committee in the Apache dispute, where Apache selling practices alone did not prove that items are alienable under tribal law, but rather show only that “[v]iolations to rules occur among all societies.” The Tlingit are apparently no exception, if we assume that UPM’s allegations are true (which the claimants do not). But this is not probative of Tlingit law. From a practical standpoint, the absurdity of defining law based solely upon

Collection to the house and clan) (Tab #12 in Dispute Letter material binder); and “Request for the Repatriation of Sacred Objects Associated with the Tasizaan Hit (Mr. Fairweather House) (aka Tax Hit (Snail House) of the T/akdeintaan Clan of Hoonah, Alaska in the Collections of the University of Pennsylvania Museum” (Dec. 3, 2006) at 2-17 and the item-by-item description at 17-61 (Dispute Letter material binder, Tab #12)

the conduct of rule-breakers is readily apparent—that approach would turn the law of every nation on its head if we define the law according to the practices of law-breakers. Were that the case, outside observers would mistakenly believe that the United States has no law at all, even to protect against the most craven acts. In a similar vein, whatever the position of the ANB organization may have been in the early 20th century, the ANB was not a law making body for the Tlingit nation, which already had a well-developed body of tribal property law. Accordingly, the diverse social views of its leaders are simply not probative of tribal law. The same is true for foreign church influences. However hard the churches may have worked during that period to stamp out tribal life, the churches were not law making bodies for the Tlingit nation. At most, the outside influences and pressures on traditional Tlingit religion during the early part of the 20th century served only to drive traditional tribal practices underground, but did not change tribal law governing communal ceremonial property, which persisted with amazing vitality throughout the 20th century, as Haas and Goldschmidt found in 1946 and as is demonstrated throughout the 20th century by court holdings which recognized extant Tlingit law, including the very principles which are at play in this dispute.

4. UPM’s analysis erroneously treats the Snail House Collection as private property belonging to Archie White who could dispose of it as he saw fit, rather than communal property belonging to the clan. At bottom, UPM treats the collection as purely private property belonging to Archie White, which could be sold according to Anglo-American notions of private property. That is simply not the case. The evidence establishes that the Collection was communal ceremonial property owned by the clan; and claimants also established that the items in the collection are *at.óowu*. See, discussion in §3.A. Therefore, we must analyze alienation of the Snail House Collection according to the tribal cultural context, using concepts from a culture vastly different from our own, and not as ordinary objects bought from a vender at the corner flea market. This, the museum failed to do. By contrast, to correctly apply NAGPRA, the Review Committee must cross the cultural divide to properly decide this dispute.

For all of the above reasons, it is hardly any wonder that UPM only found that two items qualify as cultural patrimony.

B. UPM’s “sacred object ” analysis is seriously flawed, which explains why only six items qualified under its faulty analysis.

UPM’s “sacred object” analysis only determined that six catalogued items are sacred objects. The analysis fails to give specific, item-by-item reasons for concluding that the remaining items do not qualify. *See*, UPM Brief at 19. UPM only states that its criteria were that an object must (1) have been devoted to a specific ceremony and (2) have a religious significance or function in the continued observance or renewal of that ceremony. *Id.* After failing to provide specific reasons why each object is not a “sacred object” under these criteria, the UPM Brief simply proclaims that *none* of the objects in the 31 catalogued numbers meet its criteria, “because the claimants did not provide evidence to show that each object was devoted to a traditional religious ceremony or ritual and has religious significance or function in the continued observance or renewal of a present day ceremony or ritual.” *Id.* This determination is faulty, because it disregards evidence that Tlingit religion invests that each object with ancestral spirits who can be evoked in present ceremonies, and that this function is critical in promoting the efficacy of those ceremonies. *See*, factual discussion in §3.A, *supra*; and “Request for the Repatriation of Sacred Objects Associated with the Tsalxan Hit (Mt. Fairweather House) (aka Tax Hit (Snail House) of the T’akdeintaan Clan, Hoonah, Alaska, in the Collections of the University of Pennsylvania Museum” (Dec. 3, 2006) at 7-17 and item-by-item religious analysis at 17-61 (Dispute Letter material binder, item #12). This dispositive point is stressed again and again in the claimants’ evidence, but the UPM analysis fails to take the spirits, who are woven into the objects, into account. The resulting failure to understand the spiritual dimension of those objects fatally flaws the museum’s analysis.

C. UPM’s “right of possession” analysis it did not consider tribal law, looked at the wrong factors for determining “alienability,” and presented no evidence to document voluntary clan consent for the sale.

The UPM’s “right of possession” analysis is faulty; and it also failed to present evidence that UPM has a right of possession. UPM Brief at 20-25. As explained above, the claimants made a *prima facie* case that UPM does not have a right of possession by their evidence on the tribal law rule against alienation and through their examination of museum sale, title, and accession records which fail to disclose the sellers’ identity, as

well as the seller's authority of alienation acquired with the knowledge and voluntary consent of the clan. *See*, §§3.A and B, *supra*. In response to this *prima facie* showing, the museum ignored the evidence on tribal law in effect in 1924, and considered the wrong factors for determining "authority of alienation" and "right of possession," as explained previously in §4.A (point 3) *supra*; and UPM utterly failed to present evidence that Shotridge acquired the collection from a seller who sold the collection with the knowledge and voluntary consent of the clan.

Contrary to its assertion at 21, UPM presented no evidence as to the identity of the seller—only speculation that is for the most part not relevant nor probative of the seller's identity. *See*, factual discussion in §§3.A (point 6), 4.A (point 3), *supra*. Stabbing in the dark, the UPM next tries to establish that the unknown seller had authority of alienation at 22-24; but again did not examine tribal law, nor produce documentation of clan consent. *See*, factual discussion in §3.A. *supra*. When the facts are applied to tribal law, the record firmly demonstrates that UPM does not have a right of possession.

5. WHEN THE CORRECT STANDARDS ARE APPLIED AND APPROPRIATE WEIGHT IS GIVEN TO CLAIMANTS' EVIDENCE, THE OBJECTS QUALIFY AS "CULTURAL PATRIMONY" AND "SACRED OBJECTS;" AND UPM DID NOT PRESENT EVIDENCE PROVING IT HAS A "RIGHT OF POSSESSION."

From the foregoing discussion, it becomes clear that when the correct standards are applied, all of the requested items qualify as "sacred objects" and "objects of cultural patrimony;" and, furthermore, when tribal law at the time of alienation is considered, the UPM does not have a "right of possession" to the Collection, because it failed to prove by a preponderance of the evidence that the Collection was obtained with the voluntary consent of the clan.

After the faulty analyses and wrong standards in the UPM Brief are discarded, the Review Committee can compare the claimant's evidence on the identity of each object with the known reasons given by UPM for denying that the object is a sacred object or object of cultural patrimony in a straightforward manner. That simple side-by-side analysis will reveal that UPM failed to consider pertinent evidence that clearly establishes the ongoing importance, religious significance, and religious function of each object.

Furthermore, when the Review Committee examines tribal law instead of the non-legal factors examined by UPM that are not probative of tribal law, it will readily be

seen that the museum's "alienability" and "right of possession" analyses are meaningless exercises that must be rejected. A searching examination of the museum's proof on "right of possession" issues will disclose that UPM did not produce one scintilla of evidence to prove the seller's identity, document this person's authority of alienation under tribal law, or establish that the seller otherwise sold the Snail House Collection with the knowledge and voluntary consent of the clan. For these reasons, the entire collection is subject to repatriation under NAGPRA.

Respectfully submitted,

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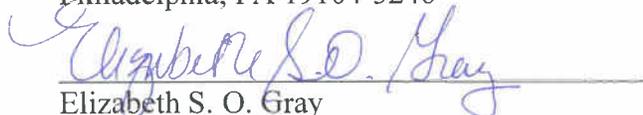
Attorney for the Hoonah Indian Association and Huna Totem Corporation

CERTIFICATE OF SERVICE

On November 11, 2010, the undersigned deposited the foregoing CLAIMANTS' REPLY TO UPM'S LETTER OF OCTOBER 15, 2010 into the first class U.S. Mail, postage prepaid, certified, return receipt requested, and addressed it to the following:

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