

Native  
American  
Graves  
Protection  
and  
Repatriation  
Review  
Committee

Annual  
Report to  
Congress  
2014





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## *EXECUTIVE SUMMARY*

With the passage of the Native American Graves Protection and Repatriation Act (NAGPRA or the Act) on November 16, 1990, 25 U.S.C. § 3001, et seq., Congress mandated the formation of the Review Committee. The Review Committee is authorized by the Act to report to Congress annually regarding progress made, and any barriers encountered, in implementing the Act's repatriation provisions during the previous year (25 U.S.C. § 3006). The Act is a very important piece of legislation benefitting Native Americans and reflecting "the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations" (25 U.S.C. § 3010). The Act was passed because of the egregious and disparate treatment of Native Americans in the protection of their ancestral burials and cultural objects.

The Review Committee has been working this year to achieve **progress** with repatriation in several respects:

1. Increase compliance: Inform museums and federal agency units if they have failed to produce a Notice of Inventory Completion – which is required in order to repatriate – where the museum or federal agency has made determinations that ancestral remains and associated funerary objects are culturally affiliated.
2. Increase compliance: Inform museums and federal agency units that they may be out of compliance with NAGPRA if they have not consulted, as appropriate, with lineal descendants, Indian tribes, or Native Hawaiian organizations on inventories containing culturally unidentifiable human remains, or, alternatively, that they should work with the National NAGPRA Program if the Program's records or databases are incomplete.
3. Increase effective administration of disputes: Work to adopt revised Dispute Resolution Procedures for Review Committee meetings.
4. Support dispositions of the human remains of culturally unidentifiable individuals (CUI) through recommendations to the Secretary of the Interior.
5. Continue constructive discussions about where the Act and its regulations require clarification and amendment.
6. Devote more time to administrative and preparatory meetings in order to support more efficient and substantive public meetings.
7. Consider a special Review Committee meeting to mark the 25th anniversary of NAGPRA (November 16, 2015).

Despite the progress noted above, full implementation of the Act is greatly hindered by barriers that have been reported to Congress year after year. These **continuing barriers** include:

- Lack of staff and inadequate funding for the National NAGPRA Program which has significantly slowed the accomplishment of NAGPRA's statutory requirements, fulfillment of certain statutory mandates, implementation activities, and enforcement of the law. Specifically, the Program lacks staff to support civil enforcement investigations and overuses term employees and contractors instead of permanent staff.
- Indian tribes, Native Hawaiian organizations, museums, and federal agencies do not have enough staff, infrastructure, or monetary support to follow through on repatriation and disposition activities.
- Lack of funding to support adequate face-to-face meetings between the Review Committee and the public to carry on implementation activities required by the Act and its regulations.
- Failures of proper reporting in inventories by museums and federal agencies concerning:
  1. federal collections that are curated in nonfederal repositories,
  2. consultation activities with lineal descendants, Indian tribes, or Native Hawaiian organizations regarding culturally unidentifiable human remains, and
  3. Notices of Inventory Completion for human remains and funerary objects determined to be culturally affiliated.
- Lack of appropriate and protected locations for reburial of human remains and funerary objects once repatriation or disposition has taken place.
- Delays caused by additional layers of administrative review by the National Park Service, causing notices, recommendations to the Secretary, and other implementation activities to be delayed.
- Ambiguities and lack of clarity in the Act and its regulations.

Based on the extensive experience of the Review Committee, public comments made to the committee, and the remarks of lineal descendants, federally recognized Indian tribes, Native Hawaiian organizations, other tribal organizations and individuals, federal agencies, and museums appearing before the Review Committee, **the Review Committee strongly advises and supports the following actions of Congress and the Secretary of the Interior:**

1. Fulfill the statutory requirements of NAGPRA by providing adequate and consistent staffing and budgetary support to the National NAGPRA Program.
2. Continue to support project-based grant funding to Indian tribes, Native Hawaiian organizations, and museums.
3. Create and fund new grant programs designed to build institutional capacity among Indian tribes, Native Hawaiian organizations, and museums to more effectively and efficiently implement the provisions of the Act.

4. Support opportunities for reburial of Native American ancestors on federal lands, including National Parks.
5. Provide tax incentives or explore other avenues for reburial on nonfederal lands that will protect lands in perpetuity.
6. Honor Senator Daniel Inouye by setting aside lands regionally to support reburial.
7. Support federal agency compliance with NAGPRA, including expedited completion of inventories of federal collections in nonfederal repositories.
8. Support strong monitoring and enforcement measures by the National NAGPRA Program to deter lack of compliance. This includes responding to requests by the Review Committee for information from museums and federal agencies regarding the status of repatriation matters; culturally unidentifiable inventories where adequate consultation may not have taken place; and culturally affiliated inventories where Notices of Inventory Completion have not been published and repatriation has not occurred.
9. Hold congressional hearings to determine whether amendments to the Act should be considered that would expedite the implementation activities of NAGPRA's repatriation provisions.

The Review Committee also respectfully requests feedback on how the committee's annual report can be improved to better accomplish the Review Committee's role in educating Congress about the committee's efforts and implementation of the Act.

### ***NAGPRA: AN OVERVIEW***

In 1990, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. § 3001, et seq.). The Act includes three primary activities: 1.) the repatriation of Native American human remains, funerary objects, objects of cultural patrimony, and sacred objects in museum and federal agency collections to lineal descendants, Indian tribes, or Native Hawaiian organizations; 2.) illegal trafficking of Native American human remains, funerary objects, objects of cultural patrimony, and sacred objects; and 3.) the disposition of Native American human remains, funerary objects, objects of cultural patrimony, and sacred objects removed from federal or tribal lands after November 16, 1990, to lineal descendants, Indian tribes, or Native Hawaiian organizations, based on geographic or cultural affiliation.

NAGPRA directs the Secretary of the Interior to establish and maintain the Review Committee to monitor and review the implementation and requirements of the Act. Although the Act was established to benefit Native American peoples, membership of the Review Committee, like other Federal Advisory Committee Act (FACA) committees, was established to ensure a balance between differing viewpoints among Native Americans,

museums, and scientific organizations. Three members are appointed by the Secretary of the Interior from nominations by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders; three members are selected from nominations by national scientific and museum organizations; and one member is selected from a list of names agreed upon by the committee itself. The Review Committee operates in accordance with FACA and a charter issued by the Secretary of the Interior. The committee's actions and findings are advisory, although they may be admissible in court proceedings.

The Review Committee has ten formally defined responsibilities:

1. Designating one of the members of the committee as chair;
2. Monitoring the inventory and identification process conducted under sections 5 and 6 of the Act to ensure a fair and objective consideration and assessment of all available relevant information and evidence;
3. Upon the request of any affected party, reviewing and making findings related to: a) the identity or cultural affiliation of cultural items, or b) the return of such items;
4. Facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and federal agencies or museums relating to the return of such items, including convening the parties to the dispute if deemed desirable;
5. 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 developing a process for disposition of such remains;
6. Consulting with Indian tribes, Native Hawaiian organizations, and museums on matters within the scope of the work of the committee affecting such Indian tribes or organizations;
7. Consulting with the Secretary in the development of regulations to carry out this Act;
8. Performing such other related functions as the Secretary may assign to the committee;
9. Making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated; and
10. Submitting an annual report to the Congress on the progress made and any barriers encountered in implementing the Act during the previous year.

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

## **REVIEW COMMITTEE 2014 ACTIVITIES**

### **REVIEW COMMITTEE MEMBERS**

Nominated by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders:

Adrian John (traditional Indian religious leader; term expired 10/27/2014)

Steve Titla (traditional Indian religious leader; term expires 04/17/2017)

Shannon Keller O'Loughlin (term expires 09/23/2017)

Armand Minthorn (traditional Indian religious leader; term expires 11/13/2018)

Nominated by national museum and scientific organizations:

Sonya Atalay (term expires 04/17/2015)

Alex W. Barker (term expires 04/28/2015)

LindaLee Kuuleilani Farm (term expires 04/28/2015)

Nominated by the Review Committee:

Dennis H. O'Rourke (term expires 09/23/2017)

Review Committee members are appointed for a four-year term and may be reappointed for a two-year term.

### **REVIEW COMMITTEE MEETINGS**

The Review Committee held two telephonic meetings and one in-person meeting in calendar year 2014. One of the telephonic meetings was for the exclusive purpose of finalizing this report to Congress. The Review Committee believes that telephonic meetings are neither as effective in advancing the work of the committee nor as successful in providing a forum to carry out consultation activities with Indian tribes and Native Hawaiian organizations, and museums and federal agencies, as required by the Act, than face-to-face meetings.

Furthermore, telephonic meetings limit communication between interested parties regarding the progress and barriers encountered in implementing the Act. However, we recognize that budget constraints required the elimination of one face-to-face meeting in 2014. It is understood that the Review Committee is scheduled to have two face-to-face meetings in 2015. The Review Committee urges the Secretary and Congress to continue to provide adequate funds to allow *at least* two face-to-face meetings annually without impacting other Program activities. Previously two to three face-to-face meetings were held by the Review Committee annually, which provided an opportunity for consultation to occur directly with Review Committee members and allowed museums and federal agencies to provide accountings on their compliance activities. All parties involved have stated they found these opportunities highly valuable. The only reason for the reduction in face-to-face meetings is due to federal budget constraints.

The Review Committee has recently instituted regular telephonic preparatory discussions to ensure that face-to-face meetings are efficient and effective.

**REVIEW COMMITTEE MEETING #52:**

The 52<sup>nd</sup> meeting of the Review Committee was held telephonically on April 10, 2014. LindaLee (Cissy) Kuuleilani Farm was selected by the committee as chair for the 52<sup>nd</sup> meeting, as well as future meetings until otherwise determined.

Disposition Requests: The Denver Museum of Nature and Science presented two requests for a recommendation from the Review Committee to the Secretary of the Interior regarding the disposition of culturally unidentifiable individuals. One of the requests concerned 15 individuals and one associated funerary object. The other request concerned five individuals. The two requests proposed disposition of the human remains to a large number of Indian tribes and Native Hawaiian organizations listed in full at 79 FR 35773 and 79 FR 35782, June 24, 2014. Because these Native American individuals lacked geographic information and other cultural identifiers, a large number of Indian tribes and Native Hawaiian organizations requested joint transfer of control after thorough consultation. Consultation was first initiated by letter to all 566 federally recognized tribes and 77 Native Hawaiian organizations.

The Review Committee was impressed by the work of the Denver Museum of Nature and Science and the Indian tribes and Native Hawaiian organizations involved in so large a consultation effort so that culturally unidentifiable Native American individuals could finally be returned to the earth to carry on their journey. The efforts of the Denver Museum of Nature and Science should be applauded and viewed as setting an example of “best practices” to other museums and federal agencies for the disposition of culturally unidentifiable human remains. The efforts of the Denver Museum of Nature and Science, Indian tribes, and Native Hawaiian organizations can be fully reviewed in this meeting’s transcript available at <https://irma.nps.gov/App/Reference/Profile/2193294/>.

The Review Committee unanimously agreed to recommend that the Secretary of the Interior authorize the dispositions as proposed by the Denver Museum of Nature and Science. On May 5, 2014, the Secretary concurred with the Review Committee’s recommendations and Notices of Inventory Completion were published on June 24, 2014 (<https://federalregister.gov/a/2014-14736> and <https://federalregister.gov/a/2014-14743>).

Museums and federal agencies’ failure to publish Notices of Inventory Completion for culturally affiliated human remains and lack of consultation concerning culturally unidentifiable inventories: The National NAGPRA Program provided two reports at the 52<sup>nd</sup> meeting following a request by the Review Committee to do so. The first report concerned

the failure of museums and federal agency units to publish Notices of Inventory Completion where a museum or federal agency has determined a cultural affiliation for ancestral remains and associated funerary objects. In total, 14,009 culturally affiliated individuals had not been included in a Notice of Inventory Completion (as of 1/31/2014). These ancestral remains could be repatriated but for the fact that such notices have not been published.

The second report concerned whether museums and federal agency units initiated consultation with Indian tribes and Native Hawaiian organizations concerning culturally unidentifiable inventories. An inventory – whether it is a culturally affiliated inventory or a culturally unidentifiable inventory – cannot be developed without consultation with lineal descendants, Indian tribes, and Native Hawaiian organizations (43 CFR § 10.9(b)(1)). The mailing of an inventory is one of the steps to creating an inventory and is not considered consultation pursuant to the Act or its regulations. Consultation is required at the earliest stages of an inventory’s development, no later than the time when cultural affiliation is being investigated (43 CFR § 10.9(b)(2)). The National NAGPRA database contains the names of the parties contacted by the museum or federal agency during the inventory process, as provided by the museums and agencies themselves. There are a total of 247 museums, representing 22,871 individual human remains and 174,187 associated funerary objects, in which the scope of consultations by museums is unclear, and a total of 76 federal agency units, representing 1,645 individual human remains and 21,803 associated funerary objects, in which the scope of consultations remains unclear (as of 1/31/2014). This may indicate that museums or federal agency units omitted the consulting parties from the inventories they submitted, or may reflect inaccuracies in the existing database, or that the museum or federal agency units never initiated consultation with any party. The National NAGPRA Program is working to clarify these numbers to facilitate appropriate action.

The numbers of culturally affiliated ancestral remains that have not been repatriated continues to be a deep concern, and records are unclear regarding the scope and character of consultation by many museums and federal agencies. This leaves the Review Committee, NAGPRA constituents, and members of the public unclear about whether meaningful consultation as required under the law did, in fact, occur in all cases. To address this, the Review Committee requested that the National NAGPRA Program write letters to the museums and federal agencies listed in these reports. The Review Committee further asked the National NAGPRA Program to amend their current data recording to provide more information about whether consultation occurred in inventories concerning culturally unidentifiable human remains. (The status of this work is discussed further under the 53<sup>rd</sup> meeting).

Discussion concerning whether the Act requires balance: The Review Committee has been in an ongoing discussion as to whether the Act requires or implies “balance.” The Review

Committee created a subcommittee including committee members Alex W. Barker and Shannon Keller O’Loughlin to further explore this topic. Currently, the subcommittee is working together to further consider the issue and is discussing potential ambiguity in the Act, its regulations, and how museums, federal agencies, and tribal parties implement the processes of the Act and its regulations.

Public Comments: The Western Apache NAGPRA Working Group (Apache Working Group) is comprised of the San Carlos Apache Tribe of the San Carlos Reservation, Arizona; the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona; the Tonto Apache Tribe of Arizona, and the Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona. The Apache Working Group discussed one repatriation matter that has not progressed, and which had previously come before the Review Committee. The American Museum of Natural History has agreed to return certain items to the Apache Working Group tribes, but has declined to include in the Notice of Intent to Repatriate that the cultural items are “sacred objects and objects of cultural patrimony.” The Apache Working Group strongly believes that such a designation is required by law, and is part of proper consultation between the institution and the tribes to fulfill the repatriation requirements. The Apache Working Group had appeared before the Review Committee in October 2009, and requested that the Review Committee make a finding of fact regarding the identity of the cultural items in question. The Review Committee found that the items are sacred objects and objects of cultural patrimony. However, as the American Museum of Natural History was not a party to the fact-finding proceeding, the Review Committee did not make a recommendation directed to the museum at that time. Since then, the museum has declined to amend its Notice of Intent to Repatriate to include the category designations. The Designated Federal Official determined that the Review Committee could not make a recommendation to the American Museum of Natural History during the 52<sup>nd</sup> meeting because the request for a recommendation was not properly brought to the Review Committee. (The issue was raised again and discussed during the 53<sup>rd</sup> meeting).

Ms. Irene Romano, Deputy Director, Arizona State Museum of the University of Arizona, summarized a panel discussion that took place at the Western Museums Association annual meeting in Salt Lake City, UT, on October 10, 2013, entitled “NAGPRA Repatriations: Lessons Learned, and Future Challenges.” The discussion was attended by approximately 60 museum professionals, and included a question-and answer session.

Mr. Michael Trimble, Senior Curator for Archeological Collections, U.S. Army Corps of Engineers (USACE), provided an update on the curation and management of the human remains of “Kennewick Man” or “the Ancient One.” Mr. Trimble was joined by Ms. Jennifer Richman, Assistant Chief Counsel, USACE, and Ms. Jennifer Riordan, USACE. Mr. Trimble stated that the USACE Northwestern Division has delegated the day-to-day administrative

control of the Kennewick collection to the Center of Expertise in St. Louis, MO. Mr. Trimble gave a brief summary of the circumstances surrounding the discovery and subsequent curation of the human remains. The Kennewick collection is currently managed by the Burke Museum in accordance with a curation services contract with the St. Louis District Center of Expertise. Mr. Trimble summarized the current status of the collection. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the District of Oregon that there was not enough information for the human remains to be considered “Native American” under NAGPRA (*see Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004)). If that status changes (i.e., the human remains *are* “Native American” under NAGPRA), the USACE will work with the Department of Justice and others on the disposition of the human remains. Some preliminary results of the *Bonnichsen* plaintiffs’ studies were presented by members of the plaintiffs’ study team to Indian tribes in Ellensburg, WA, in October 2012. The results of the plaintiffs’ studies were awaiting publication. Mr. Trimble stated that the USACE will continue to manage the Kennewick collection according to the standards in 36 CFR Part 79, and that, as the chief curator for the collection, he is committed to ensuring that the human remains receive appropriate care and respectful treatment as long as they are the responsibility of the USACE St. Louis District Center of Expertise.

**REVIEW COMMITTEE MEETING #53:**

The 53<sup>rd</sup> meeting of the Review Committee was held in Washington, D.C., at the National Museum of the American Indian (NMAI) on November 20-21, 2014. The Review Committee attended ethics and professional training, as well as NAGPRA basics training, during the week of November 17. In addition, the Review Committee attended the NMAI Symposium and Reception for the 25<sup>th</sup> anniversary of the NMAI Act, which is Native American repatriation legislation specifically for the Smithsonian museums.

2014 National NAGPRA Program Report: The National NAGPRA Program provides technical assistance and training to Indian tribes, Native Hawaiian organizations, museums, and federal agencies; administers NAGPRA grants; receives inventories of human remains and associated funerary objects and summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony; processes Notices of Intent to Repatriate, Notices of Inventory Completion, and Notices of Intended Disposition; investigates civil penalties; and supports the Review Committee’s implementation of the repatriation provisions of the Act. The National NAGPRA Program writes an annual report on its activities and provided the Review Committee with an overview of its 2014 fiscal year report during our 53<sup>rd</sup> meeting. That report is attached to this report and provides detailed information about the Program’s activities. Significant activities the National NAGPRA Program has undertaken over the last year include:

- 69 inventories and 10 summaries received and processed;

- 185 notices published;
- 29 consultation/documentation grants and 8 repatriation grants awarded;
- 3,500 views of the You Tube channel; and
- Over 2,000 email and telephone requests for technical assistance.

National NAGPRA Program Report regarding correspondence letters with museums and federal agencies: Pursuant to the Review Committee's request from its 52<sup>nd</sup> meeting, the National NAGPRA Program sent, via e-mail, letters to federal agencies and museums and has received positive feedback, new Notices of Inventory Completion concerning culturally affiliated human remains and associated funerary objects, and corrections to the culturally unidentifiable inventories that provide evidence of consultation or amend the inventory to "culturally affiliated" (updated reports at <http://www.nps.gov/nagpra>). The Review Committee requested that the National NAGPRA Program continue its review of inventories of culturally unidentifiable individuals and supplement the database with information to show what type of consultation has been performed or documented by museums and federal agencies. The National NAGPRA Program reported that it will take 450 hours to complete this task and that, due to lack of staffing, this project could take six months or more to complete. The Review Committee would like to once again emphasize the need for more support in terms of funding to the National NAGPRA Program to ensure that this work associated with the Program's statutory duties can be effectively and efficiently completed.

Dispute Procedures: The Review Committee discussed its draft dispute procedures and solicited further comments. To date, the Review Committee has only received comments from the Society for American Archaeology. The Review Committee will take any additional comments received and finalize the draft dispute procedures at the next Review Committee meeting in March 2015.

Disposition Requests: The University of Denver Museum of Anthropology presented a request for a recommendation from the Review Committee to the Secretary of the Interior on the disposition of one individual. The University of Denver Museum of Anthropology initially reached out to representatives of Indian tribes whose aboriginal territory included Wyoming. Thirteen of those Indian tribes responded and consulted on the proposed disposition. After a review of the materials and discussions with the Indian tribes and the museum representatives, the Review Committee unanimously agreed to recommend that the Secretary of the Interior authorize the proposed disposition.

The Florida Department of State, Division of Historical Resources, presented a request for a recommendation from the Review Committee to the Secretary of the Interior on the disposition of one individual. The State of Florida has in its control the human remains of one individual with no known provenience that were found at a tattoo shop. The Review

Committee carefully considered the request and concluded that, based on the available evidence, it could not make a determination whether the human remains in question are “Native American,” as this term is defined in NAGPRA. The Review Committee also expressed its belief that the Florida Department of State, Division of Historical Resources may proceed with the proposed disposition under other applicable law (i.e., not pursuant to NAGPRA) and recommended this action to the Secretary of the Interior.

History Colorado presented a request for a recommendation from the Review Committee to the Secretary of the Interior on the disposition of five individuals. In consultation with 28 Indian tribes, a disposition agreement was proposed to transfer control of the human remains to the Southern Ute Indian Tribe of the Southern Ute Reservation and the Ute Mountain Tribe of the Ute Mountain Reservation. After a review of the materials and discussions with the Indian tribes and the museum representatives, the Review Committee unanimously agreed to recommend that the Secretary of the Interior authorize the proposed disposition.

On December 12, 2014, the Secretary of the Interior concurred with the Review Committee’s recommendations. Notices of Inventory Completion for the University of Denver and History Colorado dispositions were published on February 4, 2015.

Presentations and Public Comments: The Western Apache NAGPRA Working Group (Apache Working Group) provided information to the committee in reference to the Review Committee’s 2009 Finding of Fact for cultural items held by the American Museum of Natural History (AMNH). In 2009, at the request of the Apache Working Group, the Review Committee determined that the cultural items are sacred objects and objects of cultural patrimony. At that time, the Review Committee did not specifically make a recommendation that the AMNH list the cultural items by category in its Notice of Intent to Repatriate. In their presentation, the Apache Working Group asked the Review Committee either to clarify that its finding of fact was a recommendation to the AMNH or to now recommend to AMNH that it revise its Notice of Intent to Repatriate to identify all items as sacred objects and objects of cultural patrimony. The Apache Working Group described the damaging effects of not having the sacred objects and objects of cultural patrimony listed as such.

After lengthy discussion, a motion was made that the Review Committee “recommend that the museum publish its Notice of Intent to Repatriate utilizing the categorical information, the sacred objects and objects of cultural patrimony in its Federal Register notice.” However, the motion failed to pass by a vote of 3 against, 2 supporting, 1 committee member recused, and 1 absent. There were multiple reasons for this outcome, one of which was the Department of the Interior’s interpretation of what the regulations require as stated in a letter from the Assistant Secretary-Indian Affairs to the Chairman, Tonto Apache Tribe, dated March 31, 2011. The Review Committee continued to discuss the issue and share its concern

that the AMNH is acting contrary to the common practice of museums and federal agencies in being transparent about its determinations regarding the type of cultural items listed in Notices of Intent to Repatriate. The Review Committee then made a consensus statement that its finding of facts, though not legally binding, should have “the same weight as a recommendation” from the Review Committee. The findings of fact “are meant to address the dispute before [the Review Committee],” and the Review Committee intends for the parties “to follow our findings of fact, to put our findings of fact into purpose.”

Representatives of the Columbia Plateau Inter-Tribal Repatriation Group prepared a written report and presented highlights from their report at the meeting. Key points and requests include: 1) a request that the National NAGPRA Program provide information on its website that addresses how reburial on federal lands can occur through examples of memoranda of understanding or agreements, policies, standard operating procedures, etc.; 2) a request that the Review Committee review and provide comments to the proposed deaccessioning regulations when they are published; 3) a request that the Review Committee encourage the publication of 43 CFR 10.7; 4) a request that the Review Committee ask the GAO to provide an update on progress and work yet to be completed by federal agencies; and 5) a request that the Review Committee review the Bureau of Indian Affairs’ plan of action, timelines, and funding needs for compliance with NAGPRA.

Dr. Jayne-Leigh Thomas, the coordinator of NAGPRA activities at Indiana University-Bloomington, described the progress Indiana University has made with NAGPRA compliance, noting the very large collection of human remains Indiana University holds, as well as the human remains they curate for multiple federal agencies. She described a National Science Foundation grant that she and two colleagues received related to NAGPRA. The Review Committee encouraged Indiana University to continue working on compliance with the Act and to keep the Review Committee up to date on its progress.

John McClelland from the Arizona State Museum, University of Arizona, identified several barriers it faces with regard to implementation of NAGPRA, including producing inventories for human remains that are not in its legal control (in cases where it is acting as a repository). Arizona State Museum emphasized its desire to implement NAGPRA and to work with tribes to do so in accordance with a 5-year plan (produced in 2012).

Sandra Dong from the Peabody Museum of Archaeology and Ethnology, Harvard University (Peabody Museum), updated the committee on progress since the last in-person meeting, including six NAGPRA consultation visits and facilitation of NAGPRA activities for federal agency-controlled collections. The Peabody Museum shared an update on a set of projects which relate to NAGPRA implementation, inspired by a ledger of Plains warrior artwork from the Battle of the Little Big Horn, which also is a NAGPRA funerary object. So far the

projects have resulted in a co-curated exhibit, on-going exchanges around the descendants' interests, and most recently, a critically-recognized scholarly publication.

Christina Cain with the University of Colorado Museum of Natural History provided a presentation detailing the museum's work on archiving NAGPRA records in an accessible and easy-to-use format. The Review Committee applauded the University of Colorado Museum of Natural History's efforts to support the transparency of their collections for NAGPRA consultation purposes. The presenters voiced their willingness to share their process and approach with other interested parties.

Christine Landrum, of the Intermountain Region of the National Park Service, presented an update on the Colorado Lands Repatriation and Reinterment Workgroup (Workgroup), comprised of Indian tribes, museums, universities, and federal and state agencies. The workgroup is led by the Ute Mountain Tribe of the Ute Mountain Reservation and the Southern Ute Indian Tribe of the Southern Ute Reservation under the purview of the Colorado Commission of Indian Affairs. The Workgroup developed a Memorandum of Understanding (MOU) and Standard Operating Procedure (SOP), and the signatories convened on May 15, 2014 and October 17, 2014 to review 15 requests from museums and tribes under the SOP procedures. The MOU signatories were able to resolve 9 requests by identifying lands for reburial within the state of Colorado managed by various agency Workgroup members. The MOU signatories were unable to resolve or refer 6 requests. Although the Workgroup process has proven to be an effective means to address the lands for reburial issue within the state of Colorado, the Workgroup hopes that the MOU and the SOP can serve as a starting point to address the issue in other parts of the United States.

Christopher Ziegler of the Little Bighorn Battlefield National Monument presented results of a multi-year comprehensive review of the ethnology items in Little Bighorn Battlefield's museum collection. After intensive government to government consultation with 17 tribes and numerous lineal descendants, Little Bighorn Battlefield has published 8 Notices of Intent to Repatriate covering 63 cultural items in its collection. The project was successful due to the strong internal NPS collaboration involving the park superintendent, park museum curator, and on-site assistance from NPS Intermountain Region NAGPRA program staff. Mr. Duane Hollow Horn Bear, a lineal descendent of Lakota Chief Hollow Horn Bear, added his personal reflections on the repatriation of a sacred object from Little Bighorn Battlefield.

Presentations by federal agencies, including the USDA Forest Service, the Bureau of Land Management, and National Park Service's Park NAGPRA Program, provided the committee with updates on their progress as well as the barriers they have encountered. One of the key barriers expressed by the Bureau of Land Management (BLM) was the lack of communication between the federal agency and the repositories that hold the collections

under BLM control. BLM noted the difficulties it faces when it is not able to have easy access to the information on the collections (some repositories require a fee for service and others simply do not have the staff to provide the information in a timely manner). The Review Committee knows that there are large numbers of federal collections held by repositories, and this lack of coordination and communication is an issue that has major impact on the implementation of NAGPRA.

Clayton Dumont (Klamath), a Professor of Sociology at San Francisco State University, in public comment to the committee, stated his understanding that “balance” is not mentioned in NAGPRA nor is it required by the law. Dr. Dumont noted that his publications on NAGPRA law and history reflect his understanding that NAGPRA is Indian law and human rights law for Indian tribes, and that it is not the purpose of the Act to ensure balance.

**Other Review Committee Actions:** The Review Committee unanimously passed the following motion regarding consultation: The Review Committee supports and encourages continuing and substantive consultations between museums, federal agencies, Indian tribes, and Native Hawaiian organizations regarding repatriation of items under NAGPRA, including consultation with respect to the descriptions of objects to be repatriated and the wording and identification of categories in Notices of Intent to Repatriate, with the aim of coming to consensus on respectful terminology and wording of the notice that will facilitate repatriation of claimed items.

**REVIEW COMMITTEE MEETING #54:**

The 54<sup>th</sup> meeting of the Review Committee was held by teleconference on December 11, 2014, to discuss and finalize this report to Congress.

***PROGRESS MADE***

1. Increase museum compliance: Inform museums and federal agencies if the museum or federal agency has failed to produce a Notice of Inventory Completion – which is required in order to repatriate – where the museum or agency has made determinations that ancestral remains and associated funerary objects are culturally affiliated.
2. Increase museum compliance: Inform museums and federal agencies that they may be out of compliance with NAGPRA if they have not consulted, as appropriate, with lineal descendants, Indian tribes, or Native Hawaiian organizations on inventories containing culturally unidentifiable human remains and funerary objects.
3. Increase effective administration of disputes: Work to achieve final Dispute Resolution Procedures. The Review Committee is currently working to develop clear and consistent procedures for hearing disputes. In 2010, the Review Committee established a subcommittee (consisting of Ms. Sonya Atalay, Mr. Eric Hemenway, and Review

Committee Chair Ms. Rosita Worl) charged with soliciting input from museums, federal agencies, and Indian tribes to develop more specific dispute procedure guidelines to be followed during disputes heard by the Review Committee. The subcommittee reported on its efforts and introduced draft dispute procedures at the Review Committee's November 2013 meeting. The Review Committee seeks to develop transparent procedures ensuring fairness and impartiality in the hearing of disputes and in facilitating their resolution. In doing so it seeks to provide procedural clarity without appearing to serve as a courtroom or forum for legal argumentation. The Review Committee's goal is to facilitate the resolution of disputes and help parties resolve questions of fact. The Review Committee has made substantial progress in developing these dispute procedure guidelines and posted a draft of the procedures on the National NAGPRA website in order to elicit public comment. The Review Committee discussed the procedures at its November meeting and after receiving additional comments from the public determined it will consider those comments, complete the final revisions of these draft procedures, and provide a final draft of the procedures ready for final approval at the spring 2015 Review Committee meeting.

4. Support CUI dispositions through recommendations to the Secretary of the Interior.
5. Continue constructive discussions about where the Act and its regulations require clarification and amendment.
6. Devote more time to administrative and preparatory meetings in order to support more efficient and substantive public meetings.
7. Consider a special Review Committee meeting to mark the 25th anniversary of NAGPRA (November 16, 2015).

Attached to this report is National NAGPRA Program's Annual Report containing statistics regarding: the number of notices published in the Federal Register supporting the implementation of NAGPRA, including Notices of Inventory Completion from museums and federal agencies for the repatriation of culturally affiliated ancestral remains and associated funerary objects and Notices of Intent to Repatriate from museums and federal agencies for the repatriation of culturally affiliated unassociated funerary objects, objects of cultural patrimony, and sacred objects; grants awarded by the National NAGPRA Program; and other important indications of progress in implementing the Act from the National NAGPRA Program. The National NAGPRA Program, as a federal agency, reports on a fiscal year basis. The Review Committee's report is on a calendar year basis.

## NATIONAL NAGPRA PROGRAM FY 2014 STATISTICS AT A GLANCE

- o **Summaries received:** 1,131 from institutions and 459 reporting no collection requiring a summary
- o **Inventories received:** 1,321 from institutions and 268 reporting no collection requiring an inventory
  - o **Culturally Unidentifiable Native American Human Remains (CUI):** 749 inventories
    - 129,219 minimum number of individuals (MNI); 971,119 associated funerary objects (AFO)
    - 6,023 MNI transferred as CUI dispositions; 6,483 MNI subsequently culturally affiliated
  - o **Culturally Affiliated Native American Human Remains (CA):** 572 inventories
    - 57,448 MNI; 1,257,518 AFO
- o **Total MNI under NAGPRA: CUI 122,736** (prior CUI, less CUI now CA) and **CA 57,448 = 180,184 MNI**
- o **Notices of Inventory Completion:** Published 153 in FY 2014. Published 1,884 in total:
  - Total in notices: 50,518 MNI and 1,185,948 AFO
- o **Notices of Intent to Repatriate:** Published 32 in FY 2014. Published 676 in total:
  - Total in notices: 219,156 unassociated funerary objects (UFO); 4,941 sacred objects; 8,118 objects of cultural patrimony; 1,624 objects both sacred and patrimony, and 237 undesignated
- o **Notices of Intended Disposition** (Federal Agency newspaper notices of new discoveries)
  - 149 notices reported; 1,072 MNI; 10,964 AFO; 64 UFO; and 4 objects of cultural patrimony
- o **Notices using the 10.11 rule:** Published 75 in FY 2014. Published 181 in total:
  - Total in notices: 2,177 MNI; 33,272 AFO (CUI also in notices using 10.16, prior to 10.11 or when 10.11 does not apply)
- o **Notice processing FY 2014:** 209 received, 185 published; aging drafts (pre-2007) 5 remaining
- o **Grants:** Requested: \$2.28m (37 requests). Awarded: \$1.47m—29 project and \$97,325—8 repatriation
- o **Civil Penalties:**
  - Received 8 allegation letters of failure to comply against 13 museums.
  - Investigations completed during FY 2014: 5 counts (2 museums); 5 counts unsubstantiated (100% of counts investigated), pending adoption by the Assistant Secretary;
  - Investigations begun but not completed during FY 2014: 8 counts (3 museums);
  - Total investigations completed FY 2006-2014: 161 counts (33 entities); 137 counts unsubstantiated and 24 counts substantiated.
  - Total of \$42,679.44 collected through civil penalty assessments and settlement agreements
- o **Review Committee:** Meetings: November 6-7, 2013, MI; December 5 & April 10, 2014, telephonic
- o **NAGPRA Regulations 43 CFR Part 10:**
  - 10.7 Unclaimed – proposed rule published on October 29, 2013; will be published, again as proposed, together with the entire proposed revision of 43 CFR Part 10
  - 43 CFR Part 10 revised – draft proposed revision completed in “plain language,” in compliance with the Plain Language Writing Act of 2010 and Executive Orders, and sent for Department of the Interior review
- o **Technical Assistance and Reports:**
  - Training provided to 417 participants at 15 events;
  - 3,549 views of the training videos and webinars on the National NAGPRA YouTube
  - 2,000 email and telephone requests for technical information
  - 1 special report in progress – Twenty Years of NAGPRA Grants: 1994 – 2013
  - 2 reports on inventories produced at the request of the Review Committee and updated as of Sept 30, 2014
  - GAO requested Federal Agency Inventory and Repatriation Data Report

## ***BARRIERS ENCOUNTERED***

Congress has charged the Review Committee with reporting annually on both progress made and on barriers encountered to NAGPRA implementation. Consistent barriers reported on by the Review Committee year after year continue to depress real success and progress supporting the implementation of NAGPRA.

### **I. Lack of Adequate Funding**

The issue of funding has been consistently raised by the Review Committee, by scientific, museum, and cultural organizations, and by Indian tribes and Native Hawaiian organizations, and is the single greatest impediment to more complete and timely implementation and compliance.

The Review Committee has heard for many years that one very significant barrier is that many Indian tribes simply lack the financial capacity to handle NAGPRA implementation. Museums likewise often lack dedicated staff to complete NAGPRA compliance work, and must therefore rely on staff with other full-time responsibilities or contract hires; both may be forced to rely on part-time or less experienced individuals not able to set aside the time needed to become familiar with NAGPRA requirements and properly perform ongoing NAGPRA tasks.

Grants provide support to Indian tribes and museums to help complete specific NAGPRA projects, but are currently inadequate in three respects: 1) as noted, allocated funding for NAGPRA grants has not kept pace with the increasing tempo of repatriation and disposition activities; 2) precedence is understandably given to funding physical repatriation and reburial, so that funding available for NAGPRA projects is both limited and varies year to year; and 3) current grants support individual, specifically focused projects but do not allow capacity-building in either Native communities or museums to coherently and consistently implement the provisions of the Act. The lack of adequate capacity and the resulting lack of continuity in staffing, expertise, and workflows make implementation of the Act more costly and time-consuming, for all concerned. Separate funding aimed at building capacity, especially within Indian tribes or Native Hawaiian organizations, would allow communities and institutions to address NAGPRA compliance in a more holistic and less fragmented fashion, and further the Congressional policy of self-determination for Indian tribes.

Inadequate funding and support needed to carry on the implementation of the Act and its regulations is demonstrated by:

- Lack of staff in the National NAGPRA Program to fulfill certain statutory mandates and support compliance and enforcement, as well as implementation activities,

- including the lack of staff to support civil enforcement investigation and lack of permanent staff in all positions;
- Indian tribes and Native Hawaiian organizations lack staff as well as monetary support for specialized and permanent infrastructure, or to follow through on repatriation and disposition activities;
  - Museums and federal agencies continue to share that efforts to support repatriation are hampered by lack of staff and funding; and
  - Lack of funding to support face-to-face meetings between the Review Committee and the public prevents implementation activities required by the Act and its regulations.

## **II. Incomplete or Inadequate Repatriation and Consultation by Museums and Federal Agencies**

Federal agencies and institutions receiving federal funds that also have possession or control of human remains and associated funerary objects are required to list those human remains and objects in an inventory. Considerable progress is being made in these continuing efforts, but lack of communication between museums and federal agencies is a significant barrier to NAGPRA implementation, particularly with regard to the need for filing notices of inventory completion. The law requires museums and federal agencies with possession or control of collections to file an inventory. According to some reports, some institutions having custody of federal collections did not list certain human remains and funerary objects in an inventory because they assumed that the federal agency having control did so. The Review Committee is thus concerned that there may be human remains and associated funerary objects that are not currently in inventories because the institution curating the remains or objects and the agency with control of the remains or objects each assumes the other has included them in their inventory and reports. As noted in previous annual reports, this concern could be addressed through structured discussion between federal agencies and those institutions having custody of federal collections, resulting in explicit agreements assigning responsibility for reporting and inventorying these remains and objects. It is noted that this is likely to require additional support for institutions caring for such collections, either to support inventory and documentation of and consultation regarding collections for which they are not responsible, or to fund the appropriate packing and return of these collections to the federal agencies responsible for them by statute.

Furthermore, as reported under Review Committee 52<sup>nd</sup> and 53<sup>rd</sup> meetings, the number of culturally unidentifiable human remains and associated funerary objects remain extremely high. As of the September 30, 2014, there are a total of 122,736 minimum number of individuals and 971,119 associated funerary objects deemed to be “culturally unidentifiable.” It is not clear from National NAGPRA Program databases whether many museums and federal agencies had completed adequate consultation with potentially affiliated Indian tribes and Native Hawaiian organizations when the museum or federal agency submitted its

inventories. Results of consultation are required to be included in an inventory according to NAGPRA regulations, 43 CFR 10.9(c)(4), based on information provided by the Indian tribes or Native Hawaiian organizations 43CFR10.9(b)(3).

Current National NAGPRA Program records show that at least 280 museums and federal agency units have never initiated consultation on Native American human remains under their control. This represents 22,806 individuals and 175,216 associated funerary objects. As the National NAGPRA Program does not maintain full records of consultation histories in its databases, the actual number of individuals who were determined to be culturally unidentifiable absent consultation is not known.

The Review Committee has asked the National NAGPRA Program to submit letters to each of the 280 museums and federal agencies to request evidence of compliance with NAGPRA, specifically, on their efforts at consultation with potentially affiliated lineal descendants, Indian tribes, and Native Hawaiian organizations. In addition, the Review Committee has asked the National NAGPRA Program to review its practices in obtaining consultation information, and to determine whether further research can be done to identify other consultation compliance issues in the culturally unidentifiable inventories.

There are 107 museums and federal agency units that have failed to include 12,888 culturally affiliated individuals in a Notice of Inventory Completion. This means that there are affiliated individuals that could be repatriated if they were listed in a notice but have not been listed in a notice for reasons unknown. The Review Committee has asked the National NAGPRA Program to submit letters to these museums and federal agencies to notify them of this discrepancy and to request that they volunteer information about why these notices have not been published.

Thus, museums and federal agencies continue to fail their obligations under the Act and its regulations including:

- Failure to properly inventory federally associated collections that are curated in nonfederal repositories;
- Failure to properly report the scope of consultation activities with lineal descendants, Indian tribes, or Native Hawaiian organizations regarding human remains and funerary objects determined to be culturally unidentifiable; and
- Failure to submit Notices of Inventory Completion for culturally affiliated human remains and funerary objects.

### **III. Lack of Appropriate and Protected Locations for Reburial**

Numerous tribes have expressed a desire for more consistent and more accommodating regulations allowing public lands to be set aside for the reburial of human remains and

associated funerary objects. Many tribes strongly prefer that reburials take place in a location as close to the original burial site as possible, and in many cases this means that the preferred reburial site is not under tribal control. While limited provisions exist allowing reburial on federal land, these provisions vary by agency and also vary in how consistently they are applied within individual agencies. Concerns have also been raised regarding the provision of adequate protection for these sites after reburial has taken place. Consistent regulations and procedures allowing portions of federal land to be set aside for reburial, and for the protection of these sites once reburial has taken place, would reduce delays in the completion of repatriation and disposition requests.

Thus, there is a:

- Lack of appropriate and protected locations for reburial of human remains and funerary objects once repatriation or disposition has taken place.

#### **IV. Administrative Burdens**

The National NAGPRA Program is contained within the National Park Service, adding an additional layer of administrative burden and expense. This causes notices, recommendations to the Secretary of the Interior, and other implementation activities to be delayed. Indian tribes and Native Hawaiian organizations and other parties including the National NAGPRA Program itself, may be better served if the Program were directly under the Secretary of the Interior.

Thus:

- Additional layers of administrative review by the National Park Service cause notices, recommendations to the Secretary, and other implementation activities to be delayed.

#### **V. Need for Clarification of the Act and its Regulations**

Indian tribes and Native Hawaiian organizations, and museums and federal agencies, continue to complain about ambiguities in the Act and its regulations that cause delay, confusion, and lack of timely compliance.

Thus, there is a:

- Lack of clarity and abundance of ambiguities in the Act and its regulations.

## ***RECOMMENDATIONS TO CONGRESS***

Based on these barriers, the Review Committee strongly recommends the following Congressional actions:

1. Fulfill the statutory requirements of NAGPRA by providing adequate and consistent staffing and budgetary support to the National NAGPRA Program.
2. Continue to support project-based grant funding to Indian tribes, Native Hawaiian organizations, and museums.
3. Create new grant programs designed to build institutional capacity among Indian tribes, Native Hawaiian organizations, and museums to more effectively and efficiently implement the provisions of the Act.
4. Expand opportunities for reburial of Native American ancestors on federal lands, including National Parks, even if the remains did not originally come from those lands.
5. Develop and support initiatives encouraging or supporting reburial on nonfederal lands that will protect lands in perpetuity, including tax incentives or other programs.
6. Honor Senator Daniel Inouye by setting aside lands regionally to support reburial.
7. Expand support for federal agency compliance with NAGPRA, including expedited completion of inventories of federal collections in nonfederal repositories.
8. Support strong monitoring, compliance, and enforcement measures by the Secretary, and support requests by the Review Committee for museums and federal agencies to report on status of repatriation matters and to explain potential compliance issues, especially regarding culturally affiliated inventories where Notices of Inventory Completion and repatriation has not occurred, or where the scope of consultations is unclear.
9. Hold hearings to determine whether amendments to the Act should be considered that would expedite the implementation activities of NAGPRA's repatriation provisions, support National NAGPRA Program staff to facilitate regulatory amendment, and clarify ambiguities.

Finally, the Review Committee takes its annual obligation to report to Congress quite seriously, and would be grateful for recommendations or comments regarding how its report can be made more useful or accessible.

The Review Committee is grateful for the opportunity to provide this report to Congress and the Review Committee remains ready to provide any additional information to address Congress' concerns about these issues.

The Native American Graves Protection and Repatriation Review Committee

*Miigwech!  
Sonya Atalay*

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