

NATHPO

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

P.O. Box 19189 • Washington, D.C. 20036-9189 • Phone: (202) 628-8476 • Fax: (202) 628-2241 • www.nathpo.org

**U.S. Senate Committee on Indian Affairs
Oversight Hearing on “Finding Our Way Home: Achieving the Policy Goals of NAGPRA”
June 16, 2011**

**Statement of the National Association of Tribal Historic Preservation Officers
Reno Keoni Franklin, Chairman**

Thank you for the opportunity to submit written testimony for this oversight hearing on:

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

On behalf of NATHPO and our member Indian tribes, we thank the committee members for your time and attention on implementing these important federal laws that direct federal agencies and museums to work with Indian tribes and Native Hawaiian organizations to seek timely repatriation of Native American human remains and cultural objects.

NATHPO Background

The National Association of Tribal Historic Preservation Officers (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. Each Indian tribe that participates in the THPO program appoints an individual to serve as the main point of contact; this is the only federal law that calls for such an appointment.

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. This is the 15th year of funding Indian tribes via the THPO program. There are now 119 THPOs with many more tribes applying for this status. Among other duties, THPOs assume the role and responsibilities of the State Historic Preservation Officers for their respective Indian reservations and aboriginal lands from which their ancestors once lived and were laid to rest. THPOs are not just tasked with complying with the National Historic Preservation Act; they are also often responsible for serving as the “NAGPRA representative” for their tribe.

NATHPO's membership includes THPOs and tribal governments that support the mission and goals of our organization. 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).

NAGPRA Background

The late 1980s were an important time period in Indian policy. The enactment of these three federal laws within a span of three years gave hope and changed many tribal communities:

1. NAGPRA, P.L. 101-601 (1990); and the
2. National Museum of the American Indian Act (1989; amended in 1996); and the
3. Indian Gaming Regulatory Act, P.L. 100-497 (1988).

In 1989-90, economic development in Indian country had yet to benefit from the Indian Gaming Regulatory Act as successful Indian casinos simply didn't exist yet. However, Indian tribes were asked to step into a NAGPRA process in the early 1990s that required substantial human and financial resources when the tribes had nothing. They also had to compete against each other for scarce resources, such as a NAGPRA grant.

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 and 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.

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 and retrieve their dead and sacred objects and cultural patrimony that have been removed from their communities.

Makah-NATHPO Report: In 2008, NATHPO worked with the Makah Tribe to examine federal agency implementation of NAGPRA and released their report, ***Federal Agency Implementation of the NAGPRA***, which included the finding that the Federal government neither assures compliance with nor enforcement of a federal law enacted to protect Indian remains and funerary objects and to reunite them with their families and homelands. The report also stated that Federal officials also have their frustrations and many said they could benefit from training on the repatriation process, but have inadequate resources. The report included many recommendations to improve the NAGPRA process and also specifically recommended that Congress request a Government Accountability Office (GAO) audit of Federal agency compliance, including the Smithsonian Institution.

Government Accountability Office (GAO) Audits: In the past three years, the Senate Committee on Indian Affairs and the House Committee on Natural Resources requested a GAO audit of the federal agencies and the Smithsonian. In 2010 and 2011 GAO issued the following reports, the titles of which speak for themselves:

- ***NAGPRA: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*** (2010) that looked at the work of eight agencies: Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, National Park Service, Forest Service, Army Corps of Engineers, and the Tennessee Valley Authority.
- ***Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects*** (2011) that reported on the lengthy and resource intensive repatriation process used by the Smithsonian's two museums that have Native American collections – the National Museum of Natural History and the National Museum of the American Indian.

House and Senate Oversight Hearings: In October 2009 the House Committee on Natural Resources, Rep. Nick Rahall chair, held an oversight hearing on NAGPRA, which NATHPO was a witness, and the Senate Committee held this hearing after the GAO completed its two audits and reports.

Challenges and Barriers in the Repatriation Process

NATHPO supports the recommendations listed in both GAO reports, including developing a needs assessment and timeline for federal agencies to comply with NAGPRA and a reporting requirement to Congress. The GAO recommendations on Smithsonian repatriation efforts include suggesting that Congress consider ways to expedite their repatriation process and to make cultural affiliations as efficiently and effectively as possible.

In addition, we provide information on the following critical areas of the repatriation process:

I. Consultation

Repatriation work is a process of consultation and information sharing. NAGPRA directs Federal agencies and museums to consult with Indian tribes and Native Hawaiian organizations 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 Makah-NATHPO 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. The Makah-NATHPO researchers 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.

In May 2011, the National Park Service National NAGPRA Program held a "government-to-government consultation meeting with Indian tribes" on the topic of amending the NAGPRA regulations. This was the first time, to our knowledge, the NAGPRA program or the National Park Service, held a government-government tribal consultation meeting via conference call. Many tribal representatives expressed concern about the call and stated that it was not tribal consultation. This is another example of the importance and need for each federal agency to have an open and transparent consultation process that is understood and agreed upon by each consulting party.

The Makah-NATHPO report also noted that most Federal agencies do not have a designated contact person for purposes of implementing NAGPRA or if there is a designated contact, that person is typically responsible for other cultural resource compliance issues. Thus, NATHPO recommends that 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 for publication in the Federal Register and that the Program also create a publicly available database that lists each Federal agency repository for curation purposes, including location and contact information. Also, 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 Program for publication in the Federal Register.

II. Enforcement and Oversight

One of the biggest challenges to ensuring compliance with federal repatriation laws is the lack of an enforcement and oversight mechanism. In their 2010 report on Federal agencies, the GAO noted that, "While the act [NAGPRA] authorizes the Secretary of the Interior to assess civil penalties against museums for noncompliance, no enforcement mechanism exists to ensure federal agency compliance except through litigation by private parties."

The Makah-NATHPO report included suggestions on creating an enforcement and/or oversight tool/s for federal agencies, such as an inter-agency NAGPRA implementation council within the executive branch, which would also establish a mechanism for referring complaints of non-compliance to the Inspector General of each federal agency.

The National NAGPRA Program recently announced that they no longer had the services of a National Park Service law enforcement officer, who was conducting civil penalty investigations of museums. At this time, there is not one person whose job is to investigate allegations of failure to comply with NAGPRA. This is a loss to implementing the overall goals of NAGPRA.

III. Burden on Indian Tribes and Native Hawaiian Organizations, including the “NAGPRA - Culturally Unidentifiable Native American Inventories Database”

Both GAO reports include information that gives Congress and Indian country a better estimate of the number of Native American human remains and cultural objects repatriated and still being held in federal agency repositories. After 20 years, federal agencies have culturally affiliated about one-half of the Native Americans held in their collections, the museums have affiliated only about 15 percent (15%) of their collections, and the Smithsonian has only affiliated about twenty-six percent (26%) of their collections. This illustrates the great amount of work left to do as the “culturally unidentifiable” process places the research and request burden on Native Americans. The following statistics on repatriation give an idea of the amount of work completed and remaining to do (attached pie charts using these numbers):

Native American Human Remains Reported by Federal Agencies (31,314 Native Americans):

14,431 culturally affiliated

14,674 culturally unidentifiable

2,209 “undetermined” (listed as culturally affiliated in the NPS database, but the agency has not published a Notice of Inventory Completion)

Native American Human Remains Reported by Museums (135,622 Native Americans):

21,485 culturally affiliated

111,654 culturally unidentifiable

2,483 “undetermined” (listed as culturally affiliated in the NPS database, but the museum has not published a Notice of Inventory Completion)

Native American Human Remains Reported by the Smithsonian (19,780 catalog numbers)

5,280 culturally affiliated

340 culturally unidentifiable

14,160 “undetermined” catalog numbers-estimation (until a tribal request is received, the Smithsonian does not research a catalog number to determine whether the remains are culturally affiliated or unidentifiable)

The Makah-NATHPO research for the 2008 report found that the Culturally Unidentifiable Native American Database does not provide adequate guidance and basic information for Native Americans who want to proceed investigating the human remains of interest or which show promise to be affiliated. 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.

For Native Americans interested in a repatriation claim from the Smithsonian, they have to review about 15,000 records and then submit a claim, thus starting a lengthy process. The burden placed on Native Americans to conduct this work is extraordinary and additional funds and resources are required if they are to indeed bring home their ancestors and cultural items.

IV. 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 representatives of Indian tribes and Native Hawaiian organizations. Our work determined that in 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.

The lack of Federal staff dedicated exclusively to carrying out compliance activities was also cited as a major problem. The Makah-NATHPO report recommended 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 in two categories: (1) consultation/documentation; and, (2) repatriation. 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 consultation/documentation 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 overall grants awarded between 1994 and 2007 indicate that proportionately fewer of the funds appropriated for this purpose are actually being allocated. 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.

V. Future Areas of Investigation and Research

One of the main goals of the Makah-NATPO 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. NATHPO continues to recommend that the Congress seek to:

1. Evaluate museum compliance with NAGPRA, similar to the Federal agency audit completed by the GAO
2. Examine how the unassociated funerary objects have been dealt with in the repatriation process
3. Examine how the Future Applicability (Sec. 10.13) provisions are being implemented
4. Examine the background process that led a Federal agency to determine whether human remains and associated funerary objects was to be entered into the CUNAIID, including the process used in working with and notifying tribes of the remains and objects.

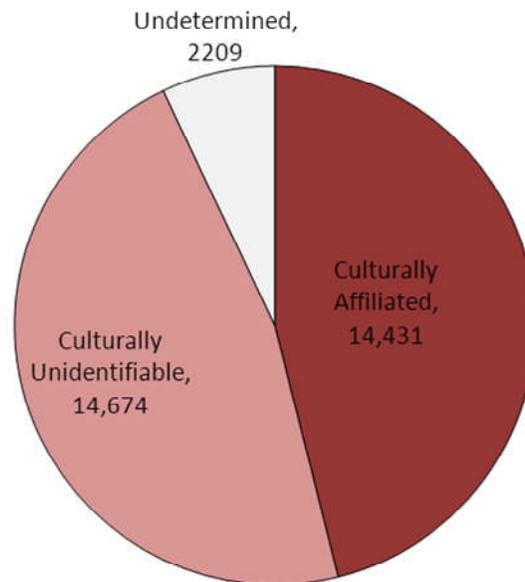
Conclusion

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 these important federal laws.

Charts attached.

Native American human remains reported by Federal agencies under NAGPRA

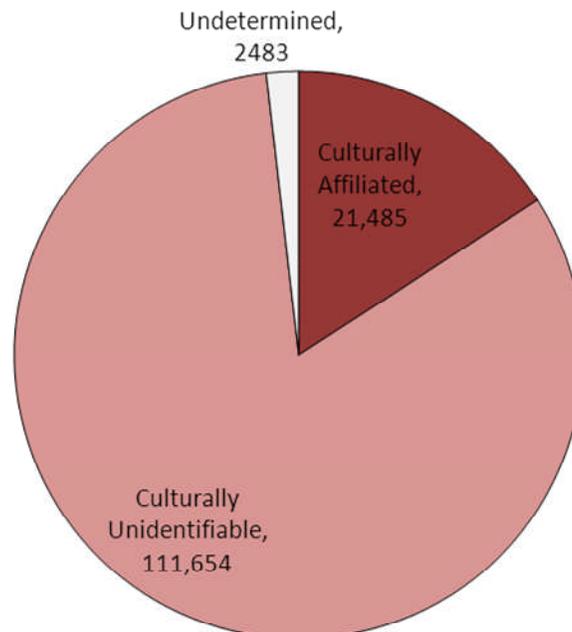
n=31,314 individuals



Date from <http://grants.cr.nps.gov/CAI/index.cfm> and <http://grants.cr.nps.gov/CUI/index.cfm> (updated June 1, 2011)

Native American human remains reported by museums under NAGPRA

n = 135,622



Native American human remains reported by the Smithsonian Institution

n = 19,780 catalog numbers
(except for culturally unidentifiable individuals)

