

U.S. House of Representatives  
Committee on Natural Resources  
Oversight Hearing on the Native American Graves Protection and Repatriation Act  
Wednesday, October 7, 2009

Statement of the National Association of Tribal Historic Preservation Officers  
Presented by D. Bambi Kraus, NATHPO President, for NATHPO Chairman Reno Franklin

Good morning Mr. Chairman and members of the committee. Thank you for the opportunity to testify at this oversight hearing on the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et.seq.* NATHPO Chairman Reno Franklin sends his regrets as he is not able to be here in person, and thanks the committee for their time and attention to examining the status of a federal law that affects almost every Native person today.

Background

Today I am representing the National Association of Tribal Historic Preservation Officers (NATHPO). NATHPO is a national not-for-profit professional association of federally recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian, Alaska Native, and Native Hawaiian cultures and practices. In 1998, the initial cohort of 12 officially recognized Tribal Historic Preservation Officers (THPOs) created NATHPO with the mission to preserve Native languages, arts, dances, music, oral traditions, and to support tribal museums, cultural centers, and libraries. .

The number of Tribal Historic Preservation Officers (THPOs) continues to increase since they were first recognized in 1996 by the National Park Service, U.S. Department of the Interior. THPOs assume the role and responsibilities of the State Historic Preservation Officers on their respective Indian reservations and aboriginal lands from which their ancestors once lived and were laid to rest. In 2008, there are now 86 officially recognized THPOs and our organization's membership has increased commensurately. NATHPO's membership includes THPOs and tribal governments that support the mission and goals of our organization.

THPOs are not just tasked with complying with the National Historic Preservation Act, they are often also the "NAGPRA representative" for their tribe.

In addition to convening training workshops and national meetings, NATHPO has produced original research reports, including: "*Federal Agency Implementation of the Native American Graves Protection and Repatriation Act*" (2008); and "*Tribal Consultation: Best Practices in Historic Preservation*" (2005).

I am familiar with the issues in today's hearing based upon my work on repatriation issues while being employed at the National Association of Tribal Historic Preservation Officers, as well as prior professional employment at the National Indian Policy Center and the Smithsonian Institution's National Museum of Natural History. Bambi Kraus is my English name, Yatxaakw is my Tlingit name.

## Why Was NAGPRA Created?

NAGPRA was enacted in response to accounts that span many generations over the significant portion of two centuries. These accounts document a spectrum of actions from harvesting human remains from the battlefield to disinterment of existing graves to the theft of Native American human remains, funerary objects given to the deceased at burial, sacred objects of different types, and objects of cultural patrimony that belong to the collective Native community.

Within a few years time, two public laws were enacted that forever changed how Native Americans are viewed today:

- Public Law 101-601, the Native American Graves Protection and Repatriation Act (November 16, 1990).
- Public Law 101-185, the National Museum of the American Indian Act (November 28, 1989; later amended in 1996 to include repatriation provisions) and

NAGPRA has been at times terrifically successful at the local level. More often, it is exemplary of the experiences of many American Indians, Alaska Natives, and Native Hawaiians: though the Act was created for their benefit and to rectify a moral wrong, most Native people have been unable to realize the law's potential. They have been forced to immediately learn a western process and bureaucratic language and to do so at the most personal and profound of times – at the time they must identify their dead and the sacred objects and cultural patrimony that have been removed from their communities.

## First In-Depth Review of How Federal Agencies are Implementing NAGPRA

In 2006, the National Park Service National NAGPRA Program awarded a grant to the Makah Tribe to assess how the Act has worked over that time and whether there remain significant barriers to the effective implementation of the Act; the Tribe worked closely with NATHPO in its research and production. The resultant report focuses on Federal agency participation in and compliance with the Act, including such overarching issues as completing notices of inventory, determining cultural affiliation, developing and implementing agency policies on tribal consultation, and resources to assist the agency meet its responsibilities under the Act.

The Makah-NATHPO Report, “**Federal Agency Implementation of the Native American Graves Protection and Repatriation Act,**” was the result of a two-year research project and was released in August 2008. The report is the work of five researchers who conducted original research for this report, analyzed existing public information, and conducted two national surveys to determine how the Act is being implemented around the country and how Federal agencies and Native Americans are working together to achieve the goals that the U.S. Congress established for the Act. The report was peer-reviewed by 11 individuals representing Indian tribes and NAGPRA practitioners, academics who work in this field, and federal agency officials. We are confident in the research, conclusions and recommendations that are presented in the 2008 report.

This study was undertaken to prepare a substantive foundation for assessing Federal agency implementation of NAGPRA and where improvements might be made. The internal processes

and effectiveness of the National Park Service (NPS) National NAGPRA Program or Park NAGPRA Program were not examined or evaluated. We are happy to report that several recommendations in the report have already been implemented or are underway in the year since the report was published.

In brief, the research team examined a national process of consultation and information sharing that has led to individual success stories at the local level. It is clear from the work that went into the report that in the almost 20-year history of the Act, it has enabled some measure of success in the efforts of Native people to secure the repatriation of Native American human remains and cultural objects, but much work remains.

Again, one of the main goals of the report was to identify where improvements might be made in the implementation of the Act and to present the information in terms of findings and recommendations. Attached to this written statement are the recommendations that were developed. For this morning's hearing, I will highlight and discuss just a few.

### Report Recommendations

The report recommendations were presented in two categories: general themes and specific recommendations. Summarizing the General Theme recommendations with a brief description are as follows:

1. Knowledge of process and responsibilities: No full-time NAGPRA staff working at the Federal agency level; lacking a list of the NAGPRA contact person for each Federal agency; need and request for NAGPRA training
2. Access to Information: burden has been placed on Native people to determine where and if a Federal agency has Native American remains and cultural objects; withdrawal of pending Notices of Inventory Completion is a barrier and/or challenge to Native people; identification of human remains and cultural objects as "culturally unidentifiable" that places those classified remains and objects beyond the reach of Native people
3. Consultation: Federal agencies don't know with whom to consult and Native people are not always welcomed when they seek to have a Federal agency engage in consultation
4. Available Resources: Currently available resources fall far short of what is needed and Native governments and organizations are unable to maintain a robust NAGPRA program effort needed to assure protection of their cultural resources. Also, congressionally appropriated funds have NAGPRA grants to tribes and museums has decreased in the past five years.
5. Standards: What constitutes correct information and who sets the standards for a Notice of Inventory Completion; when has a Federal agency complied with the Act per the notification process; how much evidence is necessary for an accurate determination of cultural affiliation; when are the remains of an ancestor considered to be "culturally unidentifiable;" no publicly available standards on "tribal consultation" and "cultural affiliation"
6. Training: develop and offer online training and online instructional materials; develop user-friendly databases

There are eight (8) specific recommendations as follows:

1. Statutory: amend the definitions section of the Act
2. Regulatory: Establish an inter-agency NAGPRA Implementation Council within the executive branch, possible the Office of Management and Budget, that would ensure and coordinate compliance, refer non-compliance and remedies for non-compliance with the Act, train federal officials, have a dispute resolution role, develop uniform NAGPRA consultation guidelines for all Federal agencies and publish in the Federal Register
3. Oversight and Enforcement:
  - a. issue and publish in the Federal Register the NAGPRA contacts and policies for each Federal agency;
  - b. create a public database that lists each Federal agency repository for curation purposes, including location and contact information;
  - c. demonstrate via publication in the Federal Register that consultation has occurred with an affected Native American/s; and
  - d. revise and improve the Culturally Unidentifiable Native American Inventories Database (CUNAIID) including the following:
    - i. improve database search functions
    - ii. show documentation as to the pre-decisional consultation has occurred
    - iii. establish an open and transparent process for why human remains and cultural objects meet the “compelling scientific interest” category
    - iv. more frequent updates of the database
    - v. Native American input in developing new information to be included in the database
    - vi. Require additional information to be included in the database, such as description of study beyond counting and sorting, original location of burial site, full address of current location of human remains and objects; and title and detailed contact information of the office responsible for writing the database record
4. General NAGPRA Program: develop a reporting system that demonstrates success
5. NAGPRA Review Committee: develop a database of disposition cases that have come before the Committee; publicize upcoming publications of Notice of Inventory Completion and a list of notices that are awaiting publication
6. Memoranda of Agreement or Programmatic Agreements: develop a standard MOA or PA
7. Adequate Funding for the Implementation of NAGPRA: appropriate adequate funding for Indian tribes, Native Hawaiian organizations, and Federal agencies, including training opportunities, and the Inter-Agency Council and additional responsibilities for the NPS
8. Compliance Audits: request that the Government Accountability Office conduct an audit of Federal agency compliance with the Act; and the Inspector General of each Federal agency should investigate any non-compliance with the Act that is identified by the GAO audit.

There was one section, Future Areas of Research, which recommended the following:

1. Evaluate museum compliance with NAGPRA, similar to this Federal agency research
2. Evaluate the role of the Smithsonian Institution in the repatriation process

3. Evaluate the NPS National NAGPRA Program for efficiency, staffing levels and areas to improve
4. Examines how the unassociated funerary objects have been dealt with in the repatriation process
5. Examines how the Future Applicability (Sec. 10.13) provisions are being implemented
6. Examine the background process that led a Federal agency to determine whether human remains and associated funerary objects was to be entered into the CUNAIID, including the process used in working with and notifying tribes of the remains and objects.

#### Are There Enough Resources?

One of the issues that was studied and discussed in the 2008 report was whether or not there were adequate resources to comply with the Act. We sought input from both Federal agency officials and from representatives of Indian tribes and Native Hawaiian organizations. Our work determined that over the past 19 years, the repatriation process has evolved to be a time consuming and expensive endeavor and even then, the repatriation process does not ensure that remains or cultural objects will be repatriated. Two possible solutions are (1) to infuse the program with much more federal support; and/or (2) to improve the process.

One of the major problems identified by the Makah-NATHPO study was the lack of Federal staff dedicated exclusively to carrying out compliance activities. The 2008 report recommend that additional appropriations be made to ensure that each agency has adequate staff. Related to this, was the lack of training for Federal staff who are assigned responsibility for NAGPRA implementation. We recommend that additional funds be appropriated to ensure that Federal officials receive adequate training and staffing levels, which they have identified as a need.

Since 1994, the U.S. Congress has appropriated funds for grants to museums and Indian tribes to carry out NAGPRA activities. Those funds have been inadequate to effectively address the mandates of the Act. Insufficient resources prevent Native Americans from maintaining robust NAGPRA programs and the needed effort to ensure protection and repatriation of a tribe's cultural resources. NAGPRA grants to tribes and museums – which are one of the only sources of funding for Native Americans in the field of cultural preservation – have decreased in the past five years. An assessment of grants made between 1994 and 2007 indicate that proportionately fewer of the funds appropriated for this purpose are actually being allocated for grants. We recommend an increase in the amount appropriated for grants, and that Congress ensure that these funds are only used for grants and not for administrative activities. If additional funds are needed for administrative activities, there is a separate line item to which additional funds could be made available.

#### Are the Law and Regulations Adequate or is Work Needed?

NAGPRA directs Federal agencies and museums to consult with Native governments and Native cultural practitioners in determining the cultural affiliation of human remains and other cultural items. Prior to passage of the Act, House Report 101-877 defined the term “consultation,” but the Department of the Interior decided not to include a definition when it promulgated regulations. As a result, there has been a great deal of confusion as to what exactly is required. The 2008 report recommended that the Department of the Interior revise the current regulations

to define consultation consistent with the language in the House Report or, if the Department declines to do so expeditiously, the Congress amend the Act to include a specific definition of consultation.

NAGPRA directs each museum and Federal agency to complete an inventory of Native American human remains and associated funerary objects in their possession or control by 1995, with notification of cultural affiliation provided to the appropriate Indian tribe or Native Hawaiian organization by 1996. The Secretary of the Interior was directed to publish a copy of each notification in the Federal Register. Our research found that ten years later, a large number of these notices have still not been published and the human remains and associated funerary objects been not been listed on the culturally unidentifiable database, thus leaving them effectively hidden from the repatriation process. It is particularly disturbing that a number of these situations involve units of the National Park Service - the agency currently delegated by the Secretary of the Interior with the responsibility for implementing the Act. We recommend that, as for all federal programs, an open and transparent process needs to be instituted for the knowledge and use by all.

#### Culturally Unidentifiable Native American Inventories Database

NAGPRA directs the National NAGPR Review Committee to compile an inventory of culturally unidentifiable human remains that are in the possession or control of each museum or Federal agency. In 1990, the Congressional Budget Office estimated that the remains of about 100,000-200,000 Native American individuals were stored in the nation's museums and Federal repositories. The National NAGPRA Program has reported that as of March 31, 2009, museums and Federal agencies had published 1,220 notices of inventory completion accounting for the remains of 37,998 individuals and 985,788 associated funerary objects. To date, about 38,000 ancestors have been returned using the NAGPRA cultural affiliation process – which is roughly 19% of 200,000 – or the repatriation at a rate of about one percent (1%) per year.

Our research for the 2008 report found that the current database does not accurately reflect the number of culturally unidentifiable human remains in the possession or control of Federal agencies. Further, the currently database does not provide adequate information about how to proceed if the database includes human remains of interest to an Indian tribe or Native Hawaiian organization. For example, there is currently no record of whether or not Native Americans have been contacted or consulted, there are no serial numbers or a way to determine which record is being referenced when seeking additional information, and there is no “user guide” for how to use the database.

Based on our work for the 2008 report and in response to our members, NATHPO sponsored in August 2009 the first organized opportunity and open call for tribal representatives to come together to review and discuss the important information contained in the database. We provided the attendees with a copy of the database and a template to use for requesting additional information, which is their right by law. This was just a start in working with this important database and we hope to continue this initiative. Attached is the one-page summary of this database and the workshop.

## Conclusion

NATHPO has been working to overcome historic practices and behavior toward Native people. We support local tribal efforts for control of their respective histories and culture. We support a tribal agenda that goes beyond merely educating and reacting to situations that are many times beyond our control. Native Americans have many reasons to be proud of their work in seeking the return of their ancestors and cultural objects and we hope that the Committee will continue supporting these local efforts and will have more opportunities to visit Indian country and hear from Native people on this important Act.

## VIII. RECOMMENDATIONS [from the report, "Federal Agency Implementation of the NAGPRA"]

### A. General Themes

#### i. Knowledge of Process and Responsibilities

One of the prominent issues that emerges from the results of both Federal agency surveys and the surveys of Native governments and organizations is the need for more training so that Federal agency personnel are aware of their agency's responsibilities under the Act, museum personnel are aware of their museum's responsibilities under the Act, and Native governments and organizations are aware of their rights and responsibilities under the Act.

The survey results would suggest that within the Federal agencies, seldom is there a full-time employee whose principle assignment is to carry out the agency's responsibilities under the Act. More often, if there is an employee who is tasked with assuring that the agency is in compliance with the mandates of the Act, that person's first responsibility is to assure compliance with section 106 of the National Historic Preservation Act. A number of the Federal agencies responding to the survey indicated that the agency has a designated Federal historic preservation officer, who may or may not devote part of his or her time to NAGPRA duties. Several agency respondents reported that they were not certain who had NAGPRA responsibilities within their agency, and others placed the role of determining cultural affiliation in the hands of the National NAGPRA Program through the publication of Notices of Inventory Completion.

It is perhaps thus not surprising that Native government and Native organization respondents reported that they have experienced difficulty in finding anyone within a Federal agency that can tell them with whom they should be addressing NAGPRA-related issues. Some Native governments report that when they contact Federal agencies with the objective of gaining an understanding of how the repatriation process works within that agency, there is no one who can tell them what the repatriation process entails or how to go about initiating a request for repatriation.

#### ii. Access to Information

No less important is the commonly-reported fact that unless a tribal government or Native organization has been contacted directly by a Federal agency or museum, they do not know how they would learn that a Federal agency or museum may have the human remains of their relatives, or associated funerary objects, sacred items or objects of cultural patrimony.

Some tribes report having had to resort to relying upon anecdotal evidence or reports that someone has seen something in a museum that looks like it would have been associated with that tribe's cultural and religious practices. Others have attempted to contact every Federal agency and every museum known to possess Native American collections. Such time-intensive, laborious and costly undertakings could have been rendered unnecessary if the policy and intent of the Act – namely to place the burden of reporting on those institutions that have possession of Native American collections – had been fully and effectively realized.

As referenced above, the Act does provide for a system of notification, but the integrity of the notification process is only as sound as the information that is provided to the Interior Department. The Act does not address how the Department would go about determining whether other Federal agencies or museums may have Native American collections for which inventories and/or summaries have not been submitted. In late 2007, several museums and National Park units withdrew many pending Notices of Inventory Completion that would have publicly announced the existence of culturally-affiliated Native

American human remains and associated funerary objects, and thereby further frustrated the efforts of Native people to identify where human remains and cultural objects could be found.

In addition, it is well known that a common practice of agencies and museums is to err on the side of caution when the cultural affiliation of human remains or associated funerary objects cannot be definitively determined. In this context, caution is exercised by reporting that such remains or objects are culturally unaffiliated. While such caution is understandable, as discussed in Section III.C. of this report, the classification of remains or associated funerary objects as culturally-unidentifiable often has the effect of placing those remains or objects so classified beyond the reach of the Act's preference for repatriation of Native American human remains and associated funerary objects.

Native governments and organizations ask whether notice has been published in the Federal Register for all remains and associated funerary objects that have been reported as culturally unaffiliated, and apparently the answer is that they have not. Responses to tribal surveys as well as an in-depth analysis of the "Culturally Unidentifiable Native American Inventories Pilot Database," maintained by the National NAGPRA Program Office and set forth in Section III.C. of this report would indicate that the database is difficult to use and has limited research and cross referencing capabilities.

### **iii. Consultation**

As outlined earlier, NAGPRA contemplates and indeed directs that Federal agencies and museums consult with Native governments and Native cultural practitioners in determining the cultural affiliation of human remains and other objects and items within their respective Native American collections. Federal agencies indicated that an element of their success in working with Native Americans in complying with the Act is that they know with whom to consult.

The Act's regulations also provide that consultation is to be carried out as part of the intentional excavation or inadvertent discovery of human remains or objects. Written plans of action must be the product of consultation, and when re-interments are to take place, consultation in how such re-interments or associated repatriations are to take place is also anticipated.

Despite these statutory and regulatory requirements, a review of both Federal agency and Native survey responses suggests that Federal agency personnel often don't know with whom they should be consulting, and Native governments are not always welcomed when they seek to have a Federal agency or a museum engage in consultation. In fact, survey results indicate that there is substantial room for improvement in the area of consultation.

### **iv. Available Resources**

Tribal survey results suggest that Native Americans place a high value on the capacity to repatriate the remains of their relatives, ancestors, sacred objects and objects of cultural patrimony, but that the resources which are currently available to effect these repatriations fall far short of what is needed. And while the Congress has appropriated funds to support the NAGPRA program, overall, those funds have also been inadequate to effectively address the mandates of the Act.

Insufficient resources also prevent Native governments and organizations from maintaining a robust NAGPRA program effort and retaining one or more people to assure protection of a tribe's cultural resources. NAGPRA grants to tribes and museums has decreased in the past five years, and an assessment of grants made between 1994 and 2007 indicates that proportionately fewer of the funds appropriated for this purpose are actually being allocated for grants (see Appendix C). Clearly, Federally-appropriated resources have been insufficient to address the needs of the repatriation process.

It is unknown what the total need for NAGPRA training is at all levels and for both Federal agencies and Native people.

An examination of fiscal support at the Federal agency level may show parallel lack of support, both in terms of staff support and training for new and current staff tasked with the responsibility to comply with the Act.

**v. Standards**

Improving information sharing and establishing standards are important components of the repatriation process and the following remain unclear:

- What constitutes correct information and who sets those standards;
- What format is to be used for a Notice of Inventory Completion and when has a Federal agency or museum complied with the Act per the notification process;
- How much evidence is necessary for an accurate determination of cultural affiliation;
- When are the remains of an ancestor considered to be “culturally unidentifiable.”

“Tribal consultation” and “cultural affiliation” are not easily understood and agreed upon processes. There are also points in the process where exclusion from these two important steps prevents active engagement of an affected Indian tribe or Native Hawaiian organization. There are no publicly available standards on what constitutes meeting the requirement to consult with an affected Indian tribe or Native Hawaiian organization. Who sets these standards is also of concern.

**vi. Training and Technology**

Many of the challenges identified by the research, as well as other identified barriers to the effective implementation of the Act, could be addressed and possibly overcome through the provision of training for Federal agency, museum, and Native government and organization personnel.

Federal agency survey responses suggest that those Federal agency personnel who are charged with carrying out NAGPRA responsibilities are frequently new or reassigned, so that while there may have been some training on the Act for those initially tasked with implementing the agency’s responsibilities, training has not been available to their successors. The same dynamic appears to be prevalent in Native communities, where the unmet need for training is further exacerbated by the lack of resources to gain access to training opportunities.

However, with the widespread advent of technological tools, there are solutions that could be applied to address the need for more knowledge about the Act, to build the capacity for access to information, to facilitate consultation, and to enable expanded training opportunities.

For instance, funds expended on travel of Federal agency personnel to training sites might be reallocated to the development of on-line instructional materials that would be accessible either directly or made available in CD and DVD formats. The development and maintenance of user-friendly databases hold the potential to greatly expand the access by Native governments and organizations to inventory and summary information held by the Interior Department. Computer software programs that enable users with differing levels of security protection to have appropriate access to confidential or proprietary information foster both transparency and accountability.

Most Native groups do not have the means to travel to regional hubs to take advantage of training opportunities where such opportunities exist, nor do they have the means to travel to the Nation’s capital to access data that is maintained in paper files. Federal agencies also lack the resources to send Federal agency personnel out to areas of Native America for the critical purpose of consultation

that is required under the Act, or to send Federal agency personnel to training sessions that are held at considerable distances from their assigned duty stations.

Many of the recommendations from both Federal agencies and Native groups can be achieved by building on-line, secure data systems that are accessible to the relevant users and their needs for information. Recent developments in computer software programs afford different users access to information that is compatible with statutory and regulatory requirements, while ensuring the security of proprietary and confidential materials. In this manner, Federal funding can be employed to maximize cost-effectiveness as well as to achieve both transparency and accountability.

## **B. Specific Recommendations**

In a climate in which the funding of Federal programs can be anticipated to fall short of what is needed to assure full compliance with statutory and regulatory requirements, creative and cost-effective alternatives must be identified.

### **1. Statutory**

Amend the "Definitions" section of NAGPRA to clarify application to human remains so that "Native American" means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.

### **2. Regulatory**

Establish an Inter-Agency NAGPRA Implementation Council within the Executive Branch (possibly the Office of Management and Budget) that would:

#### ***a. Assure Compliance within each Federal Agency***

The Council should be vested with the authority to assure that each Federal agency with land management responsibilities or otherwise subject to the provisions of the Act is complying with the Act. The Council should identify instances in which creative approaches to compliance have proven to be effective for purposes of advising Federal agencies of useful models for compliance.

#### ***b. Coordinate Compliance across all Federal Agencies***

The Council should also oversee coordination of Federal agency activity to assure compliance with the Act's requirements across Federal agencies. The Council should maintain a database of compliance with NAGPRA across all Federal agencies including information on the compliance record of each Federal agency.

#### ***c. Refer Non-Compliance and Remedies for Non-Compliance***

The Council should establish a mechanism for the referral of complaints concerning a Federal agency's lack of compliance to the Inspector General of each Federal agency, and the Council should direct the National NAGPRA Program Office to publish relevant information on the referral process as well as information identifying the designated agent within each Federal agency with whom complaints should be filed in the Federal Register. The Council should also establish remedies for non-compliance with the statutory and regulatory requirements and the Council should direct the National NAGPRA Program Office to publish the remedies in the Federal Register.

*d. Train*

The Council, in coordination with the National NAGPRA Program within the National Park Service, should assure that all Federal agency personnel charged with responsibilities under the Act have the necessary training to effectively carry out their responsibilities under the Act.

*e. Dispute Resolution Role*

The Council should serve as a forum for the resolution of disputes amongst Federal agencies.

*f. Uniform Consultation Guidelines*

Following direct, meaningful and pre-decisional consultation with Indian tribes, Alaska Native villages and Native Hawaiian organizations, the Council should develop a set of uniform NAGPRA consultation guidelines for all Federal agencies. The Council should direct the National NAGPRA Program Office to publish the consultation guidelines in the Federal Register.

*g. NAGPRA Regulations*

The Council shall develop and maintain one set of regulatory language for all provisions of the Act.

**3. Oversight and Enforcement of Statutory Requirements**

*a. Training*

Establish a program to train Federal agency personnel who are assigned responsibility for NAGPRA implementation by each Federal agency including not only statutory and regulatory requirements but also requirements for pre-decisional consultation associated with cultural affiliation determinations and consultation associated with the publication of notices and with repatriation of cultural items as defined by the statute.

- i. As part of the training effort, Native people with extensive NAGPRA experience in representing their tribes or Native Hawaiian organizations at NAGPRA and other cultural resource consultations, need to become a part of the National NAGPRA Program's training component. All official training held thus far (for Native people or for institutions) has been carried out by non-Native people, and while this training has provided some benefits, Native people report that there is still a significant need for education amongst Federal agency personnel when Native people seek to repatriate remains. High turnovers in NAGPRA-responsible staff at both the tribal and Federal levels also underscore the need for the permanent creation of a training team comprised of experienced Native NAGPRA representatives.
- ii. In consultation with Indian tribes, Alaska Native villages, and Native Hawaiian organizations, the National NAGPRA Program Office should develop training modules that are accessible through the Internet, or which can be made available to Native groups in compact disc or DVD format.

*b. Issue and Publish NAGPRA Contacts and Policies within each Federal Agency*

A policy for the implementation of NAGPRA's statutory and regulatory requirements, including consultation requirements, should be promulgated by each Federal agency, and each Federal

agency should submit its policy to the National NAGPRA Program Office for publication in the Federal Register.

Create a database that would list each Federal agency repository, including its location and NAGPRA contact.

*c. Demonstrate Consultation with Native Americans*

The process that each agency proposes to follow for pre-decisional consultation associated with the determination of cultural affiliation of human remains and cultural items should be submitted to the National NAGPRA Program Office for publication in the *Federal Register*.

*d. "Culturally Unidentifiable Native American Inventories Pilot Database"*

- i. The "Culturally Unidentifiable Native American Inventories Pilot Database" should be revised to enable access to information across all Federal agencies so that an inquiry as to whether any agency has human remains or cultural items from a particular area can be pursued without having to search the records of each Federal agency.
- ii. The National NAGPRA Program Office should require the submittal of information by Federal agencies documenting what pre-decisional consultation was undertaken to determine cultural affiliation of human remains and funerary objects listed in the database.
- iii. The National NAGPRA Program Office should require the submittal of information by the Federal agencies documenting that human remains or associated funerary objects that the Federal agencies seek to retain for purposes of scientific study to ensure that the agency has met the statutory standard of proving that there is a "compelling scientific interest" in the retention of the remains or funerary objects that are identified in the database.
- iv. The National NAGPRA Program Office should provide more frequent updates of the database, as well as other databases recommended in this report. The National NAGPRA Program Office should afford tribes and Native Hawaiian organizations an opportunity to provide input in developing new questions for the database.
- v. The National NAGPRA Program Office should require the provision of uniform information to be contained in the database including: (1) a description of any study beyond counting, sorting, and original location of the burial of human remains or funerary objects, whether used to determine cultural affiliation or not, and whether or not the statute's standard regarding extra-legal study had been met and by whom; (2) the full address of the current location of the culturally-unidentifiable human remains and associated funerary objects; (3) the title and detailed contact information of the office responsible for writing the database records for each Federal agency; and (4) the title and detailed contact information for each individual who is ultimately responsible for NAGPRA compliance for each Agency.

**4. General NAGPRA Program**

*a. Inventory of Repatriation Process Data*

Under current practice, there is no reporting system in place by which Federal agencies, museums, Indian tribes or Native Hawaiian organizations can submit information about the actual repatriation of human remains, associated funerary objects, sacred objects, or objects of cultural patrimony. Accordingly, the Congress has no means of periodically assessing the effectiveness with which the Act's goals are being implemented.

- i. Establish a process by which Federal agencies, museums, Indian tribes and Native Hawaiian organizations can submit electronic data to the National NAGPRA Program Office identifying the number of remains or objects that have been the subject of a completed repatriation.
- ii. Develop an inventory of all repatriations that have been completed under the authority of the Act, and establish a database to house repatriation information. The National NAGPRA Program Office should require signed statements from each Federal agency and institution that document the repatriation of human remains and cultural items. The inventory should also contain a record of the tribes or Native Hawaiian organizations that have received repatriated remains or cultural items under the authority of NAGPRA. Such a database should provide protection of proprietary information but should also enable access to the number of repatriations in each category (human remains, associated funerary objects, sacred objects, objects of cultural patrimony, unassociated funerary objects).

5. NAGPR Review Committee

- a. The National NAGPRA Program Office, in consultation with the NAGPR Review Committee, should develop a database of all cases that have come before the Review Committee. Information in the database should identify which cases have been resolved, the manner in which they were resolved, and any outstanding cases that have yet to be resolved.
- b. The National NAGPRA Program Office should maintain an updated list of any upcoming publications of Notices of Inventory Completion on its website, along with a list of Notices that are awaiting publication.
- c. The National NAGPRA Program Office should maintain a database that contains information on the location of, as well as possession and control of, all Native American human remains, funerary objects, and other cultural items.

6. Memoranda of Agreement or Programmatic Agreements

The National NAGPRA Program Office, in consultation with Indian tribes, Alaska Native entities, Native Hawaiian organization, and Federal agencies, should develop a standard memorandum of agreement or a programmatic agreement that would provide for Native groups to assume stewardship of a site or human remains in the event of an inadvertent discovery of a Native burial on Federal lands. One example of a programmatic agreement is the 2004 Programmatic Agreement reached between 18 Missouri River Tribes, the Corps of Engineers, the National Trust for Historic Preservation, the Advisory Council on Historic Preservation, and the State Historic Preservation Officers for Montana, North Dakota and South Dakota and Nebraska.

7. Adequate Funding for the Implementation of NAGPRA

- a. The Congress should appropriate adequate funding to assure the effective implementation of the Act at the tribal level. Many Native groups do not have the resources to secure training in repatriation under the Act, or the resources to carry out repatriation activities. In addition, many of the NAGPRA representatives at the tribal level are elderly, and the training of members of the younger generations is vital if the Act is to be effectively implemented in the future.
- b. The Congress should also appropriate adequate funding to assure the effective implementation of the Act at the Federal level, including funding for the activities of the Inter-Agency Council and the additional responsibilities of the National NAGPRA Program Office recommended in this report.

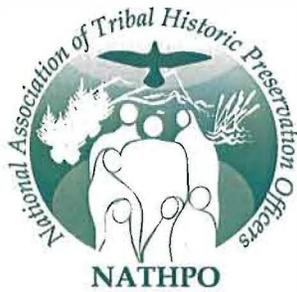
8. Compliance Audits

- a. The Congress should request that the Government Accountability Office (GAO) conduct an audit of Federal agency compliance with the statutory and regulatory requirements of NAGPRA for all relevant Federal agencies. Such an audit could include:
  - i. The mechanisms each Federal agency employs for assuring that all human remains and cultural items in the possession or control of the agency have been reported to the National NPS NAGPRA Program Office, and the effectiveness of such mechanisms;
  - ii. The means by which the National NPS NAGPRA Program Office determines that each Federal agency has fully complied with the mandates of the NAGPRA statute and regulations;
  - iii. The identification of the Federal agency or program office within a Federal agency that is best equipped to provide information to the Congress on a regular basis of how many human remains and cultural items have been repatriated under the authority of the NAGPRA statute and regulations, as well as an assessment of the overall effectiveness with which the provisions of the Act have been implemented, as well as what barriers exist to the effective implementation of the Act;
  - iv. The identification of an entity within the Executive branch that has the authority or can be vested with the authority to oversee and assure the compliance of each Federal agency with the NAGPRA statute and regulations;
  - v. The identification of secure data system alternatives that would enhance public access to the data collected and maintained by the National NPS NAGPRA Program Office while still assuring the security and confidentiality of such data, including the identification of data system capacities to provide differing levels of access to confidential information;
  - vi. The identification of the most cost-efficient manner of providing training to Federal agency employees charged with assuring compliance with the NAGPRA statute and regulations;
  - vii. The identification of the most cost-efficient manner of providing training for Indian tribes, Alaska Native entities, and Native Hawaiian organizations on the NAGPRA statute and regulations; and
  - viii. The identification of a reporting system that would enable the oversight entity within the Executive branch referenced in subparagraph iv of this paragraph to refer potential enforcement actions for failure to comply with the NAGPRA statute to the relevant law enforcement agency or agencies.

- b. The Inspector General of each Federal agency should investigate any non-compliance with the Act that is identified by the Government Accountability Office audit.

**C. Future Areas of Research (not listed in priority order)**

1. Evaluate museum compliance with NAGPRA, with the same goals as to how this research project was conducted.
2. Evaluate the role of the Smithsonian Institution, including the intersections of National Park Service NAGPRA and the law governing the Smithsonian's repatriation activities, and Federal agency collections that are now housed permanently or temporarily at the Smithsonian.
3. Evaluate the NPS National NAGPRA Program for efficiency, staffing levels, and areas to improve
4. Examine how unassociated funerary objects have been dealt with in the repatriation process. Research work on this project focused on cultural affiliation and associated funerary objects, and a thorough study of how objects became "unassociated" or if there is means to hasten research time to associating these objects would be of benefit to the local Native community.
5. Examine how the Future Applicability (§10.13) provisions are being implemented.
6. Examine the background process that led a Federal agency to determine whether human remains and associated funerary objects was to be entered into the "Culturally Unidentifiable Native American Inventories Pilot Database," including the process used in working with and notifying tribes of the human remains and associated funerary objects.



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## **CULTURALLY UNIDENTIFIABLE NATIVE AMERICAN INVENTORIES DATABASE (CUNAIID)**

In August 2008, the National Association of Tribal Historic Preservation Officers (NATHPO) -- working in collaboration with the Makah Tribe -- published the report, **Federal Agency Implementation of the Native American Graves Protection and Repatriation Act**. This first-ever review and report of how the Act has been implemented by those entities that are charged with responsibilities under the Act contains original research and recommendations on how to improve the process to better serve Indian country. It has had policy implications on a national level and has provided important information to Indian country as well as putting Federal agencies on notice that there is additional work to be done so that our Native ancestors and sacred objects may be returned to their communities.

One of the principal findings of our report is the need for more training, both at the tribal level and at the Federal level. Accordingly, NATHPO and the National Park Service National NAGPRA Program have collaborated to offer this one-day overview of the "Culturally Unidentifiable Native American Inventories Database." NATHPO has provided the following materials for you:

1. Excerpt from the Makah-NATHPO report that covers the CUNAIID
2. NATHPO comments on Sec. 10.11, Disposition of Culturally Unidentifiable Human Remains, per Federal Register notice of October 16, 2007
3. State of Iowa process for reburial of remains and funerary objects
4. "Prehistoric" references in Final NAGPRA Regulations
5. FY2009 NAGPRA Consultation/Documentation Grant Recipients
6. Legal citations and Draft Template, "Request for Documentation"
7. CD of the following information:
  - a. Database in two formats: NPS' version (Access) and NATHPO's version (Excel);
  - b. Draft Template for Request for Documentation

In 1990, the Congressional Budget Office estimated that the remains of about 100,000-200,000 Native American individuals were stored in the nation's museums and Federal repositories. The National NAGPRA Program has reported that as of March 31, 2009, museums and Federal agencies had published 1,220 notices of inventory completion accounting for the remains of 37,998 individuals and 985,788 associated funerary objects. To date, about 38,000 ancestors have been returned using the NAGPRA cultural affiliation process -- which is roughly 19% of 200,000 -- or the repatriation at a rate of about one percent (1%) per year.

Per Section 8 of the act, the NAGPR Review Committee must compile an inventory of culturally unidentifiable Native American remains that are in the possession and control of each Federal agency and museum and with recommending specific actions for the development of a process for the disposition of human remains if the parties deem it desirable. Thus, the CUNAIID was created and is maintained by National Park Service National NAGPRA Program. Per the NPS website, as of July 31, 2009, the database reflects information and is comprised of 16,922 records that describe 124,008 Native Americans and 915,783 associated funerary objects.

Today's one-day overview of this database is to familiarize you with the content and utilities currently available. We hope that additional information will be shared and your questions will be answered, such as:

- What is the CUNAIID and why are these ancestors called "culturally unidentifiable?"
- How was the original information provided by museums and federal agencies summarized in the CUNAIID?
- How do I use the CUNAIID to identify and repatriate my tribe's ancestors and funerary objects?
- How do I obtain the original information provided by museums and federal agencies?
- How do I claim ancestors currently listed as "culturally unidentifiable?"