



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

The Honorable Brian Schatz
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Native American Graves Protection and Repatriation Review Committee (Review Committee) asked me to forward to you their fiscal year (FY) 2022 Report to Congress. On January 10, 2023, the Review Committee held a public meeting and approved the report for distribution.

Section 8 of the Native American Graves Protection and Repatriation Act (NAGPRA) requires the Review Committee to report to Congress on the progress made, and any barriers encountered, in implementing NAGPRA. This is the twenty-second report prepared for Congress by the Review Committee. As the report is the work product of the Review Committee, it does not necessarily reflect the views of the Department of the Interior (Department) or the National Park Service.

We appreciate your interest in the successful implementation of NAGPRA and look forward to working closely with you and other members of Congress on NAGPRA matters. If you have any questions regarding the Review Committee, please do not hesitate to contact the Review Committee's Designated Federal Officer, Melanie O'Brien, at Melanie_O'Brien@nps.gov or by phone at (202) 354-2204.

A similar letter is being sent to the Honorable Chuck Schumer, Majority Leader, and the Honorable Lisa Murkowski, Vice Chairman, Committee on Indian Affairs in the United States Senate. In the U.S. House of Representatives, a similar letter is being sent to the Honorable Kevin McCarthy, Speaker; the Honorable Bruce Westerman, Chair, and the Honorable Raúl Grijalva, Ranking Member, Committee on Natural Resources; and the Honorable Harriet Hageman, Chair, and the Honorable Teresa Leger Fernández, Ranking Member, Subcommittee for Indian and Insular Affairs, Committee on Natural Resources.

Sincerely,

 Date: 2023.04.04
11:33:50 -04'00'

Shannon Estenoz
Assistant Secretary
for Fish and Wildlife and Parks

Enclosure

cc: Members of the Senate Committee on Indian Affairs
Members of the Native American Caucus

Annual Report to Congress

NATIVE AMERICAN GRAVES PROTECTION & REPATRIATION REVIEW COMMITTEE

Fiscal Year 2022

October 1, 2021-September 30, 2022

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Executive Summary

The passage of the Native American Graves Protection and Repatriation Act (NAGPRA or the Act) on November 16, 1990, mandated the formation of a Federal advisory committee to "monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 3003, 3004 and 3005" of the Act.¹ One of the specific duties of the Native American Graves Protection and Repatriation Review Committee is to report to Congress annually regarding progress made and any barriers encountered in implementing the Act's provisions during the previous year.²

This report summarizes Review Committee activities and progress made and barriers encountered in implementation of NAGPRA during fiscal year (FY) 2022 (October 1, 2021-September 30, 2022). The Review Committee also offers specific recommendations to improve implementation of NAGPRA in the future. The following summary of the Review Committee's recommendations include references to where in this report they are described in greater detail. The Review Committee recommends that the Congress:

1. Amend sections of NAGPRA regarding the definitions of "sacred objects" (recommendation #1A), "Native American" (#1B and #7B), "Hui Malama I Na Kupuna O Hawai'i Nei" (#1C), "Native Hawaiian organization" (#1D), "Office of Hawaiian Affairs" (#1E), "right of possession" (#1F), "aboriginal land" (#2A), Review Committee's responsibilities (#3), Native Hawaiian traditional religious leaders (#6), illegal trafficking (#7C); exemption from disclosure of culturally sensitive information (#8), administration of the NAGPRA program (#9), and scope of the Review Committee's report to Congress (#11).
2. Amend a section of the National Museum of the American Indian Act to grant the United States District Courts jurisdiction over violations of the Act (recommendation #10).
3. Request that the Government Accountability Office complete evaluations of Federal agency compliance with the requirements of 25 U.S.C. 3002 (recommendation #2B), implementation of the civil penalty provisions (#4), NAGPRA grant program (#5A), and costs of proposed regulatory revisions (#5B).
4. Establish and fund an interagency investigative effort to combat illegal trafficking of Native American cultural items (recommendation #7D).
5. Include \$3 million in the FY2024 and subsequent year budgets for implementation of the Safeguard Tribal Objects of Cultural Patrimony Act (recommendation #7A).

¹ 25 U.S.C. § 3006 (a).

² 25 U.S.C. § 3006 (h).

Summary of Activities

NAGPRA affects Indian Tribes, Native Hawaiian organizations, lineal descendants, museums, and Federal agencies. The development of long-term positive collaborations and cooperation among these different communities as part of their compliance and involvement with the law is an important goal. Through its public meetings, oversight of implementation of the Act, review and recommendations regarding the resolution of disputes, and recommendations to the Secretary of the Interior, the Review Committee works to achieve the goals and objectives of the statute.

Review Committee Members

Nominated by Indian Tribes and Native Hawaiian organizations:

John Beaver (term ended May 2022)
Barnaby Lewis (term ended May 2022)
One position was vacant

Nominated by national museum and scientific organizations:

Francis McManamon (term ends October 2022)
C. Timothy McKeown (term ends June 2024)
Shelby Tisdale (term ends June 2024)

Nominated by the Committee:

Honor Keeler (term ended May 2022)

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

Review Committee Meetings

In fiscal year 2022, the Review Committee held ten public, telephonic meetings.

During the FY2022 meetings, 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 comments. The Review Committee also expressed serious concern about the delays in transmittal of the Committee's FY2019 annual report to Congress. The Review Committee conducted substantive discussions on the FY2021 annual report to Congress.

Attached to this Annual Report are statistics reported by the National NAGPRA Program for fiscal year 2022 regarding the implementation of NAGPRA, grants awarded under the Act, and other important progress made. It is noteworthy that the National NAGPRA Program staff,

despite Covid restrictions that prevented them from face-to-face interaction in their normal office environment, managed to maintain a high level of performance, particularly in the fiscal year 2021 and 2022 grant awards and *Federal Register* notice aspects of the program.

There have been notable examples of progress made by Indian Tribes, Native Hawaiian organizations, museums, and Federal agencies in the implementation of NAGPRA. Regrettably, there are also longstanding barriers to swifter implementation of the law. In the body of this report, we present additional information on both the progress and the barriers.

Minutes and transcripts of past meetings can be accessed at:

<https://www.nps.gov/subjects/nagpra/meetings.htm>

The 73rd meeting of the Review Committee was held telephonically for three hours on November 12, 2021. During the meeting, the Review Committee:

- Approved its annual Report to Congress for FY2021. The report was forwarded to the Congress by Assistant Secretary Shannon Estenoz on June 3, 2022.
- Benefited from public comments from the Pueblo Grande Museum, Gila River Indian Community, Bureau of Indian Affairs, Salt River Pima-Maricopa Indian Community; University of Denver; University of California, Davis; and Bay Mills Indian Community.

The 74th meeting of the Review Committee was held telephonically for three hours on November 23, 2021. During the meeting, the Review Committee:

- Considered evidence presented by The Choctaw Nation of Oklahoma, The Chickasaw Nation, Coshatta Tribe of Louisiana, The Muscogee (Creek) Nation, Seminole Tribe of Florida, The Seminole Nation of Oklahoma, Jena Band of Choctaw Indians, and Alabama-Coshatta Tribe of Texas that supported the Review Committee's finding of fact that the present-day Muskogean-speaking Indian Tribes are culturally affiliated with the human remains and funerary objects excavated at, and adjacent to, the Moundville archeological site (1TU500), in Tuscaloosa County, AL. The committee's finding of fact was [published in the Federal Register on February 1, 2022](#).
- Benefited from four public comments and received one written comment.

The 75th meeting of the Review Committee was held telephonically for two hours on January 31, 2022. During the meeting, the Review Committee:

- Discussed the draft proposed regulations that had been released for Tribal consultation in July of 2021. Individual members were asked to provide written comments for compilation and public distribution at the next committee meeting.
- Benefited from public comments from the Navajo Nation and a private individual.

The 76th meeting of the Review Committee was held telephonically for three hours on February 14, 2022. During the meeting, the Review Committee:

- Discussed the compilation of members' recommendations and questions regarding the July 2021 draft proposed NAGPRA rule. Individual members were asked to provide

written comments on the compilation for discussion at the next committee meeting.

- Benefited from public comment from the Confederated Tribes of the Colville Reservation.

The 77th meeting of the Review Committee was held telephonically for three hours on February 28, 2022. During the meeting, the Review Committee:

- Considered a proposal from the University of Colorado Museum for disposition of culturally identifiable Native American human remains to the Southern Ute Indian Tribe and Ute Mountain Ute Tribe. The committee agreed to recommend that the Secretary approve the disposition request and a notice was [published in the Federal Register on June 6, 2022](#).
- Considered draft recommendations on the draft proposed regulations.
- Benefited from public comment from the U.S. Department of State and American Alliance of Museums.

The 78th meeting of the Review Committee was held telephonically for three hours on March 10, 2022. During the meeting, the Review Committee:

- Considered a proposal from Little Bighorn National Monument for disposition of culturally identifiable Native American human remains to the Crow Tribe. The committee agreed to recommend that the Secretary approve the disposition request and a notice was [published in the Federal Register on May 18, 2022](#).
- Considered draft recommendations on the draft proposed regulations and authorized the committee chair to send a letter outlining concerns to the Secretary of the Interior.

The 79th meeting of the Review Committee was held telephonically for three hours on March 15, 2022. During the meeting the Review Committee:

- Considered draft recommendations on the draft proposed regulations.
- Benefited from a presentation by the University of Missouri, and public comments by the National Association of Tribal Historic Preservation Officers, and two private individuals.

The 80th meeting of the Review Committee was held telephonically for three hours on March 21, 2022. During the meeting the Review Committee:

- Considered draft recommendations on the draft proposed regulations.
- Benefited from a presentation by Bernstein & Associates NAGPRA Consultants, and public comments by the Bay Mills Indian Community.

The 81st meeting of the Review Committee was held telephonically for four hours on May 3, 2022. During the meeting, the Review Committee:

- Benefited from presentations by Assistant Secretary Shannon Estenoz (Fish and Wildlife and Parks) and Assistant Secretary Bryan Newland (Indian Affairs) who confirmed the Department of the Interior's commitment to completing the revisions to the regulations in consultation with Indian Tribes and Native Hawaiian organizations, summarized the

regulatory process, and recognized the work of the Review Committee. The Review Committee acknowledged the Assistant Secretaries' comments and thanked them for taking time to attend the meeting. Review Committee members asked several questions, with an eye toward determining the most effective use of available time for making recommendations regarding the revised regulations. Individual members noted concerns with the proposed revisions, including a narrowing of the definitions of national museum and scientific organizations, which was reflected in a recent nomination notice, and whether the Department has considered the increased funding that will be necessary to implement the revised regulations.

- Considered draft recommendations on the draft proposed regulations.
- Benefited from presentations by the UCLA School of Law and public comments by the Authentic Tribal Art Dealers Association, Seminole Tribe of Florida, and an individual.

The 82nd meeting of the Review Committee was held telephonically for four hours on May 9, 2022. During the meeting, the Review Committee:

- Deliberated and finalized a letter to Secretary Haaland which included specific recommendations to section 10.1, 10.10 (d), and 10.10 (e) of the draft proposed regulations. This letter was sent by the Committee chair on June 7, 2022.
- Committee members John Beaver, Honor Keeler, and Barnaby Lewis, whose terms on the committee were about to expire, offered recommendations for issues to be addressed in the Committee's FY2022 Report to Congress.
- Benefited from comments by Association of American Indian Affairs and three individuals.

Progress Made

Congress has charged the Review Committee with reporting annually on progress made and barriers encountered in NAGPRA implementation. We are pleased to report on the following progress in the implementation of NAGPRA.

1. **Senate Committee on Indian Affairs Hearing.** On February 2, 2022, the Senate Committee on Indian Affairs held an oversight hearing titled "The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act's Promise After 30 Years of Practice." Witnesses included representatives of the National Park Service, Government Accountability Office, Office of Hawaiian Affairs, National Association of Tribal Historic Preservation Officers, and Sealaska Heritage Institute. The representative of the National Association of Tribal Historic Preservation Officers subsequently presented her testimony to the Review Committee. The Review Committee is heartened to see the Congress continuing to actively exercise its oversight of implementation of NAGPRA.
2. **Passage of the Safeguard Tribal Objects of Patrimony Act (STOP Act).** Parallel versions of this bill were introduced in the House and Senate during the 117th Congress. H.R. 2930 was passed by the House on December 2, 2021, and by the Senate on November 29, 2022. Once

signed by the President, the STOP Act will increase the maximum penalty for trafficking of Native American cultural items, establish mechanisms to stop illegal export of Native American cultural items, facilitate the international repatriation of Native American cultural items, and establish a Federal network to support the voluntary return of Native American cultural items to Indian Tribes and Native Hawaiian organizations. The STOP Act establishes a Native American Working Group and directs this Review Committee to make efforts to provide information and assistance to it to facilitate repatriations; protect tangible cultural heritage; improve Federal agency implementation of NAGPRA, ARPA, and other laws; and advise on the voluntary return of Native American cultural items and elimination of illegal commerce of cultural items. The Review Committee looks forward to assisting the Native American Working Group in these tasks.

3. Cooperation and collaboration by Tribes, museums, Federal agencies, and organizations carrying out NAGPRA implementation. In FY2022, the Review Committee heard reports highlighting ongoing cooperation and collaboration among Tribes, museums, Federal agencies, and organizations involved in implementing NAGPRA. In one presentation to the Review Committee, representatives of the Pueblo Grande Museum, Bureau of Indian Affairs, Gila River Indian Community, and Salt River Pima-Maricopa Indian Community focused on their ongoing collaboration to recover 96 archaeological items that were originally recovered from lands controlled by the City of Phoenix and the Gila River Indian Community and which were subsequently improperly transferred to the Woolaroc Museum & Wildlife Preserve in Bartlesville, Oklahoma, which may not have received Federal funds.

4. Federal Indian Boarding School Initiative. On June 22, 2021, Secretary of the Interior Deb Haaland announced the initiation of the Federal Indian Boarding School Initiative to investigate the loss of life and lasting consequences of residential Indian boarding schools. The primary goal of the Initiative is to identify boarding school facilities and sites; the location of known and possible student burial sites located at or near school facilities; and the identities and Tribal affiliations of children interred at such locations. On May 11, 2022, the Department of the Interior released the first volume of its report. The report emphasized that the disinterment of the remains of children from burial sites located on Federal or Tribal land must comply with the NAGPRA.

Barriers to Overcome

A number of barriers to full implementation of NAGPRA were identified in FY2022.

1. Continued resistance by some institutions. A representative of the Bay Mills Indian Community identified resistance of some research institutions to carry out their NAGPRA responsibilities and asked the Review Committee to request that the Congress have the Government Accountability Office investigate the matter.

2. Conflicting estimates of the cost of repatriation. The Review Committee has

consistently requested that the Congress appropriate additional funding for implementation of NAGPRA since its first report to Congress in 1995. Representatives of Indian Tribes, Native Hawaiian organizations, and museums have consistently expressed the need for additional funding. 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) identified a lack of resources within Federal agencies dedicated to NAGPRA implementation as "one of the most significant challenges" to compliance with the Act. However, the Department of the Interior recently reported estimates that are largely consistent with current appropriations, and have indicated that proposed regulations requiring museums and Federal agencies to complete or revise inventories in consultation with Indian Tribes and Native Hawaiian organizations for over 100,000 Native American human remains and associated funerary objects within a 30-month period will not impose a significant economic impact on a substantial number of small entities. The Review Committee feels there is a need for accurate and impartial assessment of the overall costs of compliance with NAGPRA.

3. Sensitive information is currently unprotected. Of critical importance, sensitive information shared during NAGPRA consultations by lineal descendants, Indian Tribes, and Native Hawaiian organizations and in the possession of a Federal agency or museum may be released under the Freedom of Information Act. For example, it is not in the spirit of the law to create open opportunities for looters by disclosing specific information on burial locations. Ceremonial information could be shared in a consultation session but should not be released to the general public. The inability to keep sensitive information confidential should be considered a significant barrier to repatriation.

4. Staff Support. NAGPRA requires the Secretary of the Interior "to provide reasonable administrative and staff support necessary for the deliberations of the committee." There are numerous examples where the support provided did not meet this standard. The Review Committee's Report to Congress for FY2019 was finalized on October 3, 2019, but the Department did not send it to the Congress for 26 months. Similarly, the Committee's combined Report for FY2020 and FY2021 was withheld from the Congress for nearly seven months. Similarly, the Review Committees' repeated request for copies of comments on a draft proposal to revise existing regulations that were provided to the Department by Indian Tribes and Native Hawaiian organizations were denied. The Review Committee's deliberations on the draft proposed regulations were cut short after only reviewing two sections.

Recommendations to Congress

Based on its experience with both barriers and examples of progress, the Review Committee recommends the following Congressional actions (proposed revisions of statutory text shown with **redline** and **strikeout**).

1. Definitions (25 U.S.C. § 3001)

A. **Sacred Objects (25 U.S.C. § 3001 (3)(C))**. The Act defines “sacred objects” in terms of traditional Native American religions only. There is a need to expand the definition to make the important distinction that some practices are religious in nature and some are familial spiritual practices and not organized formally amongst the larger community or considered stately religions. For Hawaiians, these are ‘aumākua practices, which are ike pāpālua (spiritual communications) with deceased family members that were not considered part of the stately religion that were overthrown in circa 1819-1820 following the defeat of ‘aikapu (sacred eating). We request the Congress to amend the definition of “sacred objects” by adding this simple language as follows:

(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions or family spiritual practices by their present day adherents, and

B. **Native American (25 U.S.C. § 3001 (9))**. The most problematic definition in the Act is that of “Native American.” NAGPRA defines the term to mean “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” However, in 2004, the United States Court of Appeals for the Ninth Circuit interpreted the term “Native American” to require that human remains and other cultural items “must bear a significant relationship” to a **presently existing** Tribe, people, or culture to be considered Native American.³ Not only was this incorrect opinion antithetical to the purpose and policy underlying NAGPRA, it necessitated passage of separate legislation to enable reburial of the 9,000-year-old human remains at issue in the case, and it created ambiguity which, in at least one case, has led to an acquittal in a NAGPRA trafficking case.⁴ In order to address this issue, the Committee recommends that Congress amends NAGPRA's definition of “Native American” to read as follows:

(9) “Native American” means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.

C. **Hui Malama I Na Kupuna O Hawai‘i Nei (25 U.S.C. § 3001 (6))**. NAGPRA names and defines “Hui Malama I Na Kupuna O Hawai‘i Nei” as a Native Hawaiian organization qualified to conduct repatriation on behalf of Native Hawaiians. In January 2015, the organization voluntarily and formally dissolved itself under the laws of the State of Hawai‘i, as directed by the organization’s founder. The organization was succeeded by the Native Hawaiian organization Hui Iwi Kuamo‘o whose leadership and membership is the same as the leadership of Hui Malama I Na Kupuna O Hawai‘i Nei. We request that the Congress repeal all references to this organization from the NAGPRA and replace it with “Hui Iwi Kuamo‘o,” its successor organization. The definition should read as follows:

(6) “Hui Iwi Kuamo‘o” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawai‘i by that name on July 21, 2022, for the purpose of succeeding to Hui Mālama I Nā Kūpuna O Hawai‘i Nei and thereby providing guidance, expertise and ceremonial practice in Native Hawaiian cultural issues, particularly repatriation and reburial

³ *Bonnichsen v. United States*, 367 F.3d 864, 878 (9th Cir. 2004) (emphasis in original).

⁴ *U.S. v. Deluca*, No. 00 CR 387 (N.D. Ill. Mar. 6, 2002).

issues.

D. **Native Hawaiian Organization (25 U.S.C. § 3001 (11)).** The Act defines “Native Hawaiian organization” by naming two such organizations, both of whom are requested to be repealed (see above). In addition, concerns about a museum asserting itself as a Native Hawaiian organization necessitates the need to establish an explicit prohibition. This is based upon an episode in which William Brown, then Director of the Bernice Pauahi Bishop Museum, attempted to assert that the museum is a Native Hawaiian organization for purposes of NAGPRA. The museum’s board of directors opposed Brown’s misguided attempt. The lesson here is the need for a legal prohibition. First, we request the Congress to delete all references to the “Office of Hawaiian Affairs” and “Hui Malama I Na Kupuna O Hawai’i Nei” and replace with the “Hui Iwi Kuamo’o”, as explained above. Second, we request the Congress to add a prohibition of any museum or government agency from asserting itself as a Native Hawaiian organization, as follows:

(11) "Native Hawaiian organization" means any organization which—
(A) serves and represents the interests of Native Hawaiians,
(B) has as a primary and stated purpose the provision of services to Native Hawaiians, ~~and~~
(C) has expertise in Native Hawaiian Affairs, and shall include the ~~Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei Hui Iwi Kuamo'o, and~~
(D) does not include any museum or agency or subdivision of the State of Hawai'i or the United States.

E. **Office of Hawaiian Affairs (25 U.S.C. § 3001 (12)).** The Act names and defines the “Office of Hawaiian Affairs” as a Native Hawaiian organization qualified to conduct repatriation on behalf of Native Hawaiians. In 2000, the U.S. Supreme Court decided *Rice v. Cayetano*, (528 U.S. 495 (2000)), in which it ruled that the State could not restrict eligibility to vote in elections for the Board of Trustees of the OHA to persons of Native Hawaiian descent. In its analysis, the High Court essentially determined that the OHA is a State agency. As a result, OHA leadership is elected by a majority of non-Hawaiians. In addition, OHA has in the past and continues to receive Federal funding. The legal conundrum created is that should OHA conduct repatriation under the NAGPRA and come into possession and control of cultural items subject to the NAGPRA, it would itself in turn be subject to NAGPRA notification requirements and claims by lineal descendants and Native Hawaiian organizations creating a double repatriation scenario. We request the Congress to correct this conundrum by repealing the definition and all references to the “Office of Hawaiian Affairs”.

F. **Right of Possession (25 U.S.C. § 3001 (13)).** The Act defines “right of possession” to apply to unassociated funerary objects, sacred objects and cultural patrimony and limits its application to human remains and associated funerary objects. There is a need to recognize that a funerary status is perpetual and cannot change. As long as an object is funerary, it cannot be owned by the living. It is also haumia (defiled) given its prior association with the dead. We request the Congress to amend the definition of “right of possession” to extend the limitation to unassociated funerary objects in addition to human remains and associated funerary objects, as follows:

(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American ~~unassociated funerary object~~, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the

*phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains, ~~and~~ associated funerary objects, **and unassociated funerary objects** which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.*

2. Ownership (25 U.S.C. § 3002)

The ownership provisions apply to the discovery, removal, or excavation of Native American cultural items on Federal lands and Tribal lands after 1990. NAGPRA and its implementing regulations require persons who discover Native American human remains or other cultural items on Federal or Tribal lands to immediately stop any ongoing activity and provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal land manager. The Federal land manager then must notify the appropriate Indian Tribes or Native Hawaiian organizations and begin consultation about the disposition of cultural items and complete a plan of action. The activity that resulted in the inadvertent discovery may resume thirty days after certification by the Federal land manager of receipt of the written confirmation of notification, or sooner if a written, binding agreement is executed between the Federal agency and the appropriate Indian Tribes or Native Hawaiian organizations. Discovered human remains or other cultural items may only be removed or excavated after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, or, in the case of Tribal lands, with the consent of the appropriate Indian Tribe or Native Hawaiian organization. The excavation or removal of cultural items must also comply with the requirements of the Archaeological Resources Protection Act (ARPA). NAGPRA provides a detailed priority listing to determine the ownership or control of discovered or excavated Native American human remains and other cultural items based on lineal descent, Tribal land, cultural affiliation, and aboriginal land. To date, only 221 discoveries and excavations of Native American human remains and other cultural items had occurred on Federal lands,⁵ indicating that NAGPRA has been somewhat successful in fulfilling its grave protection mandate.

NAGPRA sets standards for the disposition of human remains and other cultural items discovered on Federal lands that are recognized by a final judgement of the Indian Claims Commission or the United State Court of Federal Claims.⁶ This Committee has adopted this standard in its recommendations regarding the disposition of culturally unidentifiable human remains in museum or Federal agency collections, but elaborated on the basis for determining aboriginal lands. The current regulations allow aboriginal lands to also be determined by a treaty, Act of Congress, or Executive Order.⁷

A. In order to bring the ownership and repatriation provisions in line, we request that the Congress amend the provisions of 25 U.S.C. § 3002 (a)(2)(C) to read as follows:

if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims

⁵ National NAGPRA Program, Fiscal Year 2022 Report.

⁶ 25 U.S.C. § 3002 (a)(2)(c).

⁷ 43 CFR § 10.11 (c)(1)(ii).

Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order as the aboriginal land of some Indian Tribe—

The ownership section has proved the most prone to litigation, due in part to the brevity of the statutory provisions, as well as the lack of any institutionalized form of alternative dispute resolution. The Committee has heard that in many cases Federal agency officials are failing to adequately consult with Indian Tribes following inadvertent discoveries and are failing to complete the plans of action required by regulation.

B. To get a better grasp of Federal compliance with NAGPRA's provisions protecting Native American graves and cultural items, we ask the Congress to:

request the Government Accountability Office to complete an evaluation of Federal agency compliance with the requirements of 25 U.S.C. § 3002 and its implementing regulations, particularly focusing on: consultation; completion of plans of action and comprehensive agreements; publication of notice of intended disposition; the disposition of so-called "unclaimed" cultural items; the protection of burial sites and cultural items located on private lands within the exterior boundary of an Indian Reservation or on lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86–3, including the required issuance of ARPA permits; and whether establishing a dedicated position to ensure compliance with these provisions at each agency would be beneficial.

3. Repatriation of Cultural Items in Federal Agency and Museum Collections (25 U.S.C. §§ 3003-3008)

The repatriation provisions of NAGPRA require Federal agencies and museums that receive Federal funds to prepare written summaries of cultural items and more detailed inventories of Native American human remains and associated funerary objects in their possession or control, consult with Indian Tribes and Native Hawaiian organizations and, upon request, repatriate cultural items. To date, nearly 209,000 Native American ancestors have been inventoried, of which museums and Federal agencies have indicated a willingness to repatriate approximately 48%.⁸ One of the responsibilities of this Committee was to compile an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommend specific actions for developing a process for disposition of such remains. After long discussions, development of several drafts, and extensive public consultation, this Committee issued its recommendations in 2000.⁹ The Committee noted that although the legal standing of funerary objects associated with culturally unidentifiable human remains is not addressed in NAGPRA, the statute does not prohibit their voluntary repatriation by museums or Federal agencies to the extent allowed by Federal law. Regulations implementing the Committee's recommendations were promulgated in 2010.¹⁰ The regulations require museums and Federal agencies that cannot prove right of possession to offer to transfer control of culturally unidentifiable human remains to the Indian Tribe or Native Hawaiian organization from whose Tribal land, at the time of the

⁸ 2022 Native American Graves Protection and Repatriation Act. https://public.tableau.com/app/profile/nationalnagpra/viz/2022NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed November 29, 2022).

⁹ Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36462 (June 8, 2000).

¹⁰ See 43 CFR § 10.11- Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains; Final Rule, 75 Fed. Reg. 12377 (Mar 15, 2010).

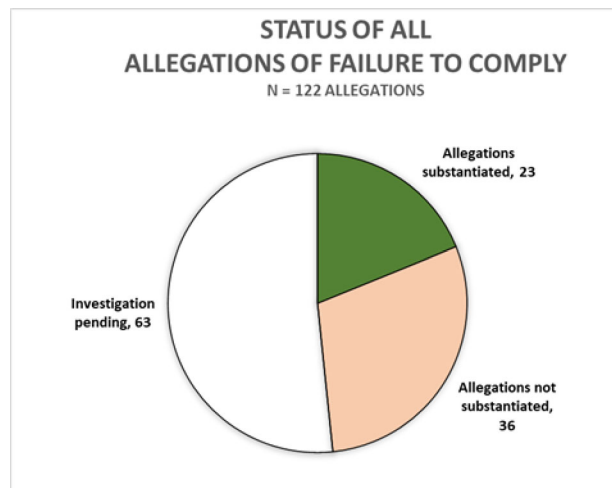
excavation or removal, the human remains were removed, or to the Indian Tribe or Tribes that are recognized as aboriginal to the area from which the human remains were removed. The regulations also recommend that a museum or Federal agency transfer control of funerary objects that are associated with culturally unidentifiable human remains if Federal or State law does not preclude it. The Committee feels strongly that Native American funerary objects in museum or Federal agency collections should be returned along with Native ancestors with which they were lovingly buried.

We request that the Congress amend the Committee’s responsibilities at 25 U.S.C. § 3006 (c) as follows to explicitly authorize a requirement that human remains and associated funerary objects be returned together:

(5) compiling an inventory of culturally unidentifiable human remains and associated funerary objects 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 and objects;

4. Civil Penalties

NAGPRA authorizes the Secretary of the Interior to assess civil penalties on museums that fail to comply with the repatriation provisions of the Act. Information finally provided by the National Park Service after a five year hiatus shows that, to date, 20 museums have failed to comply, three twice, and that \$59,111.34 in penalties were collected. For ten of the allegations the penalty was waived. The National Park Service also indicates there is a backlog of allegations against another 63 museums that have not been investigated. No failures to comply have been determined since 2016.



The Committee is very concerned that civil enforcement of NAGPRA has been carried out without any degree of public scrutiny, that the penalties assessed are typically mitigated or unknown, and that since 2016 it appears to have completely stopped. We ask the Congress to:

request the Government Accountability Office to complete an evaluation of the implementation of the civil enforcement provisions of NAGPRA and its implementing regulations, particularly focusing on ensuring that all allegations are adequately investigated in a timely manner, that the full range of penalties detailed in statute are considered, whether the alternative method for

calculation and mitigation of penalties outlined in the current regulations has been effective, and that the results of these investigations are publicly known.

5. Grant Funding

NAGPRA authorizes the Secretary of the Interior to make grants to Indian Tribes and Native Hawaiian organizations for the purpose of assisting such Tribes and organizations in the repatriation of Native American cultural items, and to museums for the purpose of assisting the museums in conducting the inventories and summaries.¹¹ Grant funding may not be used for the initiation of new scientific studies of Native American human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.¹² In 1990, the Congressional Budget Office estimated that NAGPRA would cost the Federal Government between \$20 and \$50 million.¹³ At the end of FY2022, \$56 million in grants had been awarded,¹⁴ yet the remains of over 108,000 Native American ancestors still sit on museum and Federal agency shelves.¹⁵

This Committee has consistently recommended in its Report to Congress that funding for NAGPRA grants be increased. Indian Tribes, Native Hawaiian organizations, and museums point out that the cost for complying with NAGPRA far exceed the available grant appropriation and the maximum grant cap ensures that progress towards repatriation is piecemeal and slow. Some Tribes have also expressed concern that some museums may be using grant money to acquire and preserve additional scientific information on human remains and associated funerary objects. However, in FY2022, the Department of the Interior submitted estimates to the Office of Management and Budget indicating that the annual burden to all museums was only \$223,304,¹⁶ and that the burden to museums to meet the requirements outlined in the proposed regulations published on estimates the total of all costs, including dealing with excavations and discoveries on Federal and Tribal lands; consulting, completing summaries and inventories, and publishing repatriation notices; and the functions of the Review Committee, at \$2,438,032 per year.¹⁷ Several museums, national scientific and museum organizations, and individuals have challenged the Department's estimates as unreasonably low. In order to get a better grasp of the true costs of complying with NAGPRA, we ask the Congress to request the Government Accountability Office to:

- A. complete a comprehensive evaluation of the NAGPRA grant program, particularly focusing on how funding has been used in the past, identifying which of those activities can be shown to most directly result in the repatriation of Native American human remains and cultural items, and make suggestions as to how the grants may be most effectively used to maximize repatriation; and

¹¹ 25 U.S.C. § 3008.

¹² 25 U.S.C. § 3003 (b)(2).

¹³ Letter from Robert D. Reischauer, director, Congressional Budget Office to Representative Morris Udall (October 15, 1990).

¹⁴ National NAGPRA Program, Fiscal Year 2022 Report.

¹⁵ 2022 Native American Graves Protection and Repatriation Act.

https://public.tableau.com/app/profile/nationalnagpra/viz/2022NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed November 29, 2022).

¹⁶ Office of Management and Budget, Information Collection Review 202202-1024-0144, Supporting Statement A for Paperwork Reduction Act Submission (April 11, 2022).

¹⁷ National Park Service. Cost-Benefit and Regulatory Flexibility Threshold Analyses: Native American Graves Protection and Repatriation Act Proposed Revisions (2022).

B. compile data from all Indian tribes, Native Hawaiian organizations, museums, and Federal agencies to get a realistic estimate of the actual costs of implementing the proposed regulations.

6. Native Hawaiian Traditional Religious Leaders (25 U.S.C. 3006 (b)(1))

NAGPRA mandates the Secretary of the Interior to establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities and sets criteria for nominations to come from Indian Tribes, Native Hawaiian organizations, and traditional Native American religious leaders; national museum organizations and scientific organizations; and from the Review Committee members themselves. An apparent drafting error has been interpreted by the Department of the Interior to yield the absurd result that Native Hawaiian organizations may nominate traditional religious leaders from Indian Tribes, but not their own Native Hawaiian traditional religious leaders. We request that the Congress amend the criteria at 25 U.S.C. § 3006 (b)(1)(A) to allow Native Hawaiian traditional religious leaders to be considered by the Secretary for appointment to the Review Committee:

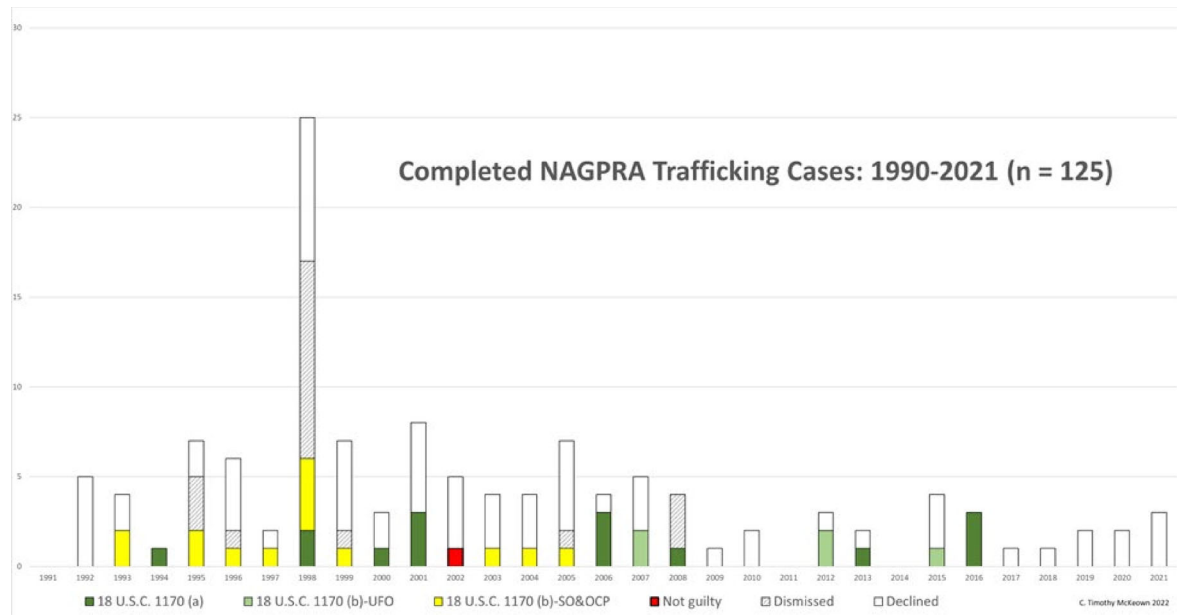
(b) Membership. (1) The Committee established under subsection (a) shall be composed of 7 members, (A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional ~~Indian~~ Native American religious leaders;

7. Illegal Trafficking in Native American Human Remains and Cultural Items (18 U.S.C. § 1170)

The criminal provisions of NAGPRA make it a crime to knowingly sell, purchase, use for profit, or transport for sale or profit Native American human remains or cultural items under certain conditions. For human remains, law enforcement must prove beyond a reasonable doubt that the financial incident occurred without the right of possession, meaning that the defendant cannot show that the human remains were obtained with the voluntary consent of an individual or group that had authority of alienation. Proving illegal trafficking of cultural items is more complicated. Law enforcement must prove beyond a reasonable doubt that the financial incident violated NAGPRA, meaning that the cultural items were either removed from Federal or Tribal lands without a permit, or were obtained from a Federal agency or museum that failed to comply with the repatriation provisions of NAGPRA. Data from the Department of Justice and the United States Courts¹⁸ indicates that, through 2021, 125 investigations of illegal trafficking of Native American human remains and cultural items have been opened resulting in 34 convictions.

¹⁸ Data compiled by C. Timothy Mckeown from the Office of the United States Attorneys, National Caseload Data, FY2021 Data Files, and Pacer.gov

Native American Graves Protection and Repatriation



These data indicate that convictions for trafficking of Native American human remains under 18 U.S.C. 1170 (a) and funerary objects under 18 U.S.C. § 1170 (b) are relatively infrequent but have continued since NAGPRA was enacted. Convictions for trafficking of Native American sacred objects and objects of cultural patrimony under 18 U.S.C. § 1170 (b) are limited to 1993 to 2005, and further all were convicted in the United States District Courts for the Districts of New Mexico, Arizona, and Utah. The single not guilty verdict in 2004 stands out. Several factors seem to be responsible for this pattern. First, 18 U.S.C. § 1170 (b) convictions requiring proof that the cultural items were obtained in violation of NAGPRA are just more difficult. Second, the not guilty verdict in 2004 seems to reflect a chilling effect of the Ninth Circuit’s interpretation of the definition of “Native American” in *Bonnichsen*. Third, the localization of convictions for illegal trafficking of Native American sacred objects and objects of cultural patrimony correlates with the activities of the Four Corners Interagency ARPA Task Force in the early 1990s and the continued activities of the law enforcement personnel involved in that project into the early 2000s. Last, during the 2010s, auctions of Native American sacred objects and objects of cultural patrimony appear to have moved outside of the United States, primarily to France. Addressing this pattern requires a multi-faceted approach. We note that Congress has already taken the first step in addressing this issue by passing the Safeguard Tribal Objects of Cultural Patrimony Act which increases penalties for both first-time and repeat traffickers and implements export restrictions to stop the illegal export of Native American sacred objects and objects of cultural patrimony.

- A. We recommend that Congress include the \$3 million in the FY2024 and subsequent budgets for implementation of the STOP Act, as estimated by the Congressional Budget Office.
- B. Second, we ask the Congress to amend the definition of “Native American” as previously shown to provide a uniform and clear standard for the prosecution of trafficking cases.
- C. Third, we request the Congress to amend 18 U.S.C. § 1170 requiring the Government to show beyond a reasonable doubt that trafficked human remains and other cultural items were obtained without right of possession:

~~(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains or other cultural items of a Native American without the right of possession to those remains or items as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 1 year and 1 day, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 10 years, or both.~~

~~(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than 1 year and 1 day, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 10 years, or both.~~

D. Fourth, we request that the Congress establish and fund an interagency investigative effort like the Four Corners ARPA Task Force that will focus specifically on stopping illegal trafficking of Native American human remains and cultural items.

Taken together, these four actions will clarify the statutory prohibition, provide the necessary expertise to investigate offenses, and chill the overseas market for Native ancestors and sacred objects.

8. Exemption from Disclosure of Culturally Sensitive Information

Many Tribes have expressed concern that culturally sensitive information they provide to Federal agencies and museums during the consultation process must be disclosed upon request under provisions of the Freedom of Information Act. The Committee recommends amending NAGPRA to protect culturally sensitive information identified by traditional religious leaders, lineal descendants, Indian Tribes, or Native Hawaiian organizations as provided under exemption (b)(3) of the Freedom of Information Act.

9. Administrative Placement of NAGPRA Implementation Responsibilities

In 2020, then-Representative Haaland introduced H.R. 8298 to amend NAGPRA. One of her key proposals was to redelegate enforcement and other activities previously assigned to the National Park Service to the Office of the Assistant Secretary for Indian Affairs. NAGPRA is clearly Indian law, not only is it enshrined under Title 25 of the United States Code, but Indian Tribes are the obvious and primary beneficiaries. Implementation of NAGPRA should be administered accordingly and not under the rubric of “cultural resources.” We recognize that Secretary Haaland has the authority to implement this redelegation by means of Secretarial Order with follow-up revision of the Departmental Manual. If, for some reason, this change is not implemented in a timely fashion, we request that Congress amend 25 U.S.C. § 3013 as follows:

25 U.S.C. § 3013. Implementation and Enforcement (a) The Office of the Assistant Secretary for Indian Affairs shall be the office for implementation and enforcement and other activities delegated by the Secretary. (b) The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.

10. NMAI Act Judicial Jurisdiction and Enforcement

An additional issue we request that the Congress consider is the process for the return of Native American sacred objects and objects of cultural patrimony from the Smithsonian Institution. At least one group of Indian Tribes has unsuccessfully tried to recover such items from the National Museum of Natural History and has exhausted their administrative appeals, despite a unanimous recommendation to repatriate from the Smithsonian's own repatriation advisory committee. In such a situation under NAGPRA, an Indian Tribe would be able to challenge the failure to repatriate such cultural items to the United States District Courts (25 U.S.C. § 2013). However, the NMAI Act does not include a similar grant of jurisdiction.

The Committee recommends amending the NMAI Act to add the following provision:

20 U.S.C. § 80 q-16. Jurisdiction and Enforcement. The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

11. Report to Congress.

NAGPRA requires this committee to submit an annual report to the Congress on progress made and barriers encountered in implementing this section during the previous year.¹⁹ The scope of the Committee's activities generally focuses on inventory and identification of the Act, but also includes duties specifically related to NAGPRA as a whole.²⁰ In the past, the committee has interpreted this charge broadly to include many issues not only arising under NAGPRA but similar repatriation issues under other statutes. Most notably, the committee's annual report for FY1994 highlighted the need to amend the National Museum of the American Indian Act to establish a deadline for completing inventories and expanding the statute to also cover unassociated funerary objects, sacred objects, and objects of cultural patrimony, changes that were eventually enacted by Congress. The Committee's report to Congress for FY2021 recommended passage of the Safeguard Tribal Objects of Patrimony Act which was eventually passed by Congress and recently signed into law by President Biden. We hope these recommendations have been helpful to the Congress. Recently, some have suggested that several of the recommendations in this report to be outside of our jurisdiction. The language of the Committee's charge may be open to interpretation, and it would be useful to eliminate confusion. In order to clarify this matter, we request that Congress amends 25 U.S.C. 3006 (h) as follows:

The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing ~~this section~~ the Act and related matters during the previous year.

¹⁹ 25 U.S.C. 3006 (a).

²⁰ 25 U.S.C. 3006 (c)(7).

National NAGPRA Program Statistics

NAGPRA At-A-Glance

Fiscal Year 2022

215	notices published in the Federal Register
10	Review Committee meetings
0	letter alleging failure to comply received
\$2.1	million awarded for grants
\$72,505	6 repatriation grants
\$2,084,495	24 project grants

NAGPRA collections increased – the number of human remains reported in NAGPRA inventories increased by 6,445 individuals.

NAGPRA activity increased – the number of human remains that have completed the regulatory process grew by nearly 19%.

NAGPRA funding increased –available grant funds increased to \$2.1 million.

More NAGPRA work needed – Over 108,000 Native American individuals are still in collections and 94% of those have not been culturally affiliated with any present-day Indian tribe or NHO. Cultural affiliation studies and in-depth consultations could resolve the rights to many of these individuals.

NAGPRA Accomplishments FY 1990 – FY 2022

92% of culturally affiliated human remains have completed the NAGPRA process.

Over 1.86 million associated funerary objects have been transferred with human remains.

31% of museums subject to NAGPRA have resolved all Native American human remains under their control.

More than 353,000 unassociated

funerary objects have been repatriated.

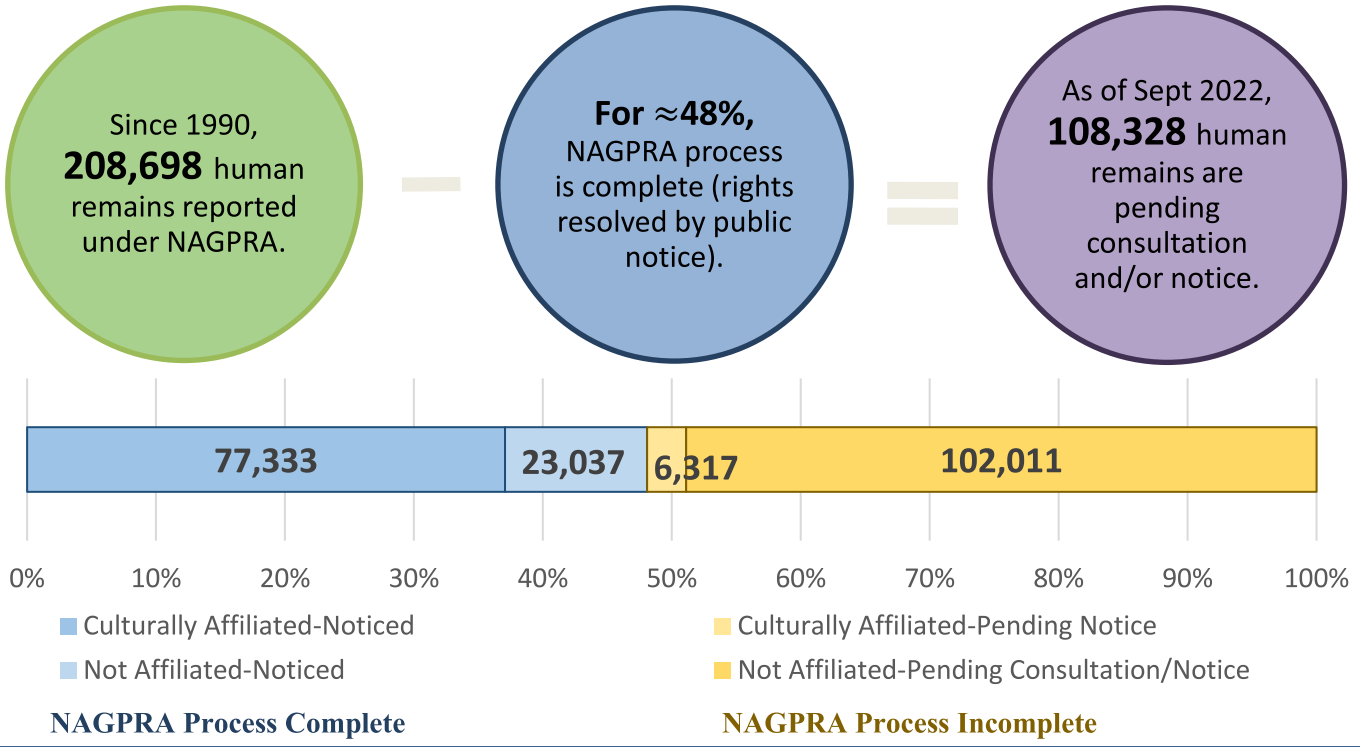
About 22,600 other cultural items have been repatriated.

82 Review Committee meetings have been held between FY 1990-FY 2022.

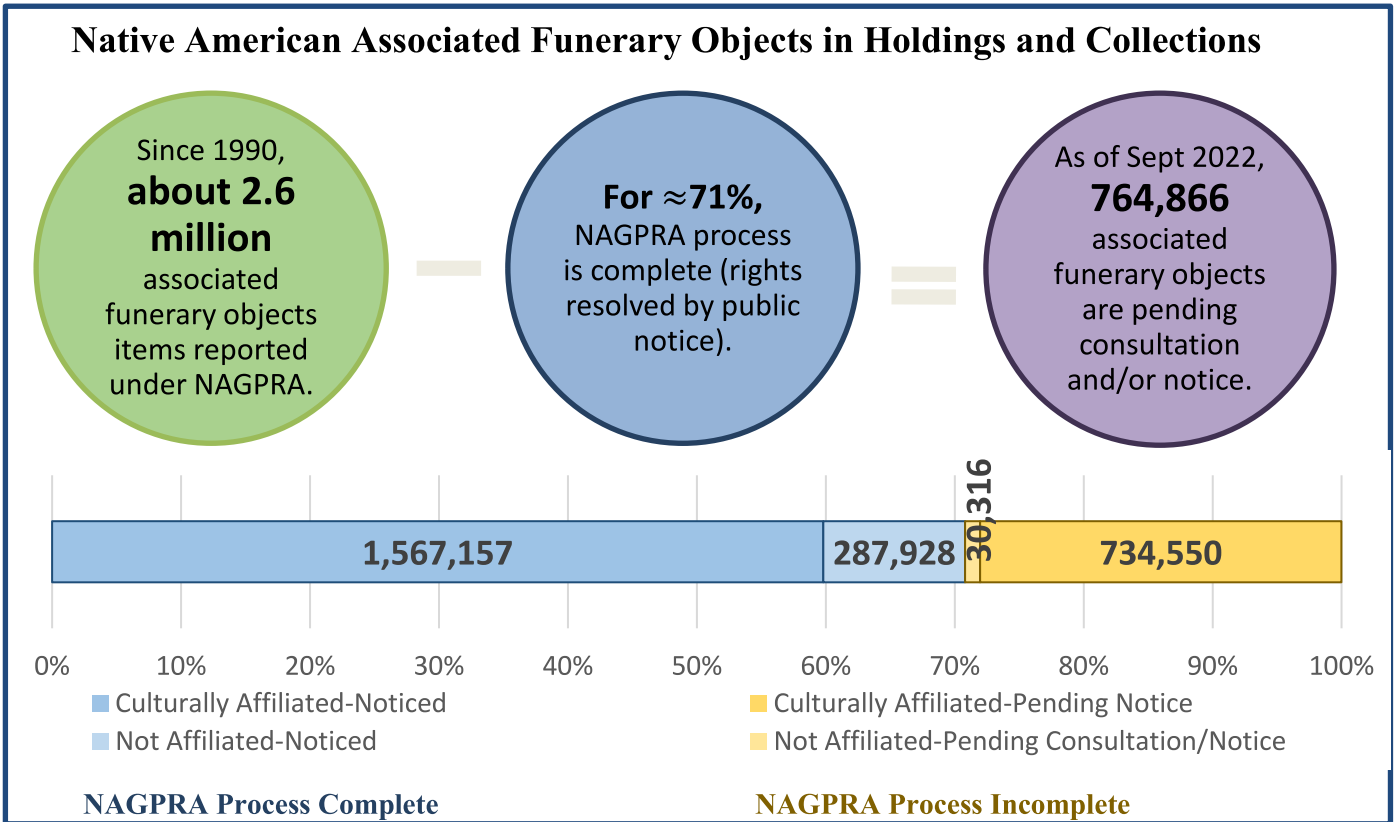
\$59,111 has been collected in civil penalties for failures to comply.

\$56 million has been awarded in NAGPRA grants.

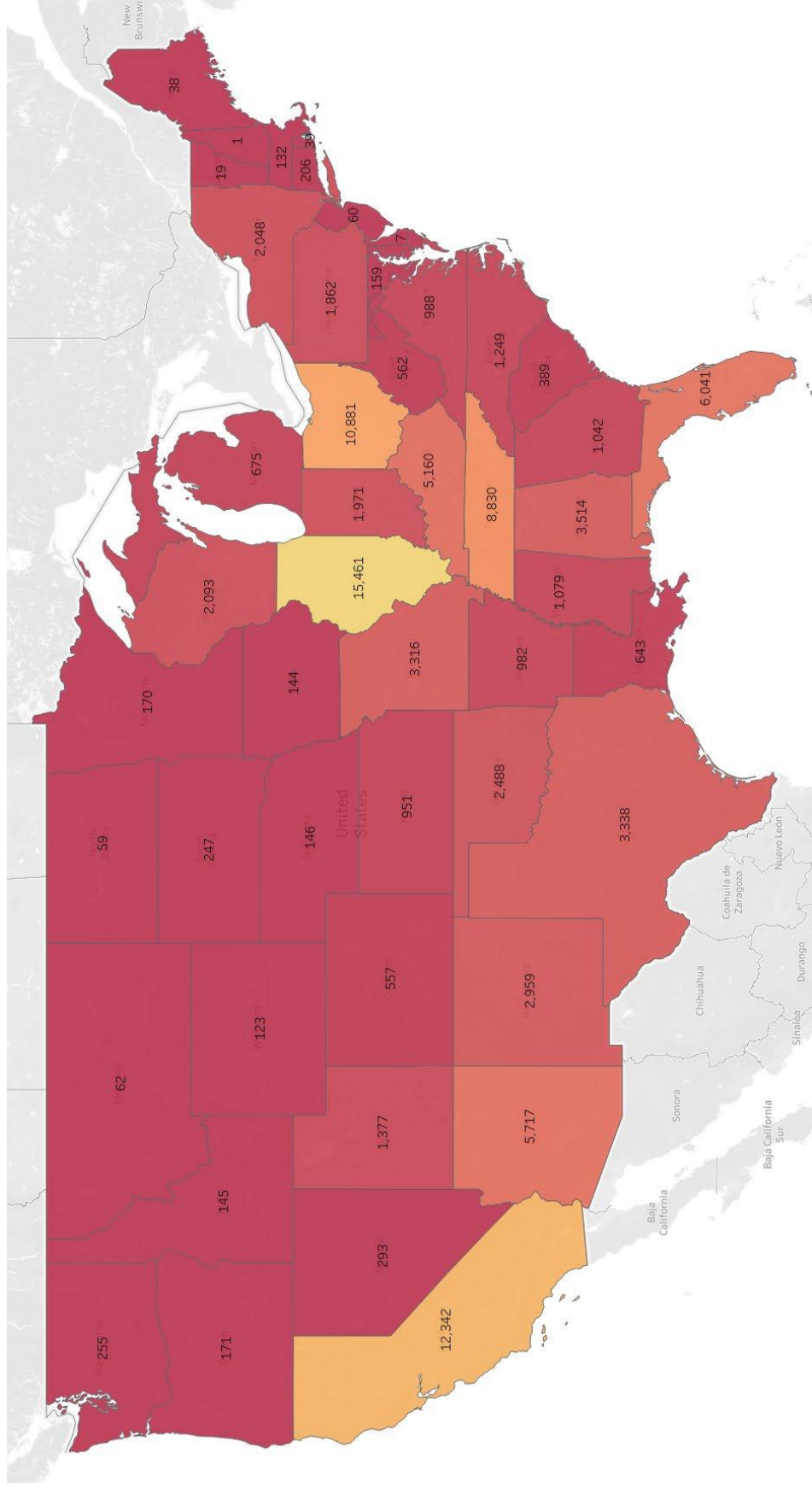
Native American Human Remains in Holdings and Collections



Native American Associated Funerary Objects in Holdings and Collections



Sets of Native American human remains by state of removal/excavation.
Showing the **108,328** human remains in holdings and collections as of Sept 2022.



Sets of Native American individuals by institution/Federal agency.

20 largest holdings or collections as of Sept 2022.

Univ. of California, Berkeley	9,062
Illinois State Museum	7,590
Ohio History Connection	7,167
Harvard University	6,484
Indiana University	4,838
Univ. of Tennessee, Knoxville	4,154
Univ. of Kentucky	3,713
Tennessee Valley Authority	3,284
Univ. of Alabama Museums	2,952
Univ. of Florida, Florida Museum of Natural ..	2,589
Univ. of Arizona, Arizona State Museum	2,471
Univ. of Missouri, Columbia, Museum of Ant..	2,451
Univ. of Oklahoma, Sam Noble Oklahoma M..	2,367
Center for American Archeology, Kampsvill..	1,947
American Museum of Natural History	1,938
Univ. of Texas at Austin, Texas Archeologic..	1,909
Milwaukee Public Museum	1,600
Florida Dept. of State	1,426
U.S. DOD, Army Corps of Engineers	1,352
Field Museum	1,324