

Annual Report to Congress

NATIVE AMERICAN GRAVES PROTECTION & REPATRIATION REVIEW COMMITTEE

FY2024

October 1, 2023-September 30, 2024

October 1, 2024

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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) 2024 (October 1, 2023-September 30, 2024). 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), "Federal lands" (#1B), "Native American" (#1C and #7B), "Hui Malama I Na Kupuna O Hawai'i Nei" (#1D), "Native Hawaiian organization" (#1E), "right of possession" (#1F), "aboriginal land" (#2A), and sections regarding notification (#2B), 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 and clarify the inventory process (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 #2C), 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 and prosecutorial effort to combat illegal trafficking of Native American cultural items (recommendation #7D).
5. Include \$3 million in the FY2025 and subsequent year budgets for

¹ 25 U.S.C. § 3006 (a).

² 25 U.S.C. § 3006 (h).

implementation of the Safeguard Tribal Objects of Cultural Patrimony Act (recommendation #7A).

6. Establish and fund capabilities within the Department of Justice, Environmental Crimes Section to coordinate prosecution of violations of NAGPRA, ARPA, and the Stop Act (recommendation #7E).
7. Authorize the National Park Service to rebury Native American human remains and funerary objects on NPS lands regardless of the original location of removal (recommendation 12).

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 Serving during FY2024

Nominated by Indian Tribes and Native Hawaiian organizations:

Domonique deBeaubien
Armand Minthorn
Toby Patrick

Nominated by national museum and scientific organizations:

Edward Halealoha Ayau
C. Timothy McKeown (term ended June 4, 2024)
Shelby Tisdale (term ended June 4, 2024)

Nominated by the Committee:

Angela Garcia-Lewis

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

Review Committee Meetings

In FY2024, the Review Committee held four public, telephonic meetings. No face-to-face meetings were held.

During the FY2024 meetings, the Review Committee received reports from the National NAGPRA Program regarding implementation and compliance activities under the Act, 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 FY2022 and FY2023 annual report to Congress. The Review Committee conducted substantive discussions on the FY2024 annual report to Congress.

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 86th meeting of the review committee was held telephonically for three hours on November 1, 2023. During the meeting, the review committee:

- Approved its FY2023 Report to Congress.
- Benefited from public comments from several members of the public.

The 87th meeting of the review committee was held telephonically for two and a half hours on November 30, 2023. During the meeting, the review committee:

- Approved a distribution list for the FY2023 Report to Congress.
- Benefited from presentations from the Illinois State Museum and from the Office of the Department of the Interior, Assistant Secretary for Policy, Management, and Budget as well as public comments from several members of the public.

The 88th meeting of the review committee was held telephonically for four hours on May 23, 2024. During the meeting, the review committee:

- Benefited from presentations from the Arizona State University School of Human Evolution and Social Change; University of Arizona, Arizona State Museum; National Association of Tribal Historic Preservation Officers; Department of the Interior, Office of the Secretary, Office of Policy Management and Budget, Bureau of Reclamation; Bureau of Indian Affairs; Bureau of Land Management; Fish and Wildlife Service; and National Park Service, as well as public comments from several members of the public.

The 89th meeting of the review committee was held telephonically for one hour on September 23, 2024. During the meeting the review committee:

- Approved its FY2024 Report to Congress and directions for distribution.
- Benefited from a presentation by Stuart Akagi and Raymond Wilson (Tlingit, Kaagwantaan Clan) as well as comments from the public.

Progress Made

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

- 1. Promulgation of final regulations implementing NAGPRA.** On December 13, 2023, the Department of the Interior published final regulations implementing NAGPRA.³ The final rule went into effect on January 12, 2024.

³ Final rule: Native American Graves Protection and Repatriation Act: Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of

2. Continued Press Coverage of Repatriation Issues. Starting in January 2023, ProPublica launched The Repatriation Project, including an online interactive tool to facilitate easy public search of information for over 100,000 Native American human remains held by roughly 600 Federally funded institutions.⁴ Since then, ProPublica has published over a dozen articles focusing on the repatriation efforts of various institutions, and its database and press guide have been used by reporters from many other news outlets in stories on the collections of institutions across the country. In August 2023, The Washington Post also did a series of articles on repatriation at the Smithsonian Institution.⁵ The Review Committee is appreciative of the press' efforts to keep the public informed, but recognize that heightened public scrutiny has also resulted in an increase of public records requests demanding sensitive information like reburial area locations, photographs of ancestors, and consultation records with traditional information.

3. Department of the Interior established administrative deadlines. On September 21, 2023, Rachel Tayler, the Department of the Interior Chief of Staff issued a memorandum to the heads of all Departmental bureaus and offices, in particular, the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, U.S. Fish and Wildlife Service, and National Park Service, directing them to prioritize and facilitate repatriation of 2,900 Native American individuals and 9,400 associated funerary objects, assure compliance with legal requirements, and demonstrate Interior's commitment to strengthening the government-to-government relationships with Indian Tribes and Alaska Native villages.⁶ A follow-up memorandum and action plan from the Principal Deputy Assistant Secretary – Policy, Management, and Budget directed Departmental bureaus and offices to complete notices of inventory completion by April 20, 2024, for 250 Native American human remains and 1,300 associated funerary objects held by the Department for which cultural affiliation had already been determined, unless additional time is requested by Indian tribes. Representatives of the Office of the Assistant Secretary-Policy, Management, and Budget; Bureau of Reclamation; Bureau of Indian Affairs; Bureau of Land Management; Fish and Wildlife Service; and National Park Service updated the Committee at its May 23, 2024, meeting. Between October 21, 2023, and May 23, 2024, DOI bureaus published 26 notices of inventory completion accounting for the remains of 1,450 Native American individuals and 6,688 associated funerary objects, although notices had not been published for many of the remains and funerary objects identified as affiliated in the September 21, 2023, memorandum. The

Cultural Patrimony (Dec. 13, 2023). <https://www.govinfo.gov/content/pkg/FR-2023-12-13/pdf/2023-27040.pdf> (accessed Sept. 30, 2024).

⁴ ProPublica, The Repatriation Project: The Delayed Return of Native Remains, <https://www.propublica.org/series/the-repatriation-project> (accessed Sept. 30, 2024).

⁵ Nicole Dungca, Claire Healy and Andrew Ba Tran, What we know about the Smithsonian's human remains (Aug. 14, 2023). <https://www.washingtonpost.com/history/interactive/2023/takeaways-smithsonian-human-brains-remains-collection/> (accessed Sept. 30, 2024).

⁶ Memorandum from Rachel S. Tayler to Heads of Bureaus and Offices, Departmental Responsibilities for Native American Human Remains and Cultural Items (Sept. 21, 2023). Memorandum from Joan M. Mooney to Assistant Secretaries and Heads of Bureaus and Offices, Departmental Action Plan (Oct. 20, 2023). <https://irma.nps.gov/DataStore/Reference/Profile/2302288> at Materials 2023-11, Meetings 86-87/ (accessed Sept. 30, 2024).

Department's FY2025 budget request included an additional \$2.9 million to facilitate bureau compliance with the new regulations.⁷

4. Consideration of the Federal Indian Boarding School Initiative Act. On May 18, 2023, Senator Elizabeth Warren introduced S. 1723 to establish a Truth and Healing Commission on Indian Boarding School Policies in the United States. Warren's bill now has 32 cosponsors. On February 9, 2024, Representative Sharice Davids introduced H.R. 7227 as a parallel effort. David's bill now has 70 cosponsors. The Review Committee supports these legislative initiatives and looks forward to working with Congress and the Commission, once seated, to ensure the appropriate protection or disposition of student graves found on Federal lands, and that if excavation occurs, is carried out pursuant to Section 3 of NAGPRA.⁸ The Review Committee also looks forward to working with the Commission to ensure all remains of boarding school students and funerary objects excavated or removed from lands controlled by any relevant institution or state or local government agency that received Federal funds are repatriated to the appropriate lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization pursuant to Sections 5, 6, and 7 of NAGPRA.⁹

5. Resolution of outstanding GAO recommendations. The Review Committee's FY2023 Report to Congress identified four recommendations to improve implementation of NAGPRA and the repatriation provisions of the NMAI Act that were made in previous Government Accountability Office reports but remained unaddressed. GAO has determined that all of two, and part of a third have been implemented and these have been closed.¹⁰

Barriers to Overcome

Several barriers to full implementation of NAGPRA were identified in FY2024.

1. Continued resistance by some institutions. The National NAGPRA Program indicates that during FY2023 it received thirteen allegations of failure to comply that are currently under review. The committee has also heard that some states insist on relying solely on state burial law regarding the disposition of Native American human remains and associated funerary objects under state control and ignore NAGPRA's repatriation

⁷ Emily Palus, Department of the Interior, Office of Management and Budget. Paths to Repatriation: Activities in Support of the Native American Graves Protection and Repatriation Act (May 23, 2024). <https://irma.nps.gov/DataStore/Reference/Profile/2304832> at Materials 2024-05 Meeting 88 (accessed Sept. 30, 2024).

⁸ 25 U.S.C. § 3002

⁹ 25 U.S.C. §§ 3003-3005

¹⁰ Government Accountability Office, Native American cultural resources: improved information could enhance agencies' efforts to analyze and respond to risks of theft and damage (Mar. 4, 2021). GAO 21-110 (recommendations 4 and 7); Government Accountability Office, Native American cultural property: Additional agency actions needed to assist Tribes with repatriating items from overseas auctions (Aug. 6, 2018). GAO-18-537 (recommendation 7); Government Accountability Office, Tribal consultation: Additional Federal actions needed for infrastructure projects (Mar. 20, 2019).

requirements that also apply, as well as allegations that the U.S. Army ignores NAGPRA's requirements regarding the planned excavation of Native American human remains at the site of the U.S. Army War College in Carlisle, Pennsylvania.

In addition, the Government Accountability Office over the years has made 55 recommendations to Federal agencies to improve implementation of NAGPRA. While most have been implemented, one and part of another remain unimplemented:

- The Secretary of Energy, and Administrator of the Federal Highway Administration should document in their agencies' tribal consultation policy how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on proposed infrastructure projects.¹¹
- The Congress should consider ways to expedite the Smithsonian's repatriation process including, but not limited to, directing the Smithsonian to make cultural affiliation determinations as efficiently and effectively as possible was not addressed, but has also been closed.¹²

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 the new 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 five year period will not impose a significant economic impact on a substantial number of small entities.¹³ The Review Committee feels there is a need for accurate, impartial, and comprehensive assessment of the overall costs of compliance with NAGPRA by museums, Federal agencies, Indian tribes, and Native Hawaiian organizations.

3. Sensitive information is currently unprotected. Of critical importance, sensitive

¹¹ Government Accountability Office, Tribal consultation: Additional Federal actions needed for infrastructure projects (Mar. 20, 2019). GAO-19-22 (recommendations 6, 7, 10, and 14).

¹² Government Accountability Office, Smithsonian Institution: Much work still needed to identify and repatriate Indian human remains and objects (Mar. 25, 2011). GAO-11-515.

¹³ National Park Service, Cost-benefit and regulatory flexibility threshold analyses: Native American Graves Protection and Repatriation Act proposed revisions (Sept. 2022).

<https://www.regulations.gov/document/NPS-2022-0004-0002> (accessed Sept. 30, 2024).

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 is 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.” The Review Committee’s repeated requests for copies of the 85 comments on a draft proposal to revise existing regulations that were provided to the Department by Indian tribes and Native Hawaiian organizations and 10 comments provided by Federal agencies on the proposed rule were denied. The Review Committee’s deliberations on the draft proposed regulations were cut short after only reviewing two sections. The Department’s initial distribution of the Review Committee’s FY2023 Report to Congress took nearly six months and it is still unconfirmed whether copies of the report have been sent to all of the members of Congress, administration officials, and national tribal, museum, and scientific organizations directed by the Review Committee. The Department has not facilitated a face-to-face meeting of the Review Committee this fiscal year.

5. Native Hawaiian organizations. When NAGPRA was enacted in 1990 it defined “Native Hawaiian organization” to include two organizations namely, Hui Malama I Na Kupuna O Hawai’i Nei and the Office of Hawaiian Affairs. In 2015, Hui Malama I Na Kupuna O Hawai’i Nei ceased to exist. Thereafter, the organization Hui Iwi Kuamo’o was established by former Hui Malama I Na Kupuna O Hawai’i Nei members to continue repatriation efforts. The Review Committee recognizes the need to address this confusion and supports the replacement of Hui Malama I Na Kupuna O Hawai’i Nei with Hui Iwi Kuamo’o throughout the Act and regulations.

6. Importance of Statutory Amendments. On June 28, 2024, the Supreme Court overturned its 1984 “Chevron” precedent to preclude courts from deferring to an agency interpretation of the law simply because a statute is ambiguous. In the post-Chevron era it is critical for the Congress to enact the Review Committee’s recommended legislative changes to the National Museum of the American Indian Act and the Native American Graves Protection and Repatriation Act.¹⁴

¹⁴ Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce, 603 U.S. ____ (2024).

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 acknowledge that while some practices are religious in nature others 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. **Federal lands (25 U.S.C. 3001 (5))**. Section 3 of the Act requires Federal agencies to protect Native American graves sites located on Federal lands. In order to maximize coverage of these provisions, we request that the Congress amend the definition of Federal lands as follows:

(5) "Federal lands" means any lands other than tribal lands which are controlled or owned by the United States, including

(A) lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.], and

(B) lands located within the boundary of any Federal or Federally assisted undertaking permitted pursuant to the National Historic Preservation Act of 1966 [54 U.S.C. 300101 et seq.].

C. **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.¹⁵ 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.¹⁶ In order to address this issue, the Committee recommends that Congress amends NAGPRA’s definition of “Native American” to read as follows:

¹⁵ *Bonnichsen v. United States*, 367 F.3d 864, 878 (9th Cir. 2004) (emphasis in original).

¹⁶ *U.S. v. Deluca*, No. 00 CR 387 (N.D. Ill. Mar. 6, 2002).

(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.

D. **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 issues.

E. **Native Hawaiian Organization (25 U.S.C. § 3001 (11))**. We request the Congress amend this definition to replace "Hui Malama I Na Kupuna O Hawai'i Nei" with "Hui Iwi Kuamo'o," and add a provision prohibiting 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.

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 objects of 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 238 discoveries and excavations of Native American human remains and other cultural items had occurred on Federal lands,¹⁷ 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.¹⁸ 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.¹⁹

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:

¹⁷ National NAGPRA Program, Fiscal Year 2023 Report.

<https://irma.nps.gov/DataStore/Reference/Profile/2301560> (accessed Sept. 30, 2024).

¹⁸ 25 U.S.C. § 3002 (a)(2)(c).

¹⁹ 43 CFR § 10.11 (c)(1)(ii).

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 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. In the new regulations, the Department of Interior eliminated these requirements in the face of strong opposing commentary to retain these requirements.²⁰

B. In order to ensure full transparency in the disposition of Native American human remains and other cultural items excavated or discovered on Federal lands, or tribal lands where an Indian Tribe has not assumed responsibility for NAGPRA compliance, we request that the Congress add the following section at the end of 35 U.S.C. 3002:

(f) Notification

(1) If the ownership or control of any particular Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony is determined pursuant to this section, the Federal agency or Indian tribe shall notify the affected lineal descendants, Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information—
(A) which identifies each Native American human remain, funerary object, sacred object, or object of cultural patrimony and the circumstances surrounding its excavation or discovery;
(B) which lists the basis for determining ownership or control as specified in this section.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

C. 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. In particular, the evaluation should explore whether all Federal land managing agencies have in place appropriate administrative procedures; whether the existing procedures are being followed regarding consultation, completion of plans of action and comprehensive agreements, and publication of notices of intended disposition, and whether all agencies have administrative procedures to fully implement 25 U.S.C. 3002, 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

²⁰ National Park Service, Response to Tribal Consultation on revisions to 43 CFR Part 10 Native American Graves Protection and Repatriation Act Regulations (Aug. 2022).
<https://www.regulations.gov/document/NPS-2022-0004-0004>, at 30. (accessed Sept. 30, 2024).

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, 213,466 Native American ancestors have been inventoried, of which museums and Federal agencies have indicated a willingness to repatriate approximately 51.8%.²¹ 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 2000.²² 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 2010.²³ 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 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

²¹ National Park Service, 2023 Native American Graves Protection and Repatriation Act. https://public.tableau.com/app/profile/nationalnagpra/viz/2023NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed Sept. 5, 2024).

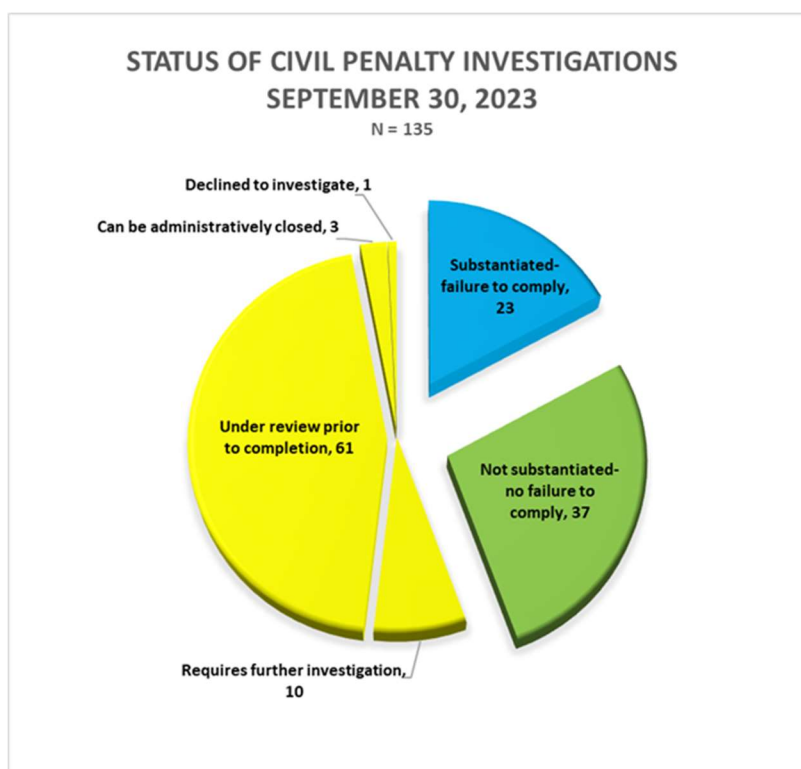
²² Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36462 (June 8, 2000). <https://www.federalregister.gov/documents/2000/06/08/00-14487/recommendations-regarding-the-disposition-of-culturally-unidentifiable-native-american-human-remains> (accessed Sept. 30, 2024).

²³ 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).

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. Regulations providing a required appeal process were first promulgated in 1997, and between then and 2016 the Department of the Interior substantiated 23 allegations of failure to comply against eleven institutions of higher learning (one twice), five private museums (two twice), three local government entities, and one state entity. Twelve civil penalties or financial settlements were assessed totaling \$59,111.34, with the penalties being waived in ten cases and one penalty currently being under appeal.²⁴ No allegations have been substantiated since 2016.



As of September 30, 2023, 37 allegations had been investigated and not substantiated. Information provided by the National Park Service shows that these include ten institutions of higher learning (one three times), eight state government entities (one twice), seven private museums (one twice), six local government entities, and two entities that were determined not to meet the definition of a museum.²⁵

Information provided by the National Park Service indicates that as of September 30, 2023, 75 allegations had been received that for which investigations were declined or had not yet been completed: NPS declined to investigate one allegation against an institution that had previously

²⁴ National NAGPRA Program, Fiscal Year 2023 Report. <https://irma.nps.gov/DataStore/Reference/Profile/2301560> (accessed Sept. 30, 2024).

²⁵ FOIA-DOI-NPS-2024-0459 (Jan. 26, 2024).

been investigated and determined to not meet the definition of museum under NAGPRA. NPS stated that 61 allegations were under review prior to completion, ten required further investigation, three were ready to be administratively closed. While NPS does not provide information on institutions that are currently under investigation, complainants have in some cases made their allegations public.²⁶ Of the 30 publicly available allegations for which investigations have not been completed one involved an institution of higher learning, five involve local government entities, and 24 involve state government entities in Alabama (1), California (9), Connecticut (2), Florida (1), Hawaii (3), Nebraska (1), Texas (1), Utah (2), Washington (3), and West Virginia (1). The identify of 44 of the pending allegations is not known.

Civil Penalty Allegations			
	Confirmed	Not Confirmed	Pending
Private museum	7	8	
Institution of higher education	12	12	1
Local government entity	3	6	5
State government entity	1	9	24*
Not a museum		2	
Declined to investigate			1
Unknown			44
Total	23	37	75

* Some allegations include one or more non-state government entities

While the data available on the pending allegations is incomplete, the disproportionate number of pending allegations from this one sample involving state government institutions is striking.

The NPS Cultural Resources, Partnerships, and Science Directorship is authorized to provide Federal financial assistance to States, Tribes, local governments, and other partners to advance the national historic preservation program. As part of that effort, the NPS cultural resources financial assistance programs proposed a Nationwide Programmatic Agreement with the Advisory Council for Historic Preservation and the National Conference of State Historic Preservation Officers to establish a consistent process to meet their responsibilities under Section 106. An April 19, 2023, draft of that agreement includes a stipulation implying that compliance with NAGPRA was discretionary for recipients of NPS funds.²⁷ This matter was raised by the Committee, and the Designated Federal Officer “concurred that if an institution that receives both Federal funds and state funds encounters Native American human remains they need to comply with both NAGPRA and their relevant state law up until the point that there is a conflict between the two.”²⁸ The language of the draft programmatic agreement along with the

²⁶ <https://www.facebook.com/profile.php?id=100062985413894> (accessed Sept. 30, 2024).

²⁷ Proposed Nationwide Programmatic Agreement for Cultural Resources Financial Assistance for compliance with Section 106 of the National Historic Preservation Act (April 19, 2023). “All human remains encountered as a result of Federal financial assistance provided by the NPS shall be treated in accordance with NAGPRA, its regulations, or the applicable laws and regulations of the State, Tribe, and/or municipality in which the project is located” (emphasis added).

²⁸ Materials 2024-05 Meeting 88/1_Program Report/Other Business 2024-0322. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024). Materials 2024-09 Meeting 89/3_Written Comments/Email from NATHPO <https://irma.nps.gov/DataStore/Reference/Profile/2306083> (accessed Sept. 30, 2024).

large number of allegations of failure to comply with NAGPRA by state government entities that remain unresolved gives an appearance of conflict of interest.

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.²⁹ NAGPRA further stipulates that “this Act shall not be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.”³⁰ In 1990, the Congressional Budget Office estimated that NAGPRA would cost the Federal Government between \$20 and \$50 million over five years.³¹

The Congress first appropriated funds for NAGPRA grants FY1994, and over the next 30 years appropriated \$73.2 million, of which \$62.5 million was awarded to Indian tribes, Native Hawaiian organizations, and museums.³² Yet, after three decades of grant funding the remains of 102,708 Native American ancestors still sit on museum and Federal agency shelves.³³

²⁹ 25 U.S.C. § 3008.

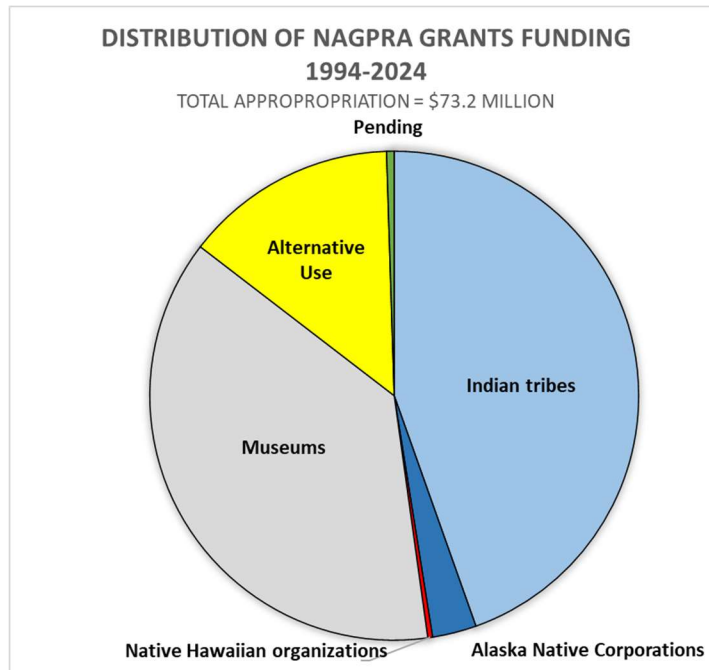
³⁰ 25 U.S.C. § 3003 (b)(2).

³¹ Letter from Robert D. Reischauer, director, Congressional Budget Office to Representative Morris Udall (October 15, 1990).

³² From FY1994 through FY2014, the National Park Service regularly diverted a portion of the grant appropriation to cover grants administration costs. In FY2005, part of the grant appropriation was used to satisfy court ordered payment of attorney fees. Alaska Native Corporations received NAGPRA grant funding from FY1994 through FY2010.

³³ National Park Service, 2023 Native American Graves Protection and Repatriation Act.

https://public.tableau.com/app/profile/nationalnagpra/viz/2023NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed Sept. 30, 2024).



This Committee has consistently recommended in its Report to Congress that funding for NAGPRA grants be increased. Indian tribes, Native Hawaiian organizations, and museums assert that the actual cost of complying with NAGPRA far exceed the available grant appropriation and the maximum grant cap ensures that progress towards repatriation is piecemeal and slow. Starting in FY2023, the Review Committee specifically asked museums with large remaining collections of Native American human remains to estimate how much it is expected to cost to comply with the proposed regulations. The Review Committee continued to ask museums and Federal agencies those questions this year:

- Arizona State University School of Human Evolution and Social Change, which holds the remains of 786 Native American individuals and 1,362 associated funerary objects, estimates that it will cost \$10 million over the next ten years to consult and prepare notices of inventory completion as required by the new regulations.³⁴
- University of Arizona, Arizona State Museum, which holds the remains of 2,691 Native American individuals and 2,872 associated funerary objects, estimated that it will cost \$168,000 per year to consult and prepare notices of inventory completion as required by the new regulations.³⁵
- National Association of Tribal Historic Preservation Officers, a 501(c)(3) non-profit membership association of Tribal government officials who implement federal and Tribal preservation laws, recommended to Congress that the FY2025 budget include

³⁴ <https://grantsdev.cr.nps.gov/NagpraPublic/Home/Inventory> (accessed Sept. 30, 2024). Note from Allisen Dahlstedt and Chris Cadedine to the Review Committee, 2024-09-19 ASU Response to Time Estimates. <https://irma.nps.gov/DataStore/Reference/Profile/2306083> (accessed Sept. 30, 2024).

³⁵ Transcript 2024-05 Meeting 88.pdf at 24-38; Materials 2024-05 Meeting 88/ASM_NAGPRA_2024_05_23_final and ASM NAGPRA Review Committee presentation 5-24. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

\$12.4 million exclusively for NAGPRA grants, \$1 million for program administration by the National NAGPRA Program, \$1.5 million for NAGPRA compliance by the Bureau of Indian Affairs, \$3 million for repatriation activities by the Smithsonian Institution, \$3 million for NAGPRA compliance by the Bureau of Land Management, and \$1 million for Department of Justice, Environmental Crimes Section to coordinate enforcement of the STOP Act, NAGPRA, and the Archaeological Resources Protection Act.³⁶

- Department of the Interior, Office of the Secretary, Office of Policy Management and Budget, which coordinates NAGPRA compliance with the five land managing bureaus within the Department of the Interior, estimated it will \$250,000 per year to coordination the Department's activities.³⁷
- Bureau of Reclamation, which holds the remains of 404 Native American individuals and 27,540 associated funerary objects estimated it will cost at least \$1.25 million per year to implement the new regulations.³⁸
- Bureau of Indian Affairs, which holds the remains of 1,111 Native American individuals and 3,932 associated funerary objects, estimated it will cost almost \$6 million over the next three to five years to implement the new regulations.³⁹
- Bureau of Land Management, which holds the remains of 367 Native American individuals and 947 associated funerary objects, estimated it will cost \$4 million per year to implement the new regulations.⁴⁰
- Fish and Wildlife Service, which holds the remains of 96 Native American individuals and 393 associated funerary objects, estimated it will cost \$940,000 per year to implement the new regulations.⁴¹
- National Park Service, which holds the remains of 316 Native American individuals and 389 associated funerary objects, estimated that it will cost over \$250,000 per year to implement the new regulations.⁴²

The cost information the Review Committee obtained from these museums and Federal agencies stands in sharp contrast with estimates compiled by the Department of the Interior to

³⁶ Transcript 2024-05 Meeting 88.pdf, at 38-43; NATHPO Remarks NAGPRA Review Committee 5.23.24; FY25 NATHPO Testimony House Approps. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

³⁷ Transcript 2024-05 Meeting 88.pdf, at 43-59; DOI PMB NAGPRA RC 20240521 PP. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

³⁸ Transcript 2024-05 Meeting 88.pdf, at 59-68; Reclamation_May 2024_NAGPRA RC mtg_presentation. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

³⁹ Transcript 2024-05 Meeting 88.pdf, at 68-79; BIA NAGPRA PPT. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

⁴⁰ Transcript 2024-05 Meeting 88.pdf, at 79-93; BLM NRC NAGPRA Update May 23, 2024 Final. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

⁴¹ Transcript 2024-05 Meeting 88.pdf, at 93-108; USFWS.NAGPRA.Review.Committee.Presentation_May.2024. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

⁴² Transcript 2024-05 Meeting 88.pdf, at 108-116. <https://irma.nps.gov/DataStore/Reference/Profile/2304832> (accessed Sept. 30, 2024).

support the final regulations. In December, 2023, the Department estimated that the total annual cost for all tribes, Native Hawaiian organizations, museums and Federal agencies to implement the new regulations would be \$12,393,571. Shortly thereafter the Department submitted a budget request to Congress for FY2025 of \$7.1 million for NAGPRA compliance by the Department alone (57% of the total estimated amount for all museums, Federal agencies, and tribes). Even though the Department recognized the increased costs for its own bureaus, the amount requested for grants for museums and tribes is unchanged from FY2024.

Some tribes have expressed concern that museums may be using grant money to acquire and preserve additional scientific information on human remains and associated funerary objects. In 2022, the National Park Service confirmed these suspicions by stating that a Notice of Funding Opportunity allowing the acquisition and preservation of additional scientific information on human remains and associated funerary objects and destructive analysis, with some restrictions, somehow overcomes Congress' clear statutory restriction.⁴³ The Review Committee also heard from one museum that received nearly \$450,000 in grant funding from FY2017-FY2023 but has published only one notice of inventory completion (for the remains of a single individual and 207 associated funerary objects) during the same period.

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, reviewing: whether all grants were awarded to appropriate recipients and exploring reasons why some Indian tribes, Native Hawaiian organizations, and museums are not applying for these grants; and whether the activities carried out under each grant were consistent with the statutory authorization as well as whether the statutory prohibition precluded funding of any activities. This evaluation would focus on directing executive administration of the grants program as well as consider the need for amending the Congressional authorization to make it more effective and efficient.

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 new regulations which were promulgated on January 12, 2024.

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

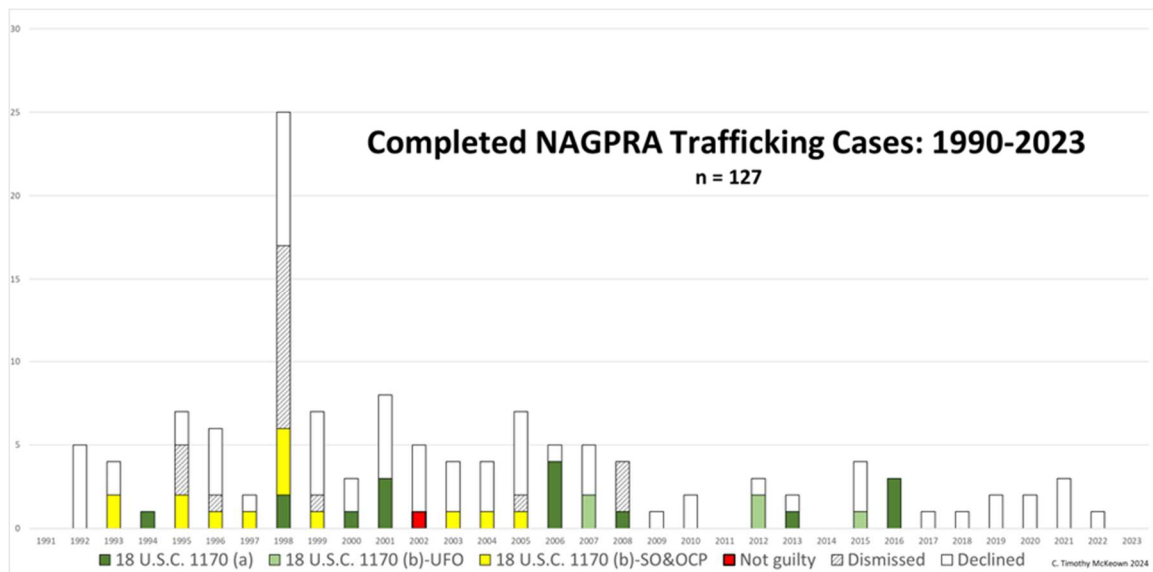
⁴³ Response to Tribal Consultation on revisions to 43 CFR Part 10 Native American Graves Protection and Repatriation Act Regulations (Aug. 2022), at 42. <https://www.regulations.gov/document/NPS-2022-0004-0004> (accessed Sept. 30, 2024).

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 Courts⁴⁴ indicates that, through 2023, 127 investigations of illegal trafficking of Native American human remains and cultural items have been opened resulting in 34 convictions.



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

⁴⁴ Data compiled by C. Timothy Mckeown from the Office of the United States Attorneys, National Caseload Data, FY2023 Data Files, and Pacer.gov.

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 FY2026 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.
- E. Fifth, we request that the Congress establish and fund capabilities within the Department of Justice, Environmental Crimes Section (ECS) to coordinate prosecution of violations of the NAGPRA, ARPA, and the STOP Act. Given the Department of the Interior’s lack

of response to the Government Accountability Office’s recommendation to centralize information on violations of these laws, we recommend that the Congress enact legislation requiring all Federal agencies to provide the ECS each year with information on all criminal and civil violations of NAGPRA, ARPA, and the STOP Act which ECS will analyze to assess risks to Native American cultural resources.

Taken together, these five 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 strongly 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.” When the question was formally asked by the Department in 2021, the majority of 85 written responses supported changing placement of the program (38) or would consider changing it pending additional consultation (10), while only six supported retaining the program within the National Park Service.⁴⁵ The NPS’s central role in funding state government entities coupled with the large number of allegations of failure to comply against state government entities that remain unresolved give the appearance of a conflict of interest. We recognize that Secretary Haaland has the authority to redelegate administrative placement of NAGPRA implementation responsibilities by means of Secretarial Order with follow-up revision of the Departmental Manual, however she has chosen not to do so. We request that the Congress amend 25 U.S.C. § 3013 specifically designate either the Office of the Assistant Secretary for Indian Affairs or the Office of the Assistant Secretary for Policy, Management, and Budget as the office responsible for implementation and enforcement.

10. NMAI Act

We also request that Congress consider amending the process by which the Smithsonian Institution returns Indian and Native Hawaiian human remains, funerary objects, sacred objects, and objects of cultural patrimony under the National Museum of the American Indian Act.

As we pointed out in last year’s report, 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

⁴⁵ Freedom of Information Act request DOI-NPS-2022-000473.

Indian Tribe is 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.

The recent series of articles by the Washington Post highlights the Smithsonian's view that determinations of cultural and geographic affiliation of Indian and Native Hawaiian human remains and associated funerary objects are only triggered by claims, and not by a set deadline as required under NAGPRA, as well as the lack of transparency in the Smithsonian repatriation process. To address these shortcomings, and to bring the Smithsonian process more in line with that required by all other Federal agencies and institutions receiving Federal funding, the Committee further recommends amending the NMAI Act as follows:

20 U.S.C. § 80 q-9 (a) Inventory and identification

(1) The Secretary of the Smithsonian Institution, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, shall-

(A) inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution; and

(B) using ~~the best available scientific and historical documentation~~ information possessed by the Smithsonian Institution, identify the ~~origins~~ geographical and cultural affiliation of such remains and objects.

(2) The inventory made by the Secretary of the Smithsonian Institution under paragraph (1) shall be completed not later than ~~June 1, 1998~~ [date 36 months following enactment].

(3) For purposes of this subsection, the term "inventory" means a simple, itemized list that, ~~to the extent practicable, identifies, based upon available information held by the Smithsonian Institution, the geographic and cultural affiliation of the remains and objects referred to in paragraph (1).~~ summarizes the information called for by this section.

20 U.S.C. § 80 q-9 (b) Notice in case of identification of ~~tribal origin~~ geographical or cultural affiliation.

If the ~~tribal origin~~ geographical or cultural affiliation of any Indian human remains or Indian funerary object is identified by a preponderance of the evidence, the Secretary shall ~~so notify any affected Indian tribe at the earliest opportunity.~~

shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes.

(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Indian human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to cultural or geographic affiliation; and

(C) which lists the Indian human remains and associated funerary objects that are not clearly identifiable as being culturally or geographically affiliated with that Indian tribe, but which, given the totality of circumstances surrounding

acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe.

(3) A copy of each notice provided under paragraph (1) shall be published by the Secretary in the Federal Register.

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.⁴⁶ 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.⁴⁷ 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 expending 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 are outside of our jurisdiction. The language of the Committee's charge may be open to interpretation, and it would be useful to eliminate confusion. Further, the Review Committee has become increasingly concerned with excessive delays between when it approves its report and when it is actually sent to the Congress by the Department of the Interior. In order to clarify these matter, we request that Congress amend 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 fiscal year by December 31.

12. Reburials within National Parks and other federally owned lands

During the June 2023 NAGPRA Review Committee meeting, the Committee received comments indicating that one of the major struggles impeding repatriation is identifying safe lands for the reburial of ancestors and their cultural belongings. Current National Park Service (NPS) management guidance currently only allows reburial within park lands if the remains were originally removed from that specific park.⁴⁸ Management Policy 6.3.8 specifically prohibits the creation of new cemeteries within a park unless authorized by federal statute. The Committee recommends that the Congress specifically authorize the NPS to:

1. Allow reburial of Native American human remains and funerary objects on NPS lands regardless of original location of removal;
2. Allow the creation of new cemeteries for the specific purpose of reburial of Native American human remains and funerary objects;
3. Incorporate reburial areas and newly created cemeteries into long-term park management plans, with appropriate documentation, protection, and confidentiality

⁴⁶ 25 U.S.C. § 3006 (a).

⁴⁷ 25 U.S.C. § 3006 (c)(7).

⁴⁸ NPS Management Policies 2001, 5.3.4 and 6.3.8.

measures; and

4. Develop specific policy guidance to facilitate the reburial process for Park managers and Tribes.