II. BACKGROUND

The Native American Graves Protection and Repatriation Act (NAGPRA) was signed into law on November 16, 1990. The law was enacted in response to accounts that span many generations over the significant portion of two centuries. These accounts document a spectrum of actions from harvesting human remains from the battlefield to disinterment of existing graves to the theft of Native American human remains, funerary objects given to the deceased at burial, sacred objects of different types, and objects of cultural patrimony that belong to the collective Native community.

A. Congressional Action Leading to Enactment

One of the early hearings before the U.S. Senate Committee on Indian Affairs in February of 1987 revealed that in the late 1880’s, the Surgeon General of the United States sent out a directive to military troops in the field to gather the skulls of Indians killed in battle.1 The purpose of the directive was to enable the examination of the skulls to determine whether there was a correlation between cranial capacity and intelligence. Reports from the field suggest that the Surgeon General’s directive was carried out with efficiency, so that in addition to gathering human remains from the battlefields, the human remains of American Indians were disinterred from their temporary sites of burial as well as from permanent graves. Remains so gathered were shipped to the Army Medical Museum for study. Years later, the Army Medical Museum transferred its collection of Native American human remains to the Smithsonian Institution. The testimony of the Secretary of the Smithsonian Institution in the February 1987 hearing indicated that many of the Native American human remains transferred to the Institution were still retained there.2

During this hearing, representatives of Federal agencies responsible for managing the nation’s public lands reported that, on occasion, and sometimes frequently, a discovery of Native American burial sites and sites culturally and religiously significant to tribes.3 They recounted instances of inadvertent discoveries of Native American human remains and funerary objects on Federal lands, and they did not know to whom they should report such discoveries or to whom they should return the objects of the discoveries.4 Repatriation was a concept that had yet to come to in contemporary times.

Federal land managers also shared with the Committee the accounts that they had received or their direct witness of grave robbing, the desecration of Native sacred sites, and the destruction of Native funerary objects, Native sacred objects and objects of Native cultural patrimony.5

1 February 20, 1987, Hearing before the U.S. Senate Committee on Indian Affairs, on S. 187, the Native American Cultural Preservation Act.

2 Id.

3 Id.

4 Id.

5 Id.
A second hearing was held in July of 1988 on the bill that had then been amended and re-titled the “Native American Museum Claims Commission Act”. Anthropologists and archaeologists expanded upon the public record with additional accounts of Native sacred site desecration, and the destruction and theft of sacred items and cultural objects that were precious to the Native people of the United States.

Thereafter, a debate emerged about whether museums and scientific institutions should have the right to retain those Native sacred items and cultural objects, and Native ceremonial dress and items used in tribal cultural and religious practices, which had found their way into the collections of museums and scientific institutions. Should these items and objects, as well as Native American human remains, be retained by institutions, because they were valuable subjects of scientific research? Should the museums and scientific institutions serve as the keepers of the Native culture? Or should Native people have the right to reclaim the remains of their ancestors, and to seek the return of the physical manifestations of their tribal cultures and religions?

An opportunity for a national dialogue was requested of the committees of jurisdiction in the Congress — a national dialogue that would involve tribal leaders, Native cultural practitioners, anthropologists, archaeologists, scientists, Federal land managing agency representatives, and officials of museums and scientific institutions, and which would focus on addressing these critical questions. In the interim, the Congress was asked not to move forward with legislation.

A year-long national dialogue ensued — and the participants reported back to the Congress that while they were not able to reach consensus on solutions, they did develop an understanding of and a mutual respect for the respective positions of those involved, and they came to agreement on a set of values that should guide considerations of when and under what circumstances repatriation or retention might be appropriate.

Thereafter, the focus shifted to the Congress to respond to the growing public debate and to demand that, at a minimum, the human remains of Native Americans should be returned to their families, their descendants, or their tribes of origin.

The values developed in the national dialogue served as a guidepost for the discussions in the Congress of how best to strike a balance amongst often competing perspectives and positions. New questions surfaced, such as who should define what is “sacred” to Native cultures? Should there be a measure of how central a cultural object or a sacred item was to a particular Native cultural practice or the religious beliefs of tribal members? If a sacred item or cultural object were not central to a Native belief system, should there be a presumption in favor of it being retained by a museum or scientific institution? Would Native people define everything as “sacred,” with the result that, eventually, the great museums and scientific institutions of the nation would be emptied of their Native American collections?

Ultimately, congressional committees with jurisdiction over matters of Federal Indian law engaged in a process of consultation with all of the interest groups, draft legislative initiatives were developed, further consultation on those initiatives was had, congressional hearings were held, and both houses of the Congress acted upon what became the Native American Graves Protection and Repatriation Act. This Act provided a process for the repatriation of Native American human remains, funerary objects, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony.

The regulations subsequently promulgated to carry out the objectives of the Act provide “a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.”

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6 Hearing of the U.S. Senate Committee on Indian Affairs, July 19, 1988, on S. 187, the Native American Museum Claims Commission Act.
7 Hearing before the U.S. Senate Committee on Indian Affairs on S. 1980, the Native American Repatriation of Cultural Patrimony Act, and Heard Museum Report, and on S. 1021, the Native American Grave and Reburial Act, May 14, 1990.
B. Mandated Activities for Federal Agencies and Museums

The Native American Graves Protection and Repatriation Act establishes a framework that is designed to facilitate the repatriation of Native American human remains and funerary objects, sacred objects and objects of cultural patrimony. The researchers considered the following major indices as demonstrations of how the Act is being implemented.

First, each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects must compile an inventory of such items and, to the extent possible, also identify the geographical or cultural affiliation of each item, in consultation with tribal government and Native organization officials. As stated in the law, the deadline for compiling inventories for those Federal agencies and museums with collections of Native American remains and objects, in consultation with the affiliated tribe(s), was November 16, 1995. The Federal agencies and museums were to send the final inventory to the culturally affiliated Native communities by May 16, 1996. As of April 20, 2007 (effective date of the “future applicability” rule), this consultation and notification process also applied to newly discovered human remains and associated funerary objects (two years to complete inventory).

Second, within six months of the completion of the inventory, each Federal agency and museum was required to notify the Indian tribe(s) or Native organization(s) if the cultural affiliation of the remains and associated funerary objects was determined, and identify the circumstances surrounding the acquisition of remains or objects. The initial deadline for providing written notification to the affected tribe(s) or Native organization(s) was May 16, 1996, and now is six months from completing a new inventory.

Third, each Federal agency and museum was to prepare a summary of its respective Native American collections which describes the scope of the collection, the kinds of objects in the collections, a reference to geographical location of the objects in the collection, the means of acquisition and the period of acquisition, and cultural affiliation of items in the collection where that information is readily ascertainable. The Act provides that summaries were to be completed not later than November 16, 1993. Summaries are more generalized than inventories, but were also to have been compiled in consultation with Indian tribe(s) and Native organization(s) as part of the process.

As indicated above, these foundational steps in the process are intended to facilitate the process of repatriation of Native American human remains and associated funerary objects, sacred items and objects of cultural patrimony.

The statute does not require the submission of an annual or periodic report to the U.S. Congress on the nature and extent of repatriations that have been effected pursuant to the Act’s authority. Each tribal government or Native organization that has sought and successfully secured the repatriation of the human remains of their relatives, or associated funerary objects, sacred items or objects of cultural patrimony, would know of that repatriation, and in like manner, the Federal agency or museum that affected the repatriation would know of that repatriation. But the statute doesn’t require any entity to maintain a record of each repatriation or an aggregate compilation of all repatriations. The Department of the Interior chose not to include such a reporting requirement in its general implementation regulations. In the absence of such a system for the reporting of each repatriation action and a mechanism for identifying the total number of repatriations, the Congress, on
behalf of the Native American people for whom the law was enacted, lacks the means to determine whether
the Act’s goals are being effectively implemented.⁹

C. Overview of Makah-NATHPO Research Project

Today, seventeen years after the enactment of the Native American Graves Protection and Repatriation Act,
the National Park Service National NAGPRA Program awarded a grant to the Makah Tribe for this project.
The Tribe’s application proposed a close working relationship with the National Association of Tribal Historic
Preservation Officers (“NATHPO”) as the basis from which to systematically assess how the Act has worked
over that time and whether there remain significant barriers to the effective implementation of the Act.

The report focuses on Federal agency participation in and compliance with the Native American Graves
Protection and Repatriation Act, including such overarching issues as completing notices of inventory,
determining cultural affiliation, developing and implementing agency policies on tribal consultation, and
resources to assist the agency meet its responsibilities under the Act.

The following five researchers and editors conducted the research and summarized their efforts for this report
(in alphabetical order): Cindy Darcy; Maria Elena Frias; Amy Kolakowsky; D. Bambi Kraus (Tlingit); Dr. James
Riding In (Pawnee); Pemina Yellowbird (Arikara-Hidatsa); and Patricia Zell. Additionally, nine individuals
reviewed a draft of this report prior to its publication. More information on researchers and reviewers may be
found at the end of this report.

The recommendations proposed in this report are premised upon the findings of the assessments, survey
results, and research conducted as outlined above within the context of the limitations referenced.

The researchers referenced the requirements and directives of the statute and employed the following
methodology in gathering data to assess implementation of the Act:

i. Legislative and Regulatory Review

A brief summary of the Act and regulations was produced for this report as important background
information for several reasons. First, we wanted to identify any sections of the Act that have yet to
be codified via the public rulemaking process. Second, there is not an easily accessible compilation of
the current regulatory provisions, as of March 2008. In order to understand the state of development
for regulations that implement the Act, several sources must be accessed in order to find the current
regulatory language. Finally, the report’s authors wanted to make this report available to the general
reader who may have little to no experience with the Act or its legislative history and regulatory provisions,
thus text boxes and sidebars are included in this report to aid the reader a better understanding of the law
and regulations. Additionally, Appendix A of this report contains these two summaries:

• The Native American Graves Protection and Repatriation Act, enacted into law on November 16, 1990
  (Public Law 101-601).
• Title 25 of the United States Code, the title of the U.S. Code in which most Federal-Indian statutes are
codified, and the specific sections which contain the statutory authority for the Native American Graves
Protection and Repatriation Act, beginning at section 3001, as well as the regulations promulgated under
the authority of the Act, which are found in Title 43, section 10 of the U.S. Code of Federal Regulations.

⁹ In 1990, the Congressional Budget Office estimated that the remains of about 100,000-200,000 Native American individuals and
10-15 million objects were stored in the nation’s museum and Federal repositories (S. Rept. 101-473 to accompany S. 1980, providing
for the protection of Native American graves and repatriation of Native American remains and cultural patrimony.) Examining publicly
available information from the National NAGPRA Program website, 31,383 Minimum Number of Individuals have been approved for
return using the repatriation process — roughly fifteen percent (15%) of 200,000. Assuming that all of these remains were actually
repatriated, this amounts to about 1% per year.
ii. Assessing Original Information Maintained in the National NAGPRA Program Office

During the summer of 2007, two individuals reviewed all original information that was submitted by Federal agencies per the inventory component of the Act and which are on file in the NPS National NAGPRA Program in Washington, DC. Reviewed documents included the original inventory correspondence (many dating back to 1995), as well as any additions, amendments, and new data since original submission. They compared this information to the Notice of Inventory Completion that was published in the Federal Register. This task was completed for all Federal agencies, as of September 2007, and focused upon the current status of Native American human remains and associated funerary objects within the control of each agency. Findings of this work may be found in Section III.B. of this report.

iii. Analysis of the “Culturally Unidentifiable Native American Inventories Pilot Database”

An in-depth analysis was conducted of the “Culturally Unidentifiable Native American Inventories Pilot Database,” which is maintained by the National Park Service (NPS), National NAGPRA Program Office in Washington, DC. This free and publicly available database may be requested via email or it may be searched online using the search functions. Pursuant to Section 8 of the Act, the NPS NAGPRA Review Committee is responsible for “compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains.” Even though a Notice of Inventory Completion is not required for items now listed in this database, Federal agencies and museums were required to consult with all Indian tribes and Native Hawaiian organizations from whose aboriginal lands the remains were recovered. The consultation process that was actually employed, prior to submission of database entries, is unknown and was not studied as part of this research project.

An analyst reviewed the information contained in the database to determine if the information it contains furthers an understanding of issues involving Federal agency compliance and to what extent the database is a useful tool for assisting Indian tribes and Native Hawaiian organizations in their efforts to implement the Act. Findings of this work may be found in Section III.C. of this report.

iv. Review and Summary of Two High Profile Federal-Tribal Cases

Two high profile, tribal-federal specific cases were reviewed and summarized as part of this project to assist in the understanding of the repatriation process. The one commonality in both cases was the issue of determining cultural affiliation. A summary of the cases may be found in Section III.D. of this report and the actual case studies may be found in Appendix B.

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[10] Database may be accessed on NPS National NAGPRA Program website: http://64.241.25.6/CUI/index.cfm
v. Review of the NPS NAGPRA Grants Program as One Source of the Federal Resources Available for NAGPRA Compliance

Using publicly available information, a funding history of the NAGPRA Grant Program was developed to provide an insight into the level of support the U.S. Congress and executive branch have provided the program. More information on this topic may be found in Section III.A.v.

vi. National Surveys of Federal Agencies and Native Americans

The research team, which included NAGPRA practitioners, developed two surveys: one for Federal agencies and another for tribal governments and Native organizations. Questions contained in the two surveys were tested on Federal and tribal officials and then refined to assure clarity in the questions posed, as well as precision in the responses, including an opportunity for respondents to expand upon their responses to any of the questions posed. Highlights of these two surveys may be found in Section III.A. of this report.

Because there is no list of designated Federal agency personnel charged with the responsibility to implement the NAGPRA statute and regulations, the NATHPO survey was sent to each of the thirty-six (36) distinct agency/departmental Federal Preservation Officers ("FPOs"), as listed on the website of the Advisory Council on Historic Preservation in August 2007. The FPO is the individual(s) that each Federal agency has designated as having the responsibility to implement the National Historic Preservation Act, and other Federal laws and executive orders. Typically, these personnel are involved with all aspects of cultural and historic preservation. For some Federal agencies, there are FPOs for sub-agencies or divisions or bureaus within each agency. NATHPO sent requests to each of these subdivisions in order to ensure that they were apprised of the survey.

A survey of Indian tribal governments, Alaska Native corporations and Native Hawaiian organizations was sent to each Native American or Native Hawaiian entity, as identified in the list of Federally-recognized tribes maintained by the U.S. Department of the Interior, as well as Alaska Native entities and Native Hawaiian organizations that are listed in the National Park Service National NAGPRA Program’s “Native American Consultation Database” and which may be found on that program’s website. If a tribal respondent had the time, resources, and interest, they were directed to an online survey that had additional NAGPRA questions. Respondents to the additional questions were fewer in number, but their responses in key areas contain important information and thus are included in this report.

D. Project Limitations

The assessment which follows is constrained by the resources available to conduct a systematic analysis of the Act’s implementation at Federal, regional, state and tribal levels and of Federally-funded museums and institutions, as well as, the resources necessary to assess the nature and extent of training, and to prepare accounts of specific repatriation experiences.

11 ACHP website noted is http://www.achp.gov/fpoagencyinfo.html
12 NPS National NAGPRA Program website noted is http://home.nps.gov/nacd
The research conducted through Federal and tribal surveys, the “Culturally Unidentifiable Native American Inventories Pilot Database” analysis and assessment of Federal agency submissions to the National NAGPRA Program Office, and case studies were necessarily constrained by the availability of financial resources to carry out the study of the effectiveness with which the Native American Graves Protection and Repatriation Act has been implemented.

As with most surveys, challenges lie in securing responses to the survey instrument. For instance, as identified above, where a Federal agency has not designated an office or an employee of the agency as having responsibility for the implementation of the NAGPRA statute, it is difficult to ascertain where in the Federal agency the responsibility for responding to the survey may have been directed — thereby compounding the challenge of follow-up communication.

The internal processes and effectiveness of the National Park Service National NAGPRA Program and Park NAGPRA Program were not examined or evaluated as these tasks are beyond the scope of this project.

Consistent with these limitations, Section IV of this report contains recommendations for future research to address some of the limitations mentioned here, as well as a means of securing a more comprehensive evaluation of compliance with the mandates of the statute.