

## IV. RECOMMENDATIONS

There are some general themes that emerge from a review of all of the research that was conducted and more specific concepts that suggest that further statutory or regulatory action may be warranted.

### A. General Themes

#### i. Knowledge of Process and Responsibilities

One of the prominent issues that emerges from the results of both Federal agency surveys and the surveys of Native governments and organizations is the need for more training so that Federal agency personnel are aware of their agency's responsibilities under the Act, museum personnel are aware of their museum's responsibilities under the Act, and Native governments and organizations are aware of their rights and responsibilities under the Act.

The survey results would suggest that within the Federal agencies, seldom is there a full-time employee whose principle assignment is to carry out the agency's responsibilities under the Act. More often, if there is an employee who is tasked with assuring that the agency is in compliance with the mandates of the Act, that person's first responsibility is to assure compliance with section 106 of the National Historic Preservation Act. A number of the Federal agencies responding to the survey indicated that the agency has a designated Federal historic preservation officer, who may or may not devote part of his or her time to NAGPRA duties. Several agency respondents reported that they were not certain who had NAGPRA responsibilities within their agency, and others placed the role of determining cultural affiliation in the hands of the National NAGPRA Program through the publication of Notices of Inventory Completion.

It is perhaps thus not surprising that Native government and Native organization respondents reported that they have experienced difficulty in finding anyone within a Federal agency that can tell them with whom they should be addressing NAGPRA-related issues.

#### ii. Access to Information

No less important is the commonly-reported fact that unless a tribal government or Native organization has been contacted directly by a Federal agency or museum, they do not know how they would learn that a Federal agency or museum may have the human remains of their relatives, or associated funerary objects, sacred items or objects of cultural patrimony.

Some tribes report having had to resort to relying upon anecdotal evidence or reports that someone has seen something in a museum that looks like it would have been associated with that tribe's cultural and religious practices. Others have attempted to contact every Federal agency and every museum known to possess Native American collections. Such time-intensive, laborious and costly undertakings could have been rendered unnecessary if the policy and intent of the Act – namely to place the burden of reporting on those institutions that have possession of Native American collections – had been fully and effectively realized.

As referenced above, the Act does provide for a system of notification, but the integrity of the notification process is only as sound as the information that is provided to the Interior Department. The Act does not address how the Department would go about determining whether Federal agencies or museums may have Native American collections for which inventories and/or summaries have not been submitted. In late 2007, several museums and National Park units withdrew many pending Notices of Inventory Completion that would have publicly announced the existence of culturally-affiliated Native American human remains and associated funerary objects, thereby further frustrating the efforts of Native people to identify where human remains and cultural objects could be found.

In addition, a common practice of agencies and museums is to err on the side of caution when the cultural affiliation of human remains or associated funerary objects cannot be definitively determined. In this context, caution is exercised by reporting that such remains or objects are culturally unaffiliated. While such caution is understandable, as discussed in Section III.C. of this report, the classification of remains or associated funerary objects as culturally-unidentifiable often has the effect of placing those remains or objects so classified beyond the reach of the Act's preference for repatriation of Native American human remains and associated funerary objects.

### **iii. Consultation**

As outlined earlier, NAGPRA contemplates and directs that Federal agencies and museums consult with Native governments and Native cultural practitioners in determining the cultural affiliation of human remains and other objects and items within their respective Native American collections. Federal agencies indicated that an element of their success in working with Native Americans in complying with the Act is that they know with whom to consult.

The Act's regulations also provide that consultation is to be carried out as part of the intentional excavation or inadvertent discovery of human remains or objects. Written plans of action must be the product of consultation, and when re-interments are to take place, consultation in how such re-interments or associated repatriations are to take place is also anticipated.

Despite these statutory and regulatory requirements, a review of both Federal agency and Native survey responses suggests that Federal agency personnel often don't know with whom they should be consulting, and Native governments are not always welcomed when they seek to have a Federal agency or a museum engage in consultation. In fact, survey results indicate that there is substantial room for improvement in the area of consultation.

### **iv. Available Resources**

Native Americans place a high value on repatriating the remains of their relatives, ancestors, sacred objects and objects of cultural patrimony. The resources which are currently available to effect these repatriations fall far short of what is needed. While the U.S. Congress and administration have appropriated funds to support the NAGPRA program, overall, those funds have been inadequate to effectively address the mandates of the Act.

Insufficient resources also prevent Native governments and organizations from maintaining a robust NAGPRA program effort needed to assure protection of a tribe's cultural resources. NAGPRA grants to tribes and museums has decreased in the past five years, and an assessment of grants made between 1994 and 2007 indicates that proportionately fewer of the funds appropriated for this purpose are actually being allocated for grants (see Appendix C). Clearly, Federally-appropriated resources have been insufficient to address the needs of the repatriation process. It is unknown what the total need for NAGPRA training is at all levels and for both Federal agencies and Native people.

An examination of fiscal support at the Federal agency level may show parallel lack of support, both in terms of staff support and training for new and current staff tasked with the responsibility to comply with the Act.

#### **v. Standards**

Improving information sharing and establishing standards are important components of the repatriation process. What constitutes correct information and who sets the standards for the following:

- What format is to be used for a Notice of Inventory Completion and when has a Federal agency or museum complied with the Act per the notification process;
- How much evidence is necessary for an accurate determination of cultural affiliation;
- When are the remains of an ancestor considered to be “culturally unidentifiable.”

“Tribal consultation” and “cultural affiliation” are not easily understood and agreed upon processes. There are points in the repatriation process where exclusion from these two important steps prevents active engagement of an affected Indian tribe or Native Hawaiian organization. There are no publicly available standards on what constitutes meeting the requirement to consult with an affected Indian tribe or Native Hawaiian organization. Who sets these standards is also of concern.

#### **vi. Training and Technology**

Many of the challenges identified could be addressed and possibly overcome through the provision of training for Federal agency, museum, and Native government and organization personnel.

Federal agency survey responses suggest that those officials who are charged with carrying out NAGPRA responsibilities are frequently new or reassigned, so that while there may have been some training on the Act for those initially tasked with implementing the agency’s responsibilities, training has not been available to their successors. The same dynamic appears to be prevalent in Native communities, where the unmet need for training is further exacerbated by the lack of resources to gain access to training opportunities.

However, with the widespread advent of technological tools, there are solutions that could be applied to address the need for more knowledge about the Act, to build the capacity for access to information, to facilitate consultation, and to enable expanded training opportunities.

For instance, funds expended on travel of Federal agency personnel to training sites might be reallocated to the development of on-line instructional materials that would be accessible either directly or made available in CD and DVD formats. The development and maintenance of user-friendly databases hold the potential to greatly expand the access by Native governments and organizations to inventory and summary information held by the Interior Department. Computer software programs that enable users with differing levels of security protection to have appropriate access to confidential or proprietary information foster both transparency and accountability.

Most Native groups do not have the means to travel to national or regional hubs to take advantage of in-person training opportunities where such opportunities exist, nor do they have the means to travel to the Nation’s capital to access data that is maintained in paper files. Federal agencies also lack the resources to send Federal agency personnel out to areas of Native America for the critical purpose of consultation that is required under the Act, or to send Federal agency personnel to training sessions that are held at considerable distances from their assigned duty stations.

Many of the recommendations from both Federal agencies and Native groups can be achieved by building on-line, secure data systems that are accessible to the relevant users and their needs for information. Recent developments in computer software programs afford different users access to information that is compatible with statutory and regulatory requirements, while ensuring the security of proprietary and confidential materials. In this manner, Federal funding can be employed to maximize cost-effectiveness as well as to achieve both transparency and accountability.

## B. Specific Recommendations

In a climate in which the funding of Federal programs can be anticipated to fall short of what is needed to assure full compliance with statutory and regulatory requirements, creative and cost-effective alternatives must be identified.

### 1. Statutory

Amend the “Definitions” section of NAGPRA to clarify application to human remains so that “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.

### 2. Regulatory

Establish an Inter-Agency NAGPRA Implementation Council within the Executive Branch (possibly the Office of Management and Budget) that would:

#### *a. Assure Compliance within each Federal Agency*

The Council should be vested with the authority to assure that each Federal agency with land management responsibilities or otherwise subject to the provisions of the Act is complying with the Act. The Council should identify instances in which creative approaches to compliance have proven to be effective for purposes of advising Federal agencies of useful models for compliance.

#### *b. Coordinate Compliance across all Federal Agencies*

The Council should also oversee coordination of Federal agency activity to assure compliance with the Act’s requirements across Federal agencies. The Council should maintain a database of compliance with NAGPRA across all Federal agencies including information on the compliance record of each Federal agency.

#### *c. Refer Non-Compliance and Remedies for Non-Compliance*

The Council should establish a mechanism for the referral of complaints concerning a Federal agency’s lack of compliance to the Inspector General of each Federal agency, and the Council should direct the National NAGPRA Program Office to publish relevant information on the referral process as well as information identifying the designated agent within each Federal agency with whom complaints should be filed in the Federal Register. The Council should also establish remedies for non-compliance with the statutory and regulatory requirements and the Council should direct the National NAGPRA Program Office to publish the remedies in the Federal Register.

#### *d. Train*

The Council, in coordination with the National NAGPRA Program within the National Park Service, should **assure** that all Federal agency personnel charged with responsibilities under the Act have the necessary training to effectively carry out their responsibilities under the Act.

***e. Dispute Resolution Role***

The Council should serve as a forum for the resolution of disputes amongst Federal agencies.

***f. Uniform Consultation Guidelines***

Following direct, meaningful and pre-decisional consultation with Indian tribes, Alaska Native villages and Native Hawaiian organizations, the Council should develop a set of uniform NAGPRA consultation guidelines for all Federal agencies. The Council should direct the National NAGPRA Program Office to publish the consultation guidelines in the Federal Register.

***g. NAGPRA Regulations***

The Council shall develop and maintain one set of regulatory language for all provisions of the Act.

**3. Oversight and Enforcement of Statutory Requirements**

***a. Training***

Establish a program to train Federal agency personnel who are assigned responsibility for NAGPRA implementation by each Federal agency including not only statutory and regulatory requirements but also requirements for pre-decisional consultation associated with cultural affiliation determinations and consultation associated with the publication of notices and with repatriation of cultural items as defined by the statute.

- i.* As part of the training effort, Native people with extensive NAGPRA experience in representing their tribes or Native Hawaiian organizations at NAGPRA and other cultural resource consultations, need to become a part of the National NAGPRA Program's training component. Official training conducted thus far (for Native people or for institutions) has been carried out by non-Native people, and while this training has provided some benefits, Native people report that there is still a significant need for education amongst Federal agency personnel when Native people seek to repatriate remains. High turnovers in NAGPRA-responsible staff at both the tribal and Federal levels also underscore the need for the permanent creation of a training team comprised of experienced Native NAGPRA representatives.
- ii.* In consultation with Indian tribes, Alaska Native villages, and Native Hawaiian organizations, the National NAGPRA Program Office should develop training modules, including a component that is accessible through the Internet, or which can be made available to Native groups in compact disc or DVD format.

***b. Issue and Publish NAGPRA Contacts and Policies within each Federal Agency***

- i.* Each Federal agency should promulgate a policy for the implementation of NAGPRA's statutory and regulatory requirements, including consultation requirements, and submit its policy to the National NAGPRA Program Office for publication in the ***Federal Register***.
- ii.* The National NAGPRA Program Office should create a publicly available database that lists each Federal agency repository for curation purposes, including location and contact information.

***c. Demonstrate Consultation with Native Americans***

The process that each agency proposes to follow for pre-decisional consultation associated with the determination of cultural affiliation of human remains and cultural items should be submitted to the National NAGPRA Program Office for publication in the ***Federal Register***.

***d. “Culturally Unidentifiable Native American Inventories Pilot Database”***

- i.* The “Culturally Unidentifiable Native American Inventories Pilot Database” should be revised to enable access to information across all Federal agencies so that an inquiry as to whether any agency has human remains or cultural items from a particular area can be pursued without having to search the records of each individual Federal agency.
- ii.* The National NAGPRA Program Office should require the submittal of information by Federal agencies documenting what pre-decisional consultation was undertaken to determine cultural affiliation of human remains and funerary objects listed in the database.
- iii.* The National NAGPRA Program Office should require the submittal of information by the Federal agencies documenting that human remains or associated funerary objects that the Federal agencies seek to retain for purposes of scientific study to ensure that the agency has met the statutory standard of proving that there is a “compelling scientific interest” in the retention of the remains or funerary objects that are identified in the database.
- iv.* The National NAGPRA Program Office should provide more frequent updates of the database, as well as other databases recommended in this report. The National NAGPRA Program Office should afford tribes and Native Hawaiian organizations an opportunity to provide input in developing new questions for the database.
- v.* The National NAGPRA Program Office should require the provision of uniform information to be contained in the database including: (1) a description of any study beyond counting, sorting, and original location of the burial of human remains or funerary objects, whether used to determine cultural affiliation or not, and whether or not the statute’s standard regarding extra-legal study had been met and by whom; (2) the full address of the current location of the culturally-unidentifiable human remains and associated funerary objects; (3) the title and detailed contact information of the office responsible for writing the database records for each Federal agency; and (4) the title and detailed contact information for each individual who is ultimately responsible for NAGPRA compliance for each Agency.

**4. General NAGPRA Program**

***a. Inventory of Repatriation Process Data***

Under current practice, there is no reporting system in place by which Federal agencies, museums, Indian tribes or Native Hawaiian organizations can submit information about the actual repatriation of human remains, associated funerary objects, sacred objects, or objects of cultural patrimony. Accordingly, the Congress has no means of periodically assessing the effectiveness with which the Act’s goals are being implemented.

- i.* In consultation with Indian Tribes and Native Hawaiian organizations, establish a process by which Federal agencies, museums, Indian tribes and Native Hawaiian organizations can submit data to the National NAGPRA Program Office identifying the number of remains or objects that have been the subject of a completed repatriation.
- ii.* Develop an inventory of all repatriations that have been completed under the authority of the Act, and establish a database to house repatriation information. The National NAGPRA Program Office should require signed statements from each Federal agency and institution that document the repatriation of human remains and cultural items. The inventory should also contain a record of the tribes or Native Hawaiian organizations that have received repatriated remains or cultural items under the authority of NAGPRA. Such a database should provide protection of proprietary information but should also enable access to the number of repatriations in each category (human remains, associated funerary objects, sacred objects, objects of cultural patrimony, unassociated funerary objects).

## 5. NAGPR Review Committee

- a.* The National NAGPRA Program Office, in consultation with the NAGPR Review Committee, should develop a database of all cases that have come before the Review Committee. Information in the database should identify which cases have been resolved, the manner in which they were resolved, and any outstanding cases that have yet to be resolved.
- b.* The National NAGPRA Program Office should maintain on its website an updated list of any upcoming publications of Notices of Inventory Completion, along with a list of notices that are awaiting publication.
- c.* The National NAGPRA Program Office should maintain a database that contains information on the location of, as well as possession and control of, all Native American human remains, funerary objects, and other cultural items.

## 6. Memoranda of Agreement or Programmatic Agreements

The National NAGPRA Program Office, in consultation with Indian tribes, Alaska Native entities, Native Hawaiian organization, and Federal agencies, should develop a standard memorandum of agreement or a programmatic agreement that would provide for Native groups to assume stewardship of a site or human remains in the event of an inadvertent discovery of a Native burial on Federal lands. One example of a programmatic agreement is the 2004 Programmatic Agreement reached between 18 Missouri River Tribes, the Corps of Engineers, the National Trust for Historic Preservation, the Advisory Council on Historic Preservation, and the State Historic Preservation Officers for Montana, North Dakota and South Dakota and Nebraska.

## 7. Adequate Funding for the Implementation of NAGPRA

- a.* The Congress should appropriate adequate funding to assure the effective implementation of the Act at the tribal level. Many Native groups do not have the resources to secure training in repatriation under the Act, or the resources to carry out repatriation activities.
- b.* The Congress should also appropriate adequate funding to assure the effective implementation of the Act at the Federal level, including funding for the activities of the Inter-Agency Council and the additional responsibilities of the National NAGPRA Program Office recommended in this report.

## 8. Compliance Audits

- a.* The Congress should request that the Government Accountability Office (GAO) conduct an audit of Federal agency compliance with the statutory and regulatory requirements of NAGPRA for all relevant Federal agencies. Such an audit could include:
  - i.* The mechanisms each Federal agency employs for assuring that all human remains and cultural items in the possession or control of the agency have been reported to the National NPS NAGPRA Program Office, and the effectiveness of such mechanisms;
  - ii.* The means by which the National NPS NAGPRA Program Office determines that each Federal agency has fully complied with the mandates of the NAGPRA statute and regulations;

- iii.* The identification of the Federal agency or program office within a Federal agency that is best equipped to provide information to the Congress on a regular basis of how many human remains and cultural items have been repatriated under the authority of the NAGPRA statute and regulations, as well as an assessment of the overall effectiveness with which the provisions of the Act have been implemented, as well as what barriers exist to the effective implementation of the Act;
- iv.* The identification of an entity within the Executive branch that has the authority or can be vested with the authority to oversee and assure the compliance of each Federal agency with the NAGPRA statute and regulations;
- v.* The identification of secure data system alternatives that would enhance public access to the data collected and maintained by the National NPS NAGPRA Program Office while still assuring the security and confidentiality of such data, including the identification of data system capacities to provide differing levels of access to confidential information;
- vi.* The identification of the most cost-efficient manner of providing training to Federal agency employees charged with assuring compliance with the NAGPRA statute and regulations;
- vii.* The identification of the most cost-efficient manner of providing training for Indian tribes, Alaska Native entities, and Native Hawaiian organizations on the NAGPRA statute and regulations; and
- viii.* The identification of a reporting system that would enable the oversight entity within the Executive branch referenced in subparagraph iv of this paragraph to refer potential enforcement actions for failure to comply with the NAGPRA statute to the relevant law enforcement agency or agencies.

*b.* The Inspector General of each Federal agency should investigate any non-compliance with the Act that is identified by the Government Accountability Office audit.

### **C. Future Areas of Research (not listed in priority order)**

1. Evaluate museum compliance with NAGPRA, with the same goals as to how this research project was conducted.
2. Evaluate the role of the Smithsonian Institution, including the intersections of National Park Service NAGPRA and the law governing the Smithsonian's repatriation activities, and Federal agency collections that are now housed permanently or temporarily at the Smithsonian.
3. Evaluate the NPS National NAGPRA Program for efficiency, staffing levels, and areas to improve
4. Examine how unassociated funerary objects have been dealt with in the repatriation process. Research work on this project focused on cultural affiliation and associated funerary objects, and a thorough study of how objects became "unassociated" or if there is means to hasten research time to associating these objects would be of benefit to the local Native community.
5. Examine how the Future Applicability (§10.13) provisions are being implemented.
6. Examine the background process that led a Federal agency to determine whether human remains and associated funerary objects was to be entered into the "Culturally Unidentifiable Native American Inventories Pilot Database," including the process used in working with and notifying tribes of the human remains and associated funerary objects.

