

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS
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U.S. House of Representatives
Committee on Natural Resources
Oversight Hearing on the Native American Graves Protection and Repatriation Act
Wednesday, October 7, 2009

Statement of the National Association of Tribal Historic Preservation Officers
Presented by D. Bambi Kraus, NATHPO President, for NATHPO Chairman Reno Franklin

Good morning Mr. Chairman and members of the committee. Thank you for the opportunity to testify at this oversight hearing on the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et seq.* NATHPO Chairman Reno Franklin sends his regrets as he is not able to be here in person, and thanks the committee for their time and attention to examining the status of a federal law that affects almost every Native person today.

Background

Today I am representing the National Association of Tribal Historic Preservation Officers (NATHPO). NATHPO is a national not-for-profit professional association of federally recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian, Alaska Native, and Native Hawaiian cultures and practices. In 1998, the initial cohort of 12 officially recognized Tribal Historic Preservation Officers (THPOs) created NATHPO with the mission to preserve Native languages, arts, dances, music, oral traditions, and to support tribal museums, cultural centers, and libraries.

The number of Tribal Historic Preservation Officers (THPOs) continues to increase since they were first recognized in 1996 by the National Park Service, U.S. Department of the Interior. THPOs assume the role and responsibilities of the State Historic Preservation Officers on their respective Indian reservations and aboriginal lands from which their ancestors once lived and were laid to rest. In 2008, there are now 86 officially recognized THPOs and our organization's membership has increased commensurately. NATHPO's membership includes THPOs and tribal governments that support the mission and goals of our organization.

THPOs are not just tasked with complying with the National Historic Preservation Act, they are often also the "NAGPRA representative" for their tribe.

In addition to convening training workshops and national meetings, NATHPO has produced original research reports, including: "*Federal Agency Implementation of the Native American Graves Protection and Repatriation Act*" (2008); and "*Tribal Consultation: Best Practices in Historic Preservation*" (2005).

I am familiar with the issues in today's hearing based upon my work on repatriation issues while being employed at the National Association of Tribal Historic Preservation Officers, as well as prior professional employment at the National Indian Policy Center and the Smithsonian Institution's National Museum of Natural History. Bambi Kraus is my English name, Yatx̄aakw is my Tlingit name.

Why Was NAGPRA Created?

NAGPRA 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.

Within a few years time, two public laws were enacted that forever changed how Native Americans are viewed today:

- Public Law 101-601, the Native American Graves Protection and Repatriation Act (November 16, 1990).
- Public Law 101-185, the National Museum of the American Indian Act (November 28, 1989; later amended in 1996 to include repatriation provisions) and

NAGPRA has been at times terrifically successful at the local level. More often, it is exemplary of the experiences of many American Indians, Alaska Natives, and Native Hawaiians: though the Act was created for their benefit and to rectify a moral wrong, most Native people have been unable to realize the law's potential. They have been forced to immediately learn a western process and bureaucratic language and to do so at the most personal and profound of times – at the time they must identify their dead and the sacred objects and cultural patrimony that have been removed from their communities.

First In-Depth Review of How Federal Agencies are Implementing NAGPRA

In 2006, the National Park Service National NAGPRA Program awarded a grant to the Makah Tribe to assess how the Act has worked over that time and whether there remain significant barriers to the effective implementation of the Act; the Tribe worked closely with NATHPO in its research and production. The resultant report focuses on Federal agency participation in and compliance with the 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 Makah-NATHPO Report, **“Federal Agency Implementation of the Native American Graves Protection and Repatriation Act,”** was the result of a two-year research project and was released in August 2008. The report is the work of five researchers who conducted original research for this report, analyzed existing public information, and conducted two national surveys to determine how the Act is being implemented around the country and how Federal agencies and Native Americans are working together to achieve the goals that the U.S. Congress established for the Act. The report was peer-reviewed by 11 individuals representing Indian tribes and NAGPRA practitioners, academics who work in this field, and federal agency officials. We are confident in the research, conclusions and recommendations that are presented in the 2008 report.

This study was undertaken to prepare a substantive foundation for assessing Federal agency implementation of NAGPRA and where improvements might be made. The internal processes and effectiveness of the National Park Service (NPS) National NAGPRA Program or Park NAGPRA Program were not examined or evaluated. We are happy to report that several recommendations in the report have already been implemented or are underway in the year since the report was published.

In brief, the research team examined a national process of consultation and information sharing that has led to individual success stories at the local level. It is clear from the work that went into the report that in the almost 20-year history of the Act, it has enabled some measure of success in the efforts of Native people to secure the repatriation of Native American human remains and cultural objects, but much work remains.

Again, one of the main goals of the report was to identify where improvements might be made in the implementation of the Act and to present the information in terms of findings and recommendations. Attached to this written statement are the recommendations that were developed. For this morning's hearing, I will highlight and discuss just a few.

Report Recommendations

The report recommendations were presented in two categories: general themes and specific recommendations. Summarizing the General Theme recommendations with a brief description are as follows:

1. Knowledge of process and responsibilities: No full-time NAGPRA staff working at the Federal agency level; lacking a list of the NAGPRA contact person for each Federal agency; need and request for NAGPRA training
2. Access to Information: burden has been place on Native people to determine where and if a Federal agency has Native American remains and cultural objects; withdrawal of pending Notices of Inventory Completion is a barrier and/or challenge to Native people; identification of human remains and cultural objects as "culturally unidentifiable" that places those classified remains and objects beyond the reach of Native people
3. Consultation: Federal agencies don't know with whom to consult and Native people are not always welcomed when they seek to have a Federal agency engage in consultation
4. Available Resources: Currently available resources fall far short of what is needed and Native governments and organizations are unable to maintain a robust NAGPRA program effort needed to assure protection of their cultural resources. Also, congressionally appropriated funds have NAGPRA grants to tribes and museums has decreased in the past five years.
5. Standards: What constitutes correct information and who sets the standards for a Notice of Inventory Completion; when has a Federal agency 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;" no publicly available standards on "tribal consultation" and "cultural affiliation"
6. Training: develop and offer online training and online instructional materials; develop user-friendly databases

There are eight (8) specific recommendations as follows:

1. Statutory: amend the definitions section of the Act
2. Regulatory: Establish an inter-agency NAGPRA Implementation Council within the executive branch, possible the Office of Management and Budget, that would ensure and coordinate compliance, refer non-compliance and remedies for non-compliance with the Act, train federal officials, have a dispute resolution role, develop uniform NAGPRA consultation guidelines for all Federal agencies and publish in the Federal Register
3. Oversight and Enforcement:
 - a. issue and publish in the Federal Register the NAGPRA contacts and policies for each Federal agency;
 - b. create a public database that lists each Federal agency repository for curation purposes, including location and contact information;
 - c. demonstrate via publication in the Federal Register that consultation has occurred with an affected Native American/s; and
 - d. revise and improve the Culturally Unidentifiable Native American Inventories Database (CUNAID) including the following:
 - i. improve database search functions
 - ii. show documentation as to the pre-decisional consultation has occurred
 - iii. establish an open and transparent process for why human remains and cultural objects meet the "compelling scientific interest" category
 - iv. more frequent updates of the database

- v. Native American input in developing new information to be included in the database
 - vi. Require additional information to be included in the database, such as description of study beyond counting and sorting, original location of burial site, full address of current location of human remains and objects; and title and detailed contact information of the office responsible for writing the database record
4. General NAGPRA Program: develop a reporting system that demonstrates success
 5. NAGPR Review Committee: develop a database of disposition cases that have come before the Committee; publicize upcoming publications of Notice of Inventory Completion and a list of notices that are awaiting publication
 6. Memoranda of Agreement or Programmatic Agreements: develop a standard MOA or PA
 7. Adequate Funding for the Implementation of NAGPRA: appropriate adequate funding for Indian tribes, Native Hawaiian organizations, and Federal agencies, including training opportunities, and the Inter-Agency Council and additional responsibilities for the NPS
 8. Compliance Audits: request that the Government Accountability Office conduct an audit of Federal agency compliance with the Act; and the Inspector General of each Federal agency should investigate any non-compliance with the Act that has been identified by the GAO audit.

There was one section, Future Areas of Research, which recommended the following:

1. Evaluate museum compliance with NAGPRA, similar to this Federal agency research
2. Evaluate the role of the Smithsonian Institution in the repatriation process
3. Evaluate the NPS National NAGPRA Program for efficiency, staffing levels and areas to improve
4. Examine how the unassociated funerary objects have been dealt with in the repatriation process
5. Examine how the Future Applicability (Sec. 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 were to be entered into the CUNAIID, including the process used in working with and notifying tribes of the remains and objects.

Are There Enough Resources?

One of the issues that was studied and discussed in the 2008 report was whether or not there were adequate resources to comply with the Act. We sought input from both Federal agency officials and from representatives of Indian tribes and Native Hawaiian organizations. Our work determined that over the past 19 years, the repatriation process has evolved to be a time consuming and expensive endeavor and even then, the repatriation process does not ensure that remains or cultural objects will be repatriated. Two possible solutions are (1) to infuse the program with much more federal support; and/or (2) to improve the process.

One of the major problems identified by the Makah-NATHPO study was the lack of Federal staff dedicated exclusively to carrying out compliance activities. The 2008 report recommends that additional appropriations be made to ensure that each agency has adequate staff. Related to this, was the lack of training for Federal staff who are assigned responsibility for NAGPRA implementation. We recommend that additional funds be appropriated to ensure that Federal officials receive adequate training and staffing levels, which they have identified as a need.

Since 1994, the U.S. Congress has appropriated funds for grants to museums and Indian tribes to carry out NAGPRA activities. Those funds have been inadequate to effectively address the mandates of the Act. Insufficient resources prevent Native Americans from maintaining robust NAGPRA programs and the needed effort to ensure protection and repatriation of a tribe's cultural resources. NAGPRA grants to tribes and museums – which are one of the only sources of funding for Native Americans in the field of cultural preservation – have decreased in the past five years. An assessment of grants made between 1994

and 2007 indicate that proportionately fewer of the funds appropriated for this purpose are actually being allocated for grants. We recommend an increase in the amount appropriated for grants, and that Congress ensure that these funds are only used for grants and not for administrative activities. If additional funds are needed for administrative activities, there is a separate line item to which additional funds could be made available.

Are the Law and Regulations Adequate or is Work Needed?

NAGPRA directs Federal agencies and museums to consult with Native governments and Native cultural practitioners in determining the cultural affiliation of human remains and other cultural items. Prior to passage of the Act, House Report 101-877 defined the term “consultation,” but the Department of the Interior decided not to include a definition when it promulgated regulations. As a result, there has been a great deal of confusion as to what exactly is required. The 2008 report recommended that the Department of the Interior revise the current regulations to define consultation consistent with the language in the House Report or, if the Department declines to do so expeditiously, the Congress amend the Act to include a specific definition of consultation.

NAGPRA directs each museum and Federal agency to complete an inventory of Native American human remains and associated funerary objects in their possession or control by 1995, with notification of cultural affiliation provided to the appropriate Indian tribe or Native Hawaiian organization by 1996. The Secretary of the Interior was directed to publish a copy of each notification in the Federal Register. Our research found that ten years later, a large number of these notices have still not been published and the human remains and associated funerary objects been not been listed on the culturally unidentifiable database, thus leaving them effectively hidden from the repatriation process. It is particularly disturbing that a number of these situations involve units of the National Park Service - the agency currently delegated by the Secretary of the Interior with the responsibility for implementing the Act. We recommend that, as for all federal programs, an open and transparent process needs to be instituted for the knowledge and use by all.

Culturally Unidentifiable Native American Inventories Database

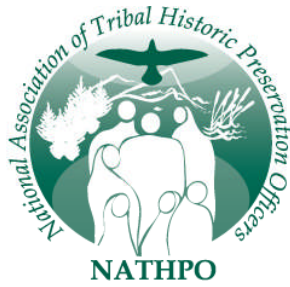
NAGPRA directs the National NAGPR Review Committee to compile an inventory of culturally unidentifiable human remains that are in the possession or control of each museum or Federal agency. In 1990, the Congressional Budget Office estimated that the remains of about 100,000-200,000 Native American individuals were stored in the nation’s museums and Federal repositories. The National NAGPRA Program has reported that as of March 31, 2009, museums and Federal agencies had published 1,220 notices of inventory completion accounting for the remains of 37,998 individuals and 985,788 associated funerary objects. To date, about 38,000 ancestors have been returned using the NAGPRA cultural affiliation process – which is roughly 19% of 200,000 – or the repatriation at a rate of about one percent (1%) per year.

Our research for the 2008 report found that the current database does not accurately reflect the number of culturally unidentifiable human remains in the possession or control of Federal agencies. Further, the currently database does not provide adequate information about how to proceed if the database includes human remains of interest to an Indian tribe or Native Hawaiian organization. For example, there is currently no record of whether or not Native Americans have been contacted or consulted, there are no serial numbers or a way to determine which record is being referenced when seeking additional information, and there is no “user guide” for how to use the database.

Based on our work for the 2008 report and in response to our members, NATHPO sponsored in August 2009 the first organized opportunity and open call for tribal representatives to come together to review and discuss the important information contained in the database. We provided the attendees with a copy of the database and a template to use for requesting additional information, which is their right by law. This was just a start in working with this important database and we hope to continue this initiative. Attached is the one-page summary of this database and the workshop.

Conclusion

NATHPO has been working to overcome historic practices and behavior toward Native people. We support local tribal efforts for control of their respective histories and culture. We support a tribal agenda that goes beyond merely educating and reacting to situations that are many times beyond our control. Native Americans have many reasons to be proud of their work in seeking the return of their ancestors and cultural objects and we hope that the Committee will continue supporting these local efforts and will have more opportunities to visit Indian country and hear from Native people on this important Act.



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CULTURALLY UNIDENTIFIABLE NATIVE AMERICAN INVENTORIES DATABASE (CUNAID)

In August 2008, the National Association of Tribal Historic Preservation Officers (NATHPO) -- working in collaboration with the Makah Tribe -- published the report, **Federal Agency Implementation of the Native American Graves Protection and Repatriation Act**. This first-ever review and report of how the Act has been implemented by those entities that are charged with responsibilities under the Act contains original research and recommendations on how to improve the process to better serve Indian country. It has had policy implications on a national level and has provided important information to Indian country as well as putting Federal agencies on notice that there is additional work to be done so that our Native ancestors and sacred objects may be returned to their communities.

One of the principal findings of our report is the need for more training, both at the tribal level and at the Federal level. Accordingly, NATHPO and the National Park Service National NAGPRA Program have collaborated to offer this one-day overview of the "Culturally Unidentifiable Native American Inventories Database." NATHPO has provided the following materials for you:

1. Excerpt from the Makah-NATHPO report that covers the CUNAID
2. NATHPO comments on Sec. 10.11, Disposition of Culturally Unidentifiable Human Remains, per Federal Register notice of October 16, 2007
3. State of Iowa process for reburial of remains and funerary objects
4. "Prehistoric" references in Final NAGPRA Regulations
5. FY2009 NAGPRA Consultation/Documentation Grant Recipients
6. Legal citations and Draft Template, "Request for Documentation"
7. CD of the following information:
 - a. Database in two formats: NPS' version (Access) and NATHPO's version (Excel);
 - b. Draft Template for Request for Documentation

In 1990, the Congressional Budget Office estimated that the remains of about 100,000-200,000 Native American individuals were stored in the nation's museums and Federal repositories. The National NAGPRA Program has reported that as of March 31, 2009, museums and Federal agencies had published 1,220 notices of inventory completion accounting for the remains of 37,998 individuals and 985,788 associated funerary objects. To date, about 38,000 ancestors have been returned using the NAGPRA cultural affiliation process -- which is roughly 19% of 200,000 -- or the repatriation at a rate of about one percent (1%) per year.

Per Section 8 of the act, the NAGPR Review Committee must compile an inventory of culturally unidentifiable Native American remains that are in the possession and control of each Federal agency and museum and with recommending specific actions for the development of a process for the disposition of human remains if the parties deem it desirable. Thus, the CUNAID was created and is maintained by National Park Service National NAGPRA Program. Per the NPS website, as of July 31, 2009, the database reflects information and is comprised of 16,922 records that describe 124,008 Native Americans and 915,783 associated funerary objects.

Today's one-day overview of this database is to familiarize you with the content and utilities currently available. We hope that additional information will be shared and your questions will be answered, such as:

- What is the CUNAID and why are these ancestors called "culturally unidentifiable?"
- How was the original information provided by museums and federal agencies summarized in the CUNAID?
- How do I use the CUNAID to identify and repatriate my tribe's ancestors and funerary objects?
- How do I obtain the original information provided by museums and federal agencies?
- How do I claim ancestors currently listed as "culturally unidentifiable?"