

**Native American Graves Protection and Repatriation
Review Committee
Report to the Congress for 2009**

Native American Graves Protection and Repatriation Review Committee

Summary of the Report to the Congress for 2009

The Native American Graves Protection and Repatriation Review Committee submits its 2009 Report to Congress on the implementation of NAGPRA for the calendar year 2009. Highlights of this report are:

39th Meeting of the Review Committee – Seattle, Washington, May 23-24, 2009

- Considered requests for recommendations to the Secretary for disposition of 200 culturally unidentifiable Native American human remains
- Requested that the DFO seek to have the Secretary of the Interior restore the holdover and quorum provisions in the charter at the next opportunity
- Received a presentation from the National NAGPRA Program Grants Coordinator of “Journeys to Repatriation: 15 Years of NAGPRA Grants” (attached to this report), as well as National NAGPRA Program reports on progress statistics and civil penalty enforcement

40th Meeting of the Review Committee – Sarasota, Florida, October 30-31, 2009

- Made findings of fact upon request from the Western Apache NAGPRA Working Group, related to the identify of 45 items listed by the American Museum of Natural History in its NAGPRA notices as “cultural items,” and instead found each of the items to be “sacred objects” and objects of “cultural patrimony.”
- Considered requests for recommendations on agreements for disposition of culturally unidentifiable Native American human remains.

Progress Made in Implementing NAGPRA noted by the Review Committee in 2009

- The number of agreements for disposition of culturally unidentifiable Native American human remains brought to the Review Committee signals progress in disposition
- NAGPRA notices published in the Federal Register are an indicator of progress and for 2009 hit an all time annual high point of 200 for the year.
- The 2009 notices reflect 1,531 individuals, 214,902 associated funerary objects, 6,712 unassociated funerary objects, 532 sacred objects, 567 objects of cultural patrimony and 16 objects that were both sacred objects and objects of cultural patrimony.

Barriers Encountered in Implementing NAGPRA noted by the Review Committee in 2009

- 1. Staffing to investigate civil penalty allegations is inadequate
- 2. Funding for NAGPRA training and education is insufficient
- 3. The NAGPRA grants appropriation is insufficient
- 4. The “90-day Rule” for repatriation is unclear
- 5. Notice requirements that allow general designation as “cultural items” is unfair and hurtful to Indian tribes and Native Hawaiian organizations

Recommendations

1. \$350,000 should be appropriated for three additional staff to process NAGPRA notices, which will increase in the coming years due to the new culturally unidentifiable regulation.
2. Increase the NAGPRA grants appropriation to \$4.2 million for tribes and museums.
3. The Secretary of the Interior should:
 - Track the status of effects of Review Committee recommendations
 - Clarify the “90-day Rule,” for repatriation to occur from receipt of a request
 - Provide detailed steps on the requirements for alleging a failure to comply with NAGPRA

Native American Graves Protection and Repatriation Review Committee Report to the Congress for 2009

Introduction

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

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

This report is prepared and submitted to Congress, as required by NAGPRA, to identify progress made and barriers encountered in implementing the summary, inventory, and repatriation requirements of the Act. Included in this report are recommendations made by the Review Committee to help facilitate the NAGPRA process between museums, federal agencies, tribes and the administration of the National NAGPRA Program.

Review Committee Activities

This report summarizes the Review Committee's activities for calendar year of 2009. The Review Committee's activities are prescribed by the Review Committee's charter and Act.

The full Review Committee convened twice. These in-person meetings occurred on May 23-24, 2009, in Seattle, Washington, and on October 30-31, 2009, in Sarasota, Florida. In addition, a telephonic meeting of the statutory subcommittee of the Review Committee convened telephonically, on June 8, 2009, in order to develop an agreed-to list of persons from which the Secretary of the Interior would appoint the seventh member.

In 2009, the Review Committee had several changes in membership from the previous year. One nominee from a scientific organization, Sonya Atalay, and two nominees from Indian tribes, Eric Hemenway and Mervin Wright, Jr., were appointed by the Secretary. Colin Kippen, the

consensus member, served as Chair for the May meeting. His term ended, and Rosita Worl became the new consensus member in time to attend the October meeting. Dan Monroe served as chair for the October meeting. Traditional Indian religious leader Donna Augustine was absent at the May meeting, and science organization member Alan Goodman was absent at the October meeting.

Summary of Meetings and Activities

The 39th meeting of the Review Committee was held in Seattle, Washington, on May 23-24, 2009. Meetings are held at various locations throughout the United States to give tribes, federal agencies and museum staff the opportunity to make in-person presentations to the Review Committee and otherwise participate in the meetings. Often, such presentations represent several years of hard work among tribes, museums, and federal agencies that has culminated in a resolution regarding sensitive issues of repatriation. As has been the case for the last several years, the bulk of the agenda at the May meeting was devoted to requests for a recommendation to the Secretary of the Interior regarding the disposition of culturally unidentifiable individuals (CUI). This process has allowed the transfer of thousands of CUI to tribes to occur. While many museums and federal agencies waited for the CUI regulation (43 C.F.R. 10.11) to be published as a final rule, museums and federal agencies were collaborating with tribes across the country to reach agreements for the transfer of CUI, and using the Review Committee's process for recommending disposition to the Secretary with great success.

Museums and federal agencies, with the agreement and participation of multiple tribes in Colorado, New Mexico, Utah, Nebraska, and Michigan presented disposition requests to the Review Committee at the May meeting. Every request received a recommendation for disposition from the Review Committee to the Secretary of the Interior. From this meeting alone, the remains of over 200 individuals were included in those recommendations.

The Review Committee discussed the issue of its charter being changed by the by Department of the Interior in 2008, without the prior knowledge of Review Committee members and the National NAGPRA Program. Both the quorum and holdover provision were taken out of the charter. Both of these amendments were seen as counterproductive by the Review Committee, which stressed the importance of reinstating both the holdover and quorum provisions, in order to help present a full, fair and well-represented Review Committee at future meetings.

The Review Committee heard presentations from the National NAGPRA Program's Grants Coordinator, Sangita Chari, on the progress made under the grants program for the last 15 years and what improvements could be made to improve the grants program as a tool for supporting the consultation and repatriation/disposition process. As 2008 marked the 15th year of the NAGRPA grants program, a retrospective was prepared by the National NAGPRA Program, *Journeys to Repatriation: 15 years of NAGPRA Grants*, and has been included with this report. It explains the importance of NAGPRA grants and how they can positively impact Native

communities and museums alike. In addition, this retrospective demonstrates how grants can help implement NAGPRA on multiple levels.

The National NAGPRA Program also presented its mid-year report to the Review Committee at the May meeting. Program Manager Sherry Hutt made this presentation. These reports are very helpful to the Review Committee, as they provide insight into the progress, problems and barriers the National NAGPRA Program observes museums, tribes and Federal agencies encountering in their administration of NAGPRA process. Many of the concerns voiced by Dr. Hutt are a reflection of the concerns shared by tribes and museums, such as inadequate funding and a need to significantly increase training. The periodic Program reports provide statistics of incremental progress made on notice publication, civil penalty investigation and training.

At the May Review Committee, the Civil Penalty Investigator, Bob Palmer, made a presentation to the Review Committee about his duties under NAGPRA. Despite a significant backlog of civil penalty allegations, the National NAGPRA Program lacks the funding to have a full time Civil Penalty Investigator. The Review Committee was dismayed to find that Mr. Palmer's position is not a full-time one and that, in fact, he can only devote approximately 20% of his time to investigating allegations of museum failure to comply with the requirements of NAGPRA. This is a woefully inadequate amount of time for such an important task. The Review Committee senses that the understaffing of civil penalty investigation has caused tribes to feel that submitting written allegations against museums is useless. Thus, the lack of manpower dedicated to pursuing allegations has had a chilling effect on filing such allegations. The Review Committee strongly recommends that more funds be authorized to support a full-time position for the investigation of civil penalties.

As with all previous Review Committee meetings, public comment was heard at the end of second day from museum representatives, federal agency staff, tribal representatives and private citizens. All Review Committee meetings are open to the public. At the May meeting, the majority of presenters were museum and federal agency staff, and they provided updates on the progress on NAGPRA implementation that has been made at their respective institutions. The Review Committee found these presentations to be very encouraging.

On June 8, 2009, a telephonic meeting of the statutory subcommittee was convened to develop and finalize the list of agreed-to persons from which the Secretary of the Interior would appoint the seventh, consensus member of the Review Committee. With the participation of all six non-consensus members, the list was finalized and subsequently forwarded to the Secretary.

The 40th Review Committee meeting was held in Sarasota, Florida on October 30-31, 2009, and included two new appointees. Rosita Worl was the new consensus member, having succeeded Colin Kippen upon the expiration of his term, and Mervin Wright, Jr. was the new member appointed from among nominations by Indian tribes, Native Hawaiian organizations, and

traditional religious leaders, having succeeded Willie Jones upon the expiration of his term. Six of the seven members were present at this meeting.

The first order of business at the fall meeting was a request by members of the Western Apache NAGPRA Working Group, on behalf of the White Mountain Apache Tribe of the Fort Apache Reservation and the San Carlos Apache Tribe of the San Carlos Reservation, for findings of fact related to the identity of 45 cultural items. The American Museum of Natural History, New York, New York, which was in possession of the items, had listed them as “cultural items” in a Notice of Intent to Repatriate published in the Federal Register. The Apache tribes, believing that cultural items listed in a Notice of Intent to Repatriate needed to be recognized by the NAGPRA categories to which they were being claimed, and lacking an acknowledgement from the museum that the cultural items fit both the category of “sacred object” and “cultural patrimony”, asked the Review Committee to find, as a matter of fact, which of the cultural items was a “sacred object” and which of them was “cultural patrimony.” After hearing testimony from Apache tribal members, the Review Committee, in a unanimous decision (6 – 0), found all 45 of the cultural items to be both cultural patrimony and sacred objects.

The testimony presented by the Apache elders underscores the need for face-to-face meetings of the Review Committee. Their message could not have been fully conveyed to the Review Committee had it taken place via teleconference.

The remainder of the fall meeting agenda largely consisted of museum and federal agency requests for Review Committee action on agreements for the disposition of CUI. Museums, federal agencies, and tribes from Arizona, Colorado, Michigan, Georgia, Utah, Wyoming, New York, North Dakota, Nevada, and Florida participated in these requests, which involved the proposed transfer of, at minimum, 400 individuals who had been removed from locations throughout this country. As with the May 2009 meeting, the Review Committee was pleased to see that numerous institutions have developed productive working relationships with many different tribes.

Progress Made in Implementing NAGPRA

The large number of museums and federal agencies that have requested a recommendation from the Review Committee to the Secretary of the Interior for the disposition of CUI is a clear sign of progress under NAGPRA. Prior to the promulgation of the rule concerning disposition of CUI (43 C.F.R. 10.11), in 2010, museums and federal agencies entered into CUI disposition agreements with tribes solely at their discretion. Over the years, many museums chose to take advantage of the opportunity to use the Review Committee’s process, and worked proactively with the appropriate tribes to reach a resolution that was agreeable to all parties and allowed for the transfer of Native American ancestors.

The number of Federal Register notices published is the easiest way to determine if progress on NAGPRA compliance is being made. These notices (and Notices of Intended Disposition, which

are published in newspapers) provide an exact number of individuals, sacred objects, funerary objects, and objects of cultural patrimony eligible for repatriation or disposition. In addition, the notice informs the public of which tribes were consulted and which museum or federal agency is responsible for carrying out NAGPRA duties. Each notice serves as a summary history of the items -- where they originated, how they came to be removed, and other important collection history. In FY 2009, 200 notices were published in the Federal Register, the most ever published in one year since the passage of NAGPRA. This accomplishment is extraordinary, as the National NAGPRA Program has only one notice coordinator, Jaime Lavallee. Ms. Lavallee's exceptional work ethic is a large reason so many notices were published in 2009. Ms. Lavallee is the only Native person currently working in the National NAGPRA Program.

Section 7 of the Act requires all museums and Federal agencies to repatriate human remains, funerary objects, sacred objects and objects of cultural patrimony when affiliation can be proved by a requesting lineal descendant or federally-recognized tribe or Native Hawaiian organization. The total number of remains in repatriations and dispositions in Fiscal Year 2009 numbered 1,531 individuals. These individuals were accompanied by 214,902 associated funerary objects and 6,712 unassociated funerary objects. Under the category of sacred objects, 532 objects were repatriated, and 567 objects of cultural patrimony were returned. Some cultural items are both cultural patrimony and sacred objects, and in 2009, 16 items such items were repatriated. These large numbers are evidence that NAGPRA works when tribes, Native Hawaiian organizations, museums and Federal agencies all work together to comply with the law. The publication of 200 notices and the numerous requests for a recommendation concerning the disposition of CUI show that significant progress is being made in carrying out NAGPRA.

Barriers Encountered in Implementing NAGPRA

Barrier 1: Staffing to investigate civil penalty allegations is inadequate.

Consultation is one of the critical steps in progress being made under NAGPRA, but many tribes feel frustrated when requests for consultation are not taken seriously by certain museums and federal agencies. The National NAGPRA Program study *Who are the CUI?*, which National NAGPRA included in its report to the Review Committee for 2007, provides abundant information regarding various CUI collections around the country. If the information in this report were utilized by museums and federal agencies to consult with tribes, numerous determinations of cultural affiliation likely would result.

When a museum or federal agency does not consult with a tribe or Native Hawaiian organization, the institution has failed to comply with the requirements of the law. Many tribes, though, feel that the mechanism to handle non-compliance, the civil penalty process (43 C.F.R. 10.12), does not work due to a lack of manpower and the complexity of the civil penalty procedure.

When a museum is out of compliance, and sanctions are lacking, a barrier to implementing NAGPRA exists. An increase in the allowable civil penalty amounts likely would lead to an increase in museum compliance with NAGPRA, as would an increase in the amount of staff time designated for civil enforcement. Currently, only one staff person is charged with investigating allegations of museum failure to comply with NAGPRA, and in 2009, this staffer was only allowed to work 10 hours per week on NAGPRA civil penalty matters. In 2009, 65 counts of failure to comply were alleged against museums, the second highest number since 1996. In light of this increase, the Review Committee believes that funds need to be dedicated to employ a permanent, full-time NAGPRA civil enforcement investigator.

Barrier 2: Funding for NAGPRA training and education is insufficient.

As stated above, the Review Committee sees the lack of consultation as a very serious issue. Consultation is critical to the NAGPRA process, and when certain museums and federal agencies do not carry out this requirement in good faith, frustration results. In addition to consultation issues, other barriers to NAGPRA compliance have been encountered by tribal communities across the United States. Not receiving inventories and summaries in a timely manner -- sometimes years pass before a tribe finally secures an inventory -- is a huge problem. Inventories and summaries form the baseline for all repatriation work performed by tribes and Native Hawaiian organizations. Without an inventory or a summary, a tribe will not be able to request the repatriation of cultural items because the tribe will not have notice that the museum or federal agency possesses, or controls, culturally affiliated items. Where this fundamental requirement of NAGPRA is not taken seriously by a museum or federal agency, progress in NAGPRA compliance cannot be achieved.

Beyond issuing civil penalties to museums that do not comply, the Review Committee sees NAGPRA training and funding allocated for training as a means to help facilitate the compliance process. Lack of sufficient funds available for training, through NAGPRA grants and National NAGPRA Program budgets, is viewed by the Review Committee as a barrier to NAGPRA implementation.

The Review Committee believes that the present funding to train tribes and museums to better understand and implement the requirements of NAGPRA is insufficient. Larger museums (many of them universities) have programs and resources to carry out their NAGPRA responsibilities. By contrast, smaller museums need financial assistance to help them comply with the law, as lack of funds often results in lack of progress. Small museums that lack training funds cannot attend the free, one-day training held before each Review Committee meeting, or any other free or tuition-based classroom training. The lack of access to training results in a diminished level of knowledge of the law's requirements and, as a consequence, NAGPRA is not implemented at even the most basic level. More training would ensure that museums have the tools to carry out their legal duties. Tribes also need access to training. Like small museums, they, too, need financial resources to obtain a better understanding on how to facilitate NAGPRA compliance,

both intertribally and with museums and federal agencies. Additional training funds also would allow training sessions to be offered more frequently than at present, and thus would give tribes greater opportunities to acquire the knowledge they need in order to fully participate in the NAGPRA process.

Barrier 3: The NAGPRA grants appropriation is insufficient.

In addition to the lack of appropriated funds targeting NAGPRA training, the yearly amount appropriated to NAGPRA grants has become a factor for NAGPRA implementation. The number of grant requests has doubled from previous years, yet the total amount of grant funding has stayed the same. The Review Committee sees the increase in grant requests as progress made in the implementation of NAGPRA, but views the lack of money available to assist museums and tribes in fulfilling NAGPRA tasks as a barrier.

Appended to this report is *Journeys to Repatriation*, a publication prepared by the National NAGPRA Program. It beautifully illustrates the many stories behind NAGPRA grants and why these funds are so important, and it underscores the need for increased grant funding in order to complete the goal of repatriation.

The need for increased funding for NAGPRA grants and the need for a NAGPRA training appropriation are linked. In order to secure grants, tribes and museums first need to understand the steps to be undertaken in the NAGPRA process. To do so requires an understanding of NAGPRA that can be acquired as a result of training.

Barrier 4: The “90-day Rule” for repatriation is unclear.

Tribes, Native Hawaiian organizations, museums, and federal agencies need to have the same understanding of NAGPRA’s requirements. A barrier to NAGPRA implementation is the lack of clarity regarding the “90-day rule” The rule at 43 C.F.R. 10.10 provides a timeline for the transfer of human remains and other cultural items following a request for their repatriation. According to this rule, repatriation must occur within 90 days of receipt of a request if the request meets certain criteria, the museum or federal agency cannot show that it has the “right of possession” to the item requested, and no other listed exceptions exist. Indian tribes are concerned that, once the criteria are met, transfer may take significantly longer than 90 days to occur. Nothing in the regulation requires a museum or federal agency to answer a request for repatriation. Thus, a museum or federal agency that does not believe the repatriation request satisfies the criteria for such a request, or believes that it has the right of possession to the item being requested, or believes that one of the listed exceptions exists to toll the 90-day timetable is not obligated under existing law to inform the requesting tribe or Native Hawaiian organization of that determination. As a result, some requests for repatriation have taken several years to be resolved, which is a timeline that the Review Committee sees as unacceptable and a barrier to the implementation of NAGPRA.

Barrier 5: The Notice requirements are unfair and hurtful to Indian tribes and Native Hawaiian organizations.

Not requiring a museum or federal agency to identify in its Federal Register “Notice of Intent to Repatriate” the category to which a requested cultural item belongs is hurtful to Indian tribes and Native Hawaiian organizations and, thus, is a barrier to NAGPRA implementation. At the fall 2009 meeting, the Review Committee heard a request from members of the Western Apache NAGPRA Working Group, on behalf of the White Mountain Apache Tribe of the Fort Apache Reservation and the San Carlos Apache Tribe of the San Carlos Reservation, for findings of fact related to the identity of 45 cultural items that were the subject of repatriation requests. The Apache tribes requested the repatriation of these items, asserting that each of the 45 items had a dual identity, as a “sacred object” and “cultural patrimony.” The American Museum of Natural History, which was in possession of the items, agreed to repatriate them, but declined to identify them. Instead, the museum’s Notice of Intent to Repatriate listed them as “cultural items.” The Apache tribes, believing that cultural items listed in a Notice of Intent to Repatriate needed to be recognized by the categories to which they were being claimed, and lacking an acknowledgement from the museum that the cultural items fit both the category of “sacred object” and “cultural patrimony”, asked the Review Committee to find, as a matter of fact, which of the cultural items was a “sacred object” and which of them was “cultural patrimony.” After hearing testimony from Apache tribal members, the Review Committee, in a unanimous decision (6 – 0), found all 45 of the cultural items to be both cultural patrimony and sacred objects.

Under the law, the Apache tribes were required to show that, more likely than not, the 45 requested items fit a specific NAGPRA category, which they did. The Review Committee believes that a regulation requiring the party requesting repatriation to prove to the museum or federal agency that an item fits a specific category of cultural item but not requiring the museum or federal agency to acknowledge in its Notice of Intent to Repatriate that the requesting party has proved all the elements in its request is unfair, and could be materially confusing for tribes and museums alike.

Recommendations

1. While writing this report, the final rule concerning the disposition of culturally unidentifiable Native American human remains was published (on March 15, 2010) and became effective (on May 14, 2020). This rule will profoundly affect the NAGPRA compliance workloads of Indian tribes, Native Hawaiian organizations, museums, and federal agencies, as well as the workload of the National NAGPRA Program. While this report is intended to cover 2009, the implications of the CUI rule (43 C.F.R. 10.11) warrant the immediate attention of the Congress.

The first matter that must be addressed is the need for more staff positions in the National NAGPRA Program. Currently, the National NAGPRA Program has 5.75 full-

time staff. While it is extraordinarily productive, increased staffing on Federal Register notice publication is imperative. One individual, Jaime Lavallee, presently coordinates all the Federal Register notices of museums and federal agencies (Notices of Inventory Completion and Notices of Intent to Repatriate Cultural Items). With the promulgation of the CUI rule, museums and federal agencies are required to offer to transfer all CUI that were removed from “tribal lands” and “aboriginal lands” to the appropriate “tribal land” and “aboriginal land” tribes and Native Hawaiian organizations. As a result, a sizeable increase in the number of Notices of Inventory Completion sent to the National NAGPRA Program for processing will occur. In the opinion of the Review Committee, the number of draft notices will increase by 300 – 400% over the next three years, making it impossible for one person to handle in addition to notices culturally affiliated human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Funds should be appropriated for three additional contractors to help manage the publication of Federal Register notices. The Review Committee recommends that Congress appropriate \$350,000 to support the three positions and to fund a full-time civil enforcement investigator position. Together, these four positions will be necessary in order to staff the near-term increase in Federal Register publication and civil enforcement workloads.

2. The second recommendation to the Congress from the Review Committee is for an increased appropriation, in the amount of \$4.2 million, for NAGPRA grants to Indian tribes, Native Hawaiian organizations, and museums. The new CUI rule (43 C.F.R. 10.11) certainly will generate more grant requests. Already, though, the increase in the number of grants requested evidences an immediate need for an increase in the NAGPRA grants appropriation.

In addition to its two recommendations to the Congress, the Review Committee has made three recommendations to the Secretary of the Interior, as follows:

- First, the Review Committee would like support staff to track and report on the status of matters concerning which the Review Committee has made findings of fact and recommendations, to the extent permissible.
- Second, the Review Committee would like support staff to provide clarification of the rule at 43 C.F.R. 10.10 (a)(3) and (b)(2), requiring that repatriation take place within 90 days of receipt of a request for repatriation that satisfies the criteria for such a request.
- Third, for use as an educational tool, the Review Committee would like support staff to provide them with detailed steps on alleging museum failure to comply with the requirements of NAGPRA beyond those set out at 43 C.F.R. 10.12.