

Native American Graves Protection and Repatriation Review Committee

Report to the Congress for 2008

Introduction

Passage of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) marked a watershed in the long and often troubled relationship between Native Americans and many of this country's educational institutions, museums, and public agencies. NAGPRA provides for the disposition of Native American cultural items – human remains, funerary objects, sacred objects, and objects of cultural patrimony – removed from Federal or tribal lands to lineal descendants or Indian tribes or Native Hawaiian organizations based on geographic or cultural affiliation. NAGPRA also prohibits trafficking of Native American cultural items. Lastly, NAGPRA provides for the repatriation of Native American cultural items in museum and Federal agency collections to lineal descendants or culturally affiliated Indian tribes or Native Hawaiian organizations.

NAGPRA directs the Secretary of the Interior to establish and maintain the Native American Graves Protection and Repatriation Review Committee to monitor and review the summary, inventory, and repatriation requirements of the Act. The Review Committee operates in accordance with the Federal Advisory Committee Act and a charter issued by the Secretary of the Interior. The Review Committee's actions and findings are advisory, although they may be admissible in court proceedings.

This report is prepared and submitted to Congress, as required by NAGPRA, to identify progress made and barriers encountered in implementing the summary, inventory, and repatriation requirements of the Act.

Review Committee Activities

This report summarizes the Review Committee's activities for calendar year 2008. The Review Committee convened three times during the reporting period: January 8 via teleconference; May 15-16 in De Pere, WI; and October 11-12 in San Diego, CA.

All of the seven members continued to serve on the Review Committee during calendar year 2008. Members appointed from nominations received from national museum organizations and scientific organizations were Dan Monroe, Vincas Steponaitis and Alan Goodman. Members appointed from nominations received from Indian tribes, Native Hawaiian organizations, or traditional religious leaders were Donna Augustine, Willie Jones and Rosita Worl. The seventh member, appointed from a list of persons developed and consented to by all of the other members of the Review Committee, was Colin Kippen.

The Review Committee's activities are prescribed by the Review Committee's charter and the Act. During calendar year 2008 the Review Committee –

- Monitored the inventory and identification process conducted by museums and Federal agencies.
- Made recommendations regarding the disposition of culturally unidentifiable human remains from Arizona, Colorado, Kentucky, Michigan, Nebraska, Tennessee, Washington, and West Virginia. For further information regarding recommendations of the Review Committee on these dispositions we direct the reader to: www.nps.gov/history/NAGPRA/Review/Summary_Requests_RC_1994-2008.pdf
- Consulted with representatives of the Secretary of the Interior regarding proposed regulations for the disposition of unclaimed cultural items (43 CFR 10.7). At the October meeting in De Pere, WI the Review Committee was provided with transcripts of the consultations regarding these proposed regulations. The transcripts were extensive, and the Review Committee requested a manageable executive summary from the National NAGPRA office. In the May 2009 meeting held in Seattle, WA the Review Committee was given the executive summary on a compact disc with the underlying documents, along with a two-page report from the drafting committee of the proposed regulations. Further work related to these proposed regulations was deferred by the Review Committee to the October 2009 meeting in Sarasota, FL, and will be reported on in the 2009 report to Congress.
- Consulted with Indian tribes, Native Hawaiian organizations, museums, and Federal agencies on inventory, identification, and repatriation activities.

Progress Made

Most museums and Federal agencies appear to have carried out the provisions of NAGPRA in good faith.

Section 5 of the Act requires all museums and Federal agencies that have possession or control over Native American human remains and associated funerary objects to compile inventories of such items in consultation with Indian tribes and Native Hawaiian organizations. As of December 31, 2008, inventories had been completed by 1,257 institutions (including both museums and Federal agencies).

Section 6 of the Act requires all museums and Federal agencies that have possession or control over collections that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony to complete summaries of such collections. As of December 31, 2008, summaries had been completed by 1,065 institutions (including both museums and Federal agencies).

Section 7 of the Act requires all museums and Federal agencies to repatriate human remains, funerary objects, sacred objects, and objects of cultural patrimony upon the request of known lineal descendants or culturally affiliated Indian tribes or Native Hawaiian organizations. While the number of actual repatriations is not monitored, notices published in the Federal Register provide a measure of museums and Federal agencies that have agreed to repatriate cultural items. As of December 31, 2008, museums and Federal agencies had published 1,147 notices of inventory completion accounting for the remains of 36,531 individuals and 771,014 associated funerary objects. Museums and Federal agencies had also published 425 notices of intent to repatriate accounting for 3,771 sacred

objects, 381 objects of cultural patrimony, 806 cultural items that fit both the sacred and cultural patrimony categories, and 215 unspecified cultural items.

Select museums and Federal agencies have consulted with tribes and Native Hawaiian organizations and conducted the necessary research to affiliate Native American and associated funerary objects that had previously been determined to be culturally unidentified individuals (CUI). Thus far, 2,321 human remains have been affiliated from those on the CUI database.

Barriers Encountered

While the Review Committee is pleased with the progress noted above, we also wish to call attention to the barriers encountered with NAGPRA. Review of the progress of NAGPRA reveals that 118,400 Native American human remains and 828,641 associated funerary objects have been labeled “culturally unidentifiable”. These numbers are quite large and indicate that over 60% of human remains held by museums and Federal agencies have not been assigned a reasonable cultural affiliation. While some individuals may be labeled culturally unidentifiable because of lack of information, these numbers might be drastically reduced if, as required by NAGPRA legislation, more consultation were carried out. Further research and consultation is required to bring all museums and Federal agencies into compliance with the law, and thus to dramatically decrease the number of human remains on the CUI database and fulfill the intent of the law.

The Review Committee views this issue very seriously and is considering steps that can be made to ensure museums, Federal agencies, and tribes have the resources and opportunities to increase consultation. To this end, the Review Committee is very concerned about the costs of compliance. These costs include documentation, consultation, travel, and the transfer of cultural items. Most of these costs are borne by museums, Federal agencies, and tribes. The National NAGPRA Program administers a competitive grant program to assist in funding some of these activities. In FY 2009, requests totaling \$4.2 million were received, and grants totaling \$1.8 million were awarded. With the advent of the culturally unidentifiable (CUI) database placing information in the inventories on-line and accessible to tribes, it is anticipated that there will be a resurgence of consultation activity on a large scale. We feel this indicates a positive step toward full compliance, and note the extreme importance of providing funds for tribes and institutions to complete this work. The future success of the program rests solidly in such actions.

The number of human remains that could be repatriated may increase dramatically if tribes, museums and Federal agencies had more extensive funding to complete consultation and research of the remains on the culturally unidentifiable database. We have already begun to see the positive effects of the online database, as evidenced in the number of requests for Review Committee recommendations for disposition of the remains, and the number of positive recommendations. There is a serious need for further funding of the grant program to allow the law to work most effectively as it was intended.

Nearly 19 years after NAGPRA’s passage, three key sections of the implementing regulations are still pending. Currently, a proposed rule for disposition of culturally unidentifiable human remains (43 CFR 10.11) has been published and public comment has been received. The January 8, 2008 Review Committee meeting was for the sole purpose of entering comment on the proposed rule. At that time the Review Committee unanimously passed a resolution recommending that the Assistant Secretary publish a new proposed rule for public comment before a final

rule is enacted. The National NAGPRA Program reported to the Review Committee at the May 2008 meeting in De Pere, WI that the Assistant Secretary felt the 90-day comment period was sufficient, and the comments went into draft and review at the Department of the Interior for the remainder of 2008. With the change of administration in 2009, the rule is currently in review a second time. The Review Committee eagerly awaits the implementation of this rule as it is of critical importance for tribes and affects a large number of collections still remaining in control of museums and Federal agencies.

In 2008 there was no progress on the rule for the disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony (43 CFR 10.7). In addition, in 2008, no action was taken on 43 CFR 10.15(b), failure to claim where no repatriation or disposition has occurred, as it is too early to determine what the remainder population will be once 10.7 and 10.11 are in place. This will become clearer and needs to be addressed after completion of rule 10.7 and 10.11.

The Review Committee believes it is of utmost importance that these rules be completed and implemented as soon as possible, and continues its efforts to ensure that this goal is achieved.

The Review Committee continues to be concerned that overall Federal agency compliance with NAGPRA has been uneven, difficult to measure, and lacking in transparency despite the huge role Federal agencies play in implementing the terms of the Act. This lack of accurate information about the status of Federal agency compliance makes it difficult to know whether these Federal agencies are meeting their responsibilities to the stakeholders under the Act and impedes the oversight functions envisioned for the Review Committee when the Act was created. This lack of data also makes it impossible to meaningfully evaluate whether the requisite constitutionally mandated government-to-government relationship between Federal agencies and Indian tribes is occurring through the consultation provisions contained within the Act and its related administrative rules. The Review Committee has three times requested a GAO study of Federal agency compliance, and such a study has been instigated by the GAO at the request of the Senate Indian Affairs Committee and the House Committee on Natural Resources. We are pleased to have this study in progress and anticipate results in 2010.

Also with regard to Federal agency and museum compliance, the Review Committee is very concerned with the actions and final outcomes of disputes that come before the Review Committee. It is our hope that these disputes are settled in a timely manner, but we currently are limited in our ability to track the final outcome of these cases. We would like to know which disputes have been resolved, how many resulted in reburial, and how many went on further to litigation in court.

In 2008 only one dispute came before the Review Committee. The dispute was between the Onondaga Nation and the New York State Museum and related to the cultural affiliation of 180 individuals removed from the Engelbert site. The Review Committee heard the dispute at its October meeting in San Diego, and ruled in favor of the Onondaga Nation. The meeting minutes related to this dispute can be found online at: <http://www.nps.gov/history/nagpra/REVIEW/meetings/RCMIN038.pdf>. The findings and recommendations of the Review Committee related to this case have been published in the Federal Register, and are also available online at: <http://www.nps.gov/nagpra/REVIEW/RCNOTICES/RCF13.htm>

By talking with the legal counsel of the Onondaga Nation, the Review Committee has learned of the positive final outcome of this dispute. In September 2009, the remains were repatriated and then reburied by the Onondaga Nation. However, this repatriation did NOT include the associated funerary objects from the burials, which are held at another

institution (SUNY Binghamton). The Onondaga Nation requested repatriation of all associated funerary objects, but is still in discussion with SUNY Binghamton about this claim. Neither the Onondaga Nation nor the New York State Museum applied for a NAGPRA repatriation grant to fund the repatriation.

The Review Committee will continue to attempt to track the outcome of disputes that come before the Review Committee. It would be very problematic to find that, after all the effort and labor put into bringing disputes before the Review Committee, there is a consistent lack of positive outcomes. We feel it is critical to understand how the dispute and 'finding of fact' processes are working, as this will help us determine if adjustments are required to improve this aspect of NAGPRA compliance.

The Review Committee is encouraged by the organized manner in which civil penalties investigations are proceeding since publication of the final rule on civil penalties (43 CFR 10.12). We are pleased that the backlog of cases in need of investigation, substantiation, and disposition was reduced in 2008, yet we note that 23 new cases have been submitted, leaving 60 cases yet to be investigated involving 26 museums. The present investigator has done a commendable job at reducing the backlog of cases, but he is currently assigned at the rate of only 10 hours per week. The Review Committee believes that this investigator should be assigned full-time to NAGPRA cases while not decreasing existing funding for enforcement of the Archaeological Resources Protection Act (ARPA).

The ability to rebury as close to the original interment site as possible is an issue of great importance to many Native Americans. Since many of the human remains subject to NAGPRA originate from burials on Federal lands, agencies' reburial policies often determine whether a repatriation can be fully satisfactory. Unfortunately, there is no uniform Federal policy on reburial. The Review Committee recommends that a uniform reburial policy on Federal lands be developed in consultation between Federal agencies and Indian tribes and Native Hawaiian organizations, and adopted.

As a key piece of human-rights legislation, NAGPRA has played an essential role in empowering Native American communities to recover culturally important items from Federal agencies and museums. In so doing it has helped to right past wrongs, and has also fostered new, more productive relationships between Native communities and these agencies and museums. NAGPRA has led to many successes, but its future success depends on continued support from Congress, particularly in overcoming some of the barriers identified above.

Recommendations

Authorized by the Native American Graves Protection and Repatriation Act [25 U.S.C. 3006], the Native American Graves Protection and Repatriation Review Committee has served since 1992 to monitor and review implementation of the Act. At its October 30-31, 2009 meeting, the Review Committee made the following recommendations:

- 1. Costs to Comply with NAGPRA.** The Review Committee recommends that Congress appropriate the following amounts for FY 2009 to ensure continued implementation of the Act:
 - At least \$4.1 million in grants to Indian tribes, Native Hawaiian organizations, and museums;
 - The amount requested by the administration that is targeted for each Federal agency's compliance efforts.

The Review Committee also recommends that the President request the same amounts listed above in the FY 2011 budget proposal. With the recent promulgation of 43 CFR 10.13 (ongoing compliance due dates) and the pending promulgation of 43 CFR 10.7(lands) and 43 CFR 10.11(CUI), we expect consultation activity to increase in coming years, which will regenerate an increasing volume of NAGPRA grant requests.

- 2. Open Hearings to Determine Progress Made and Barriers Encountered by Tribes and Federal Agencies and Museums.** The Review Committee acknowledges that there are barriers encountered by tribes, museums, and Federal agencies with regard to NAGPRA. We are aware of some of these (as outlined above), but we feel that it is most productive to hear from these groups themselves about the barriers they've encountered. Tribes, museums and Federal agencies who have been actively involved in the on-the-ground workings of NAGPRA are the ones best equipped to offer details of how the law is working, the progress made, and the barriers encountered. For this reason, the Review Committee recommends that Congress hold open hearings related to NAGPRA in which representatives who represent a wide range of the communities involved in NAGPRA are invited to testify and share their views and experiences. This will provide an invaluable resource that can guide any future improvements to NAGPRA.
- 3. Meeting with Museum and Federal Agencies with large CUI Inventories.** As a way to better understand the problems encountered by museums and Federal agencies with large holdings of CUIs, the Review Committee recommends meeting with such agencies and tribes that are possible descendants at one of its next meetings.
- 4. Development of Reburial Policy.** The Review Committee recommends that a uniform reburial policy on Federal lands be developed in consultation between Federal agencies and Indian tribes and Native Hawaiian organizations, and adopted.
- 5. Definition of Native American.** The Review Committee recommends strongly that Congress amend the definition of "Native American" at 25 U.S.C. 3001 (9) by adding the words "or was" so that it reads: "Native American' means of, or relating to, a tribe, people, or culture that is or was indigenous to the United States."

The Review Committee respectfully submits these recommendations with the full and unanimous support of all members.

Native American Graves Protection and Repatriation Review Committee Members

Donna Augustine (traditional religious leader)

Term: 2006-2010

Nominated by: Aroostook Band of Micmac Indians of Maine, Houlton Band of Maliseet Indians of Maine, Passamaquoddy Tribe of Maine, and Penobscot Tribe of Main

Alan Goodman

Term: 2007-2011

Nominated by: American Anthropological Association

Willie Jones (traditional religious leader)

Term: 2004-2008

Nominated by: Lummi Tribe of the Lummi Reservation, Washington

Colin Kippen

Term: 2005-2009

Nominated by: Concurrence of other Review Committee members

Dan Monroe

Term: 1992-1997

Nominated by: American Association of Museums, Museum Trustee Association

Term: 2004-2008

Nominated by: American Association of Museums

Vincas Steponaitis

Term: 2004-2008

Nominated by: Society for American Archaeology

Rosita Worl

Term: 2001-2006

Nominated by: Huna Heritage Foundation on behalf of Huna Totem Corporation

Term: 2007-2009

Nominated by: Huna Heritage Foundation on behalf of Huna Totem Corporation

Chair: 2004-end of term 2009

Charter

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE

A. OFFICIAL DESIGNATION.

The official designation of the Committee is the Native American Graves Protection and Repatriation Review Committee (Committee).

B. PURPOSE.

The purpose of the Committee is to monitor and review the implementation of the inventory and identification processes and repatriation activities required under sections 5, 6 and 7 of Public Law 101-601.

C. DUTIES AND RESPONSIBILITIES.

The duties of the Committee are solely advisory. Specifically, the Committee will be responsible for:

1. Monitoring and reviewing the implementation of the inventory and identification processes and repatriation activities required under sections 5, 6, and 7 of Public Law 101-601 to ensure a fair and objective consideration and assessment of all available relevant information and evidence;
2. Reviewing and making findings relating to the identity or cultural affiliation of human remains, funerary objects, sacred objects, and objects of cultural patrimony, or the repatriation of such items, upon the request of any affected party;
3. Facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants, and Federal agencies or museums relating to the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony, including convening the parties to the dispute, if deemed desirable;
4. Compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for disposition of such human remains;
5. Consulting with Indian tribes, Native Hawaiian organizations, and museums on matters pertaining to the work of the Committee affecting such tribes or organizations;
6. Consulting with the Secretary in the development of regulations to carry out Public Law 101-601;
7. Performing such other related functions as the Secretary may assign to the Committee;
8. Making recommendations, if appropriate, regarding future care of human remains, funerary objects, sacred objects, and objects of cultural patrimony which are to be repatriated; and
9. Submitting an annual report to Congress on the progress and any barriers encountered in carrying out the Committee responsibilities during the year.

D. MEMBERSHIP.

1. The Committee will be composed of seven members appointed by the Secretary as follows:
 - (a) Three members appointed from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders, with at least two of such persons being traditional Native American religious leaders;
 - (b) Three members appointed from nominations submitted by national museum organizations and scientific organizations; and
 - (c) One member appointed from nominations developed and consented to by the other members of the committee.
2. Members are appointed as Special Government Employees.
3. Terms of appointment will be for 4 years. Reappointment of current members will be for a term of 2 years. All appointments will terminate upon the termination of the Committee. Any vacancy on the Committee will be filled in the same manner in which the original appointment was made within 90 days of the occurrence of such vacancy.
4. Any member who fails to attend two successive meetings of the Committee, or who otherwise fails to substantively participate in the work of the Committee, may be removed from the Committee by the Secretary and a replacement named.
5. Members of the Committee will serve without pay, but will be reimbursed at a rate equal to the daily rate for Level IV of the Executive Schedule for each day (including travel time) for which the member is actually engaged in Committee business. While away from their homes or regular places of business in the performance of services of the Committee, members will be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in government service are allowed such expenses in accordance with Sections 5703 of Title 5 of the United States Code.
6. The Secretary will establish such rules and regulations for the Committee as are necessary. The Secretary may not appoint Federal Officers or employees to the Committee.

E. ETHICS RESPONSIBILITIES OF MEMBERS.

All members will comply with applicable ethics rules and regulations. The Department of the Interior will provide materials to those members appointed as Special Government Employees, explaining their ethical obligations and with which the members should be familiar. Consistent with the ethics requirements, members will endeavor to avoid any actions that would cause the public to question the integrity of the Committee's operations, activities, or advice. The provisions of this paragraph do not affect any other statutory or regulatory ethical obligations to which a member may be subject.

F. ADMINISTRATION.

1. CHARTER. The Committee is subject to the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix (1994). The Committee will take no action unless the charter filing requirements of sections 9 and 14(b) of FACA have been complied with.
2. DESIGNATED FEDERAL OFFICIAL. The Committee reports to the Secretary of the Interior, United States Department of the Interior, 1849 C Street, NW, Washington, DC

20240. The Manager, National NAGPRA program, National Park Service, or a designee will serve as the Designated Federal Official (DFO) required by section 10 of FACA to oversee the management of the Committee.

3. CHAIRPERSON. The Committee will designate one member to be Chairperson.
4. SUPPORT AND COST. Support for the Committee is provided by the U.S. Department of the Interior, National Park Service, Office of the Director. The estimated annual operating cost of the Committee is \$163,000, which includes the cost of 0.5 work-years of staff support.
5. MEETINGS. The Committee will meet approximately three times a year, although it may convene more often if there is an immediate need for consultation, advice and review. All meetings of the Committee will be subject to the provisions FACA, 5 U.S.C. Appendix (1994). No Advisory Committee member, and no member of any subgroup of this Committee, shall participate in any matter in which the member has a financial interest.
6. SUBCOMMITTEES. The Committee may, in consultation with the DFO, create subcommittees from among its membership supplemented when appropriate by members of the public, provided that the role of such subcommittees will be solely to gather information or conduct research for the Committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the Committee. Membership on all subcommittees will be determined by the Chairperson, subject to the concurrence of the DFO. Subcommittees will meet as necessary, subject to the approval of the DFO.

G. DURATION AND DATE OF TERMINATION.

In view of the objectives, scope and purposes of the Committee, it is expected to continue into the foreseeable future. The Committee will terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the Committee has been completed.

H. AUTHORITY.

The Native American Graves Protection and Repatriation Review Committee is established by authority of Section 8 of Public Law 101-601, November 16, 1990.

/s/ Dirk Kempthorne
Secretary of the Interior

/November 24, 2008
Date Signed

DATE CHARTER FILED November 24, 2008

The National NAGPRA Program

This report was prepared by the Native American Graves Protection and Repatriation Review Committee and edited and produced by the National NAGPRA Program.

The National NAGPRA Program carries out certain responsibilities for the Secretary of the Interior and Assistant Secretary for Fish and Wildlife and Parks related to implementation of NAGPRA. One of these duties is to provide administrative and staff support to the Review Committee.

Statements, views, and recommendations in this report are those of the Review Committee and should not be interpreted as representing the opinions of the U.S. Government.

Send inquiries about this report to:

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