

Annual Report to Congress

NATIVE AMERICAN GRAVES PROTECTION & REPATRIATION REVIEW COMMITTEE

2017-2018

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Executive Summary

With the passage of the Native American Graves Protection and Repatriation Act (NAGPRA or the Act; 25 U.S.C. § 3001, et seq.) on November 16, 1990, Congress mandated the formation of the NAGPRA Review Committee. The NAGPRA Review Committee is required to report to Congress annually regarding progress made, and any barriers encountered, in implementing the Act's provisions during the previous year (25 U.S.C. § 3006). The Act benefits Native Americans and reflects "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 disparate treatment afforded to Native Americans in the protection of their ancestral burials and cultural objects.

This report covers Review Committee activities from January 2017 through September 2018. Subsequent annual reports will cover Federal fiscal years.

From January 2017 through September 2018, the Review Committee held only one public, face-to-face meeting, in March 2017. In May 2017, the Department of the Interior postponed the activities of all of its Federal Advisory Committee Act (FACA) committees while it conducted a review of their charters and charges. As a result, the Review Committee was unable to meet again until the beginning of fiscal year 2019 in October 2018.

In its March 2017 meeting, the Review Committee received reports from the National NAGPRA Program regarding implementation and compliance activities under the Act, provided recommendations to the Secretary of the Interior regarding the disposition of culturally unidentifiable human remains, heard presentations from NAGPRA constituents, and received public comment in both oral and written form.

Attached to this Annual Report are statistics reported by the National NAGPRA Program for fiscal year 2018 regarding the implementation of NAGPRA, grants awarded under the Act, and other important progress made. Despite some notable examples of progress, the National NAGPRA Program and the NAGPRA Review Committee remain hindered by barriers that have been reported to Congress year after year. These are discussed in the body of the report below.

Recommendations to Congress

Based on its experience with both barriers and examples of progress, the Review Committee strongly recommends the following Congressional actions:

1. Increase NAGPRA grant funding. Over the 24 years that grant funding has been awarded, the NAGPRA Program has had a maximum of \$2.4 M to award in a single year (2001). In 2005, this figure dipped to its lowest point, at \$1.4 M, and in 2017, the amount available was \$1.7 M. In an average year, 43% of applicants are funded. This percentage reflects a lack of available funds, not a lack of qualified applicants.
2. Encourage and support federal agency compliance with NAGPRA, including the completion of required inventories of federal collections curated in non-federal repositories by:
 - a) increasing dedicated federal funding for NAGPRA implementation activities and training;
 - b) requiring non-federal repositories make available to federal agencies, or the Secretary of the Interior, all “associated records” (as defined in 36 CFR 79.4(2)), as well as accession and catalog records related to these collections; and
 - c) requiring federal agencies to assign federal staff to create inventories and summaries for their NAGPRA collections in non-federal repositories and notify lineal descendants, Indian Tribes, and Native Hawaiian organizations. A date to meet these requirements should be specified by Congress.
3. Refine and promulgate regulations to improve and expedite the repatriation process.
4. Consider directing federal agencies that control cemeteries to set aside some percentage of available cemetery plots for use in the reburial of human remains and funerary objects repatriated pursuant to NAGPRA; and also amend the Recreation and Public Purposes Act to facilitate use of Bureau of Land Management lands for this purpose.
5. Invite the Review Committee, through the Secretary of the Interior, to report to Congress in person on persistent barriers, and proven methods of achieving significant progress, in implementing NAGPRA, and also hold hearings on the requirements in recommendation 2 prior to establishing timelines for meeting those requirements.

2017-2018 Report to Congress

Congress has charged the Review Committee with reporting annually on progress made and barriers encountered in NAGPRA implementation. Certain barriers have been reported year after year, and they continue to hinder progress in the implementation of NAGPRA.

Barriers Encountered

1. NAGPRA compliance is much more complicated than ever imagined by Congress.

Congress envisioned in 1990 that repatriation activity pursuant to NAGPRA would be complete, or nearly so, within five years of the Act's passage. As evidenced by the Government Accountability Office's (GAO) report entitled *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied With The Act* (GAO-10-768), as well as statistics compiled and reported annually by the National NAGPRA Program, after nearly three decades, a daunting amount of work remains. A key component of NAGPRA's complexity is the fact that the Act is implemented, of necessity, on a case-by-case basis. A related factor, highlighted nearly ten years ago by GAO, is that vast numbers of human remains and cultural items under the legal control of federal agencies are curated by non-federal repositories. Federal agencies often do not have physical custody of their collections and, in some cases, may not even know that collections exist or where they are housed, mainly due to the inadequacies of early permitting procedures and gaps in record-keeping. In addition, establishing a federal agency's legal control might take years, in part because some museums may not be forthcoming with catalog/accession records. Further, loans, exchanges, and excavation of the same site by multiple institutions have frequently resulted in collections from one site having been split among multiple institutions, each with its own protocols for determining cultural affiliation. Finally, while museums have always known that faunal collections might have included human remains, more careful inventories have recently shown the actual frequency of this occurrence.

2. NAGPRA compliance is much more expensive than ever imagined by Congress.

The Congressional Budget Office estimated, in 1990, that total costs for NAGPRA compliance would run between \$5 million and \$30 million. As of 2017, the National NAGPRA Program had received requests for nearly \$100 million in grant support, and had awarded more than \$46 million. Over this same period, hundreds more millions of dollars have been spent on compliance by federal agencies, Indian Tribes, and museums. The size of the annual NAGPRA grant funding pool, since its inception, has varied from a maximum of \$2.4 M to a minimum of \$1.4 M. The amount allocated has never been adjusted for inflation, nor has it reflected the scale of repatriation work that remains to be done. GAO, in GAO-10-768, identified a lack of

resources within federal agencies dedicated to NAGPRA implementation as "one of the most significant challenges" to compliance with the Act. Although NAGPRA constituents (Indian Tribes, museums, federal agencies, and the Review Committee) are all working together to address issues related to the complexity of NAGPRA compliance (see Barrier 1 and Progress Made, below), only Congress can address the funding challenge.

3. There has been a perceived lack of transparency and a perception of bias in the Committee's decision making processes and actions.

The Federal Advisory Committee Act (FACA) states that members should use independent judgment to ensure that major, and sometimes opposing, viewpoints are represented on a committee, as this provides a foundation for fair and comprehensive advice and recommendations to the federal agency. Lack of confidence in the openness and objectivity of individual members and the Committee as a whole undercuts the Committee's ability to meet its mission to support implementation of the Act, especially in regard to facilitating the resolution of disputes and making recommendations to the Secretary of the Interior concerning the disposition of human remains and funerary objects. In designing the structure of the Committee membership, Congress sought to create a balance of viewpoints among stakeholders. Maintaining this balance is imperative if the Committee is to be seen as an honest broker among parties in disputes. The postponement of the NAGPRA Review Committee's activities from 2017-2018 not only impeded the work of the Committee, but left certain positions on the Committee unfilled, which precluded the Committee from fully serving its function.

4. Legislative work is required in order to broaden opportunities for reburial of Native American human remains and cultural items on public lands.

Progress has been made on identifying places to rebury repatriated human remains and funerary objects (as discussed below), but difficulties remain. Reburial sites must be monitored and protected from looters. Although laws, such as NAGPRA and the Archaeological Resources Protection Act (ARPA), and the Protect PATRIMONY Joint Resolution exist, appropriate Congressional allocations to monitor sites and prevent looting have not been made.

Many Indian Tribes advocate for additional federal lands to be set aside for reburial. Others feel that, due to changing land use and a lack of assured protection from development, human remains and cultural items should only be reburied on reservation lands. Legislation should reflect the diversity of tribal opinions on this issue.

Information divulged during NAGPRA consultations by lineal descendants, Indian Tribes, and Native Hawaiian organizations and in the possession of a federal agency is discoverable under the Freedom of Information Act. The inability to keep sensitive information confidential should be considered a barrier to reburial and, therefore, to repatriation. Finally, it is important to note

Native American Graves Protection & Repatriation
Review Committee

that many Indian Tribes face additional burdens as their ancestors were interred in locations remote from their present-day tribal lands.

5. The Department of the Interior suspended the activities of all its FACA committees while it conducted a review of their charters and charges.

This suspension was undertaken as an effort to maximize feedback and to ensure Committee compliance with FACA and executive orders. Nonetheless, the hiatus of the Review Committee created a barrier to progress in implementing NAGPRA by delaying meetings, recommendations for disposition of human remains, and recommendations to involved parties in dispute resolutions. In addition, critical Committee positions were not filled. The postponement of Committee activities has slowed the repatriation process for many Indian Tribes, Native Hawaiian organizations, and museums.

In a June 12, 2017, letter to the Secretary of the Interior, the Confederated Tribes of the Colville Reservation expressed its concern that the National NAGPRA Program had not been able to meet its responsibilities pursuant to the Act, as follows:

We seek your assistance in, at least, maintaining the previous level of NAGPRA program services to the Native American tribes and communities and Native Hawaiian organizations. The [FACA] review process currently suspends several critical functions and responsibilities of the NAGPRA program, including:

1. Postponement of scheduled NAGPRA Review Committee Meetings: July 11, 2017, Teleconference; August 30-31, 2017, Review Committee meeting, and December 12, 2017, Teleconference
2. Delay of the review of nominations and appointments to the NAGPRA Review Committee
3. Hiring freeze for filling vacant program positions.

While these suspensions may be temporary; they are profound impediments to the repatriation and return of ancestral remains, their associated and unassociated funerary objects and the repatriation of sacred objects and objects of cultural patrimony to tribes throughout the United States.

The work of the program staff and the Review Committee is critical to ensuring the NAGPRA process moves forward for not only Native American tribes and Native Hawaiian organizations, but also for museum communities, Federal agencies, and scientific organizations. Working with a full program staff and Review Committee safeguards the intent and purpose of NAGPRA law. Any review should not suspend the daily activities and service to the people. We urge you to immediately restore the suspended activities discussed above while the Department's program review

proceeds in order for your staff to continue their work. You will be providing a service to the Tribes and to our ancestors.

This letter from the Confederated Tribes of the Colville Reservation was accompanied by a copy of Resolution 18-21, passed by the Affiliated Indian Tribes of Northwest Indians (ATNI), a regional organization representing Indian Tribes in the States of Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska. In the resolution, ATNI “insists there be immediate restoration of the functions of the NAGPRA Program and Review Committee including resumptions of Review Committee meetings, as soon as possible, and, authorization of full staffing of the NAGPRA Program, and, immediate action on nominations to the Review Committee.”

In addition to the above letter, an email from a representative of the Robert S. Peabody Museum of Archaeology at Phillips Academy expressed concern regarding delays in the museum’s plan to transfer human remains and associated funerary objects from the Swanton Site to the Missisquoi Abenaki. Further, a large number of social media posts suggest widespread public dissatisfaction with the suspension.

Progress Made

1. More and improved training and new tools

The emergence of new NAGPRA training models is encouraging. The Bureau of Land Management (BLM) is providing both in-person and online NAGPRA training, incorporating NAGPRA consultation in all management instruction associated with tribal relationships, and promoting the sharing of NAGPRA expertise among different field offices.

The results of a recent survey conducted by two graduate students at the University of Denver Department of Anthropology (who are also curatorial assistants at the University of Denver’s Museum of Anthropology) indicate widespread interest in training on the planning and consultation associated with NAGPRA projects, including repatriation and reburial, preparation of summaries and inventories, and grant writing, as well as advanced instruction on determining cultural affiliation, articulating the differences between NAGPRA and the National Historic Preservation Act, and identifying the specific needs of Indian Tribes and Native Hawaiian organizations. The survey gathered responses from employees of federal and state agencies, private consultants, museum professionals, and representatives of Indian Tribes and Native Hawaiian organizations. A major recommendation resulting from the survey is that trainings on these topics should be offered to NAGPRA stakeholders in conjunction with annual professional conferences.

In March 2017, History Colorado organized a Public Roundtable and Open Forum on Consultation. Panelists and attendees included federal and state agency personnel, university

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and museum staff, tribal representatives, private consultants, and representatives of scientific organizations. Participants reflected a cross-section of perspectives and levels of experience. Panelists and attendees spoke about their experiences with consultation, identified obstacles to meaningful consultation, discussed potential solutions, and highlighted examples of successful consultation. This workshop and the training survey discussed above represent the seeds of a nascent, broad-based repatriation practitioners' network which could develop into an organizational locus of training and the development of best practices in the field.

A partnership between the Arizona State Historic Preservation Office, the Salt River Pima-Maricopa Indian Community, and SWCA Environmental Consultants, Inc. recently resulted in an online resource called the Arizona Government-to-Government Consultation Toolkit (<https://sites.google.com/view/az-consultation-toolkit/home>). The toolkit, designed to facilitate consultation with Arizona tribes pursuant to federal and state statutes, features many resources, including an interactive map which users can employ to identify tribes to consult regarding a particular project, or the discovery or disposition of human remains and other cultural items. The site also provides current contact information for representatives of Arizona tribes, federal and state agencies, and certified local governments.

2. Success in partnerships between federal agencies and non-federal repositories

In 2017, the Review Committee heard reports detailing successful partnerships between federal agencies and non-federal repositories, which have resulted in significant progress toward NAGPRA compliance. The Bureau of Indian Affairs (BIA), for example, reported that it currently had 11 contracts with non-federal repositories and that each was in various stages of NAGPRA implementation, with exemplary results in several cases. BLM recounted similar momentum, noting that the keys to such partnerships have been a shared vision of purpose, i.e., the need to effect the disposition of Native American human remains and cultural items, and the joint leveraging of resources to make that vision a reality. Such partnerships - the US Forest Service is another example - are critical to addressing the barriers associated with the repatriation of federal collections curated by non-federal repositories.

An alternative model offered by the Department of the Army involves the development of regional curation centers for archeological collections and NAGPRA compliance activities. Work is underway to develop cost comparisons and justifications for this model.

3. Review Committee Responses to Feedback

A Subcommittee on Critiques was formed in September of 2016 to review the transcript from the July 2016 meeting, and subsequent related correspondence, and to summarize salient critiques for future consideration by the Review Committee as a whole. The Review Committee continues to seek feedback about ways to improve its meetings in every way, but especially to address perceptions concerning transparency or bias. FACA states that members should use independent judgment to ensure that major, and sometimes opposing, viewpoints are

represented on a committee, as this provides a foundation for fair and comprehensive advice and recommendations to the federal agency.

The Subcommittee developed a list of changes to the meeting procedures for consideration by the Review Committee:

- If the chair is absent, or needs to be recused from consideration of a matter, that the chair may appoint another member to serve in his or her stead.
- The chair only votes in the event of a tie among the other members.
- During a public meeting, any member may request an executive session to seek the advice of legal counsel, with the consent of the chair.
- The chair should have a two-year term, with no limit on the number of terms.
- Members may not miss more than three meetings, and that includes any portion of a meeting. Requesting action by the Secretary to replace a member is at the discretion of the DFO.
- Meeting procedures should be reviewed by the Committee every two years.

The Subcommittee's recommendations were voted on and passed by the Review Committee. The Subcommittee is continuing to craft recommendations to refine meetings procedures to improve transparency and address the perception of bias.

4. Land for Reburial

More public land is being made available for reburial. In 2017, the Review Committee was informed of reburials on BLM lands in Colorado and Wyoming, as well as lands controlled by the Department of the Army. The Review Committee also learned that BLM had recently changed its reburial policy. Reburial decisions are now made at the level of the state office rather than in Washington, D.C. BLM's new guidance document on reburial addresses legal and logistical issues, such as selection of the reburial location, protection of human remains and other cultural items reburied, and access to the reburial location.

Native American Graves Protection & Repatriation
Review Committee

2017-2018 Review Committee Activities

Review Committee Members

Nominated by Tribes and Native Hawaiian organizations:

Armand Minthorn (term ended November 13, 2018) - Chair

Lauren Peters (term ended September 23, 2017)

Steve Titla (term ended April 17, 2017)

Nominated by museums and scientific organizations:

LindaLee Farm (term ended November 9, 2017)

Patrick Lyons (term ends November 9, 2019)

Heather Edgar (term ends November 9, 2019)

Nominated by the Committee:

Dennis H. O'Rourke (term ended September 23, 2017)

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

Review Committee Meeting

The 62nd meeting of the NAGPRA Review Committee was held in Denver, Colorado, at History Colorado, March 15-16, 2017. Six Review Committee members were present and one participated in a portion of the meeting via telephone.

In addition to the National NAGPRA Program's report, the Review Committee heard 16 presentations, made four recommendations to the Secretary of the Interior regarding the disposition of culturally unidentifiable human remains, had a preliminary discussion of this Report to Congress, and benefitted from both oral (public) and written comments. Minutes and a transcript of the 62nd meeting can be accessed at <https://irma.nps.gov/DataStore/Reference/Profile/2193294>.

NAGPRA Statistics for Fiscal Year 2018

NAGPRA At-A-Glance Fiscal Year 2018

101	new/amended inventories or summaries received
169	notices published in the Federal Register
0	Review Committee meetings
2	letters alleging failure to comply received
\$1.65	million awarded for grants
\$190,115	16 repatriation grants
\$1,466,885	19 project grants

NAGPRA collections increased – the number of human remains reported in NAGPRA inventories increased by 3,940 individuals.

NAGPRA activity remains high – 50% more draft notices were submitted than previous years, a record year for notice submissions.

NAGPRA funding remains level – despite increased demand of \$2.78 million in requests, available grant funds were level at \$1.65 million.

More NAGPRA work needed – Over 122,000 Native American individuals are still in collections and 93% of those have not been culturally affiliated with any present-day Indian tribe or NHO. Cultural affiliation studies and in-depth consultations could help resolve the rights to many of these individuals.

NAGPRA Accomplishments FY 1990 – FY 2018

86.32% of culturally affiliated human remains have completed the NAGPRA process.

Over 1.67 million associated funerary objects have been transferred with human remains.

20% of museums subject to NAGPRA have resolved all Native American human remains under their control.

Nearly 245,000 unassociated funerary objects have been repatriated.

About 15,000 other cultural items have been repatriated.

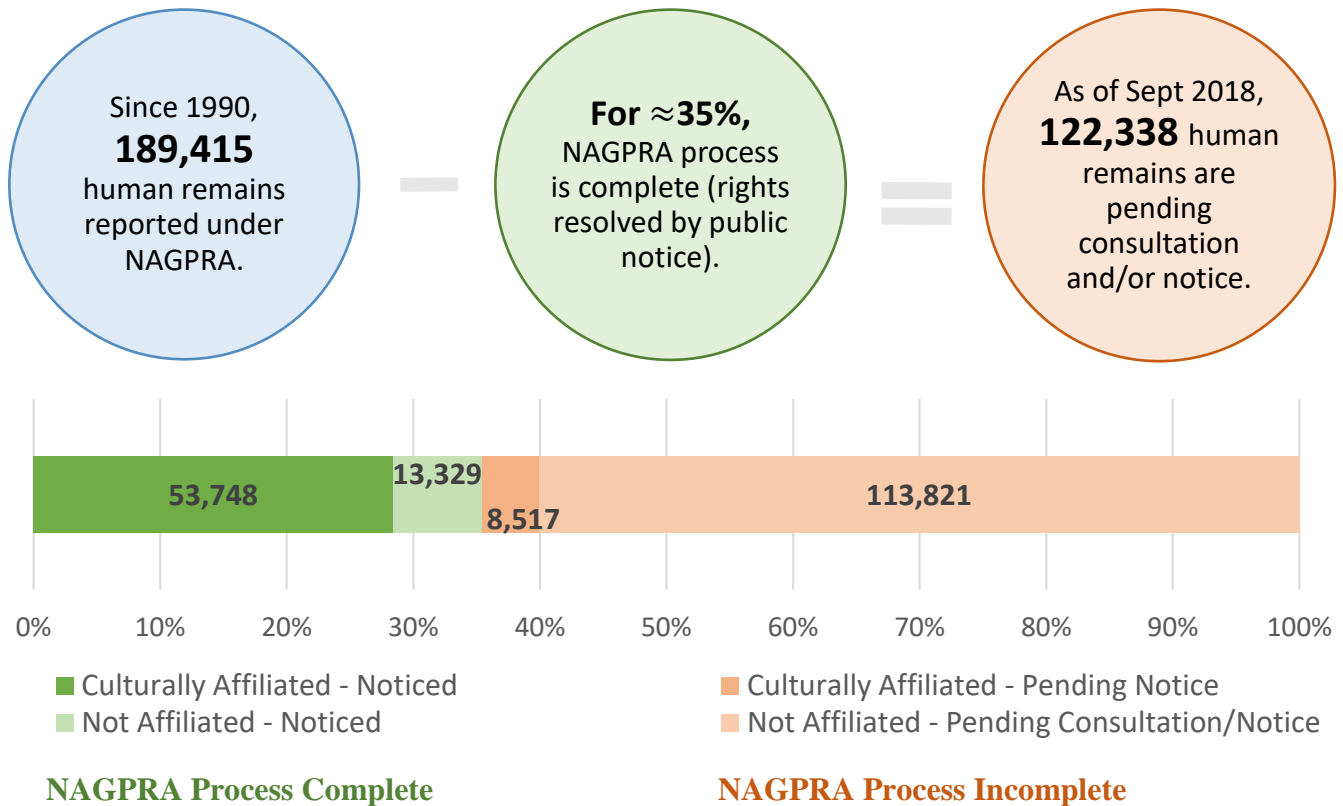
62 Review Committee meetings have been held since 1992.

\$59,111 has been collected in civil penalties for failures to comply.

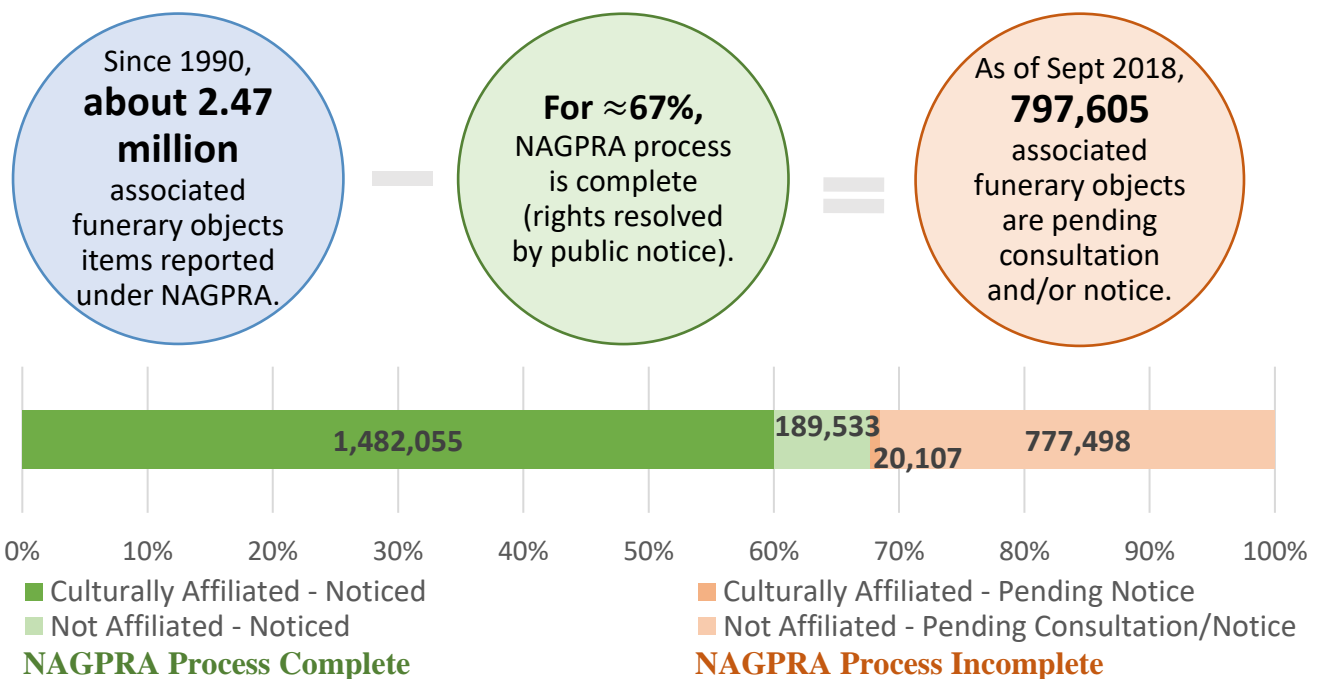
\$48.47 million has been awarded in NAGPRA grants.

NAGPRA Statistics 1990-2018

Native American Human Remains in Holdings and Collections



Native American Associated Funerary Objects in Holdings and Collections



Showing the 122,338 human remains pending under NAGPRA in 2018.
Sets of Native American human remains by state of removal/excavation.

