

**Native American Graves Protection and  
Repatriation Review Committee  
Report to Congress, 2011**



## Executive Summary

The NAGPRA Review Committee held two face-to-face meetings, one in the eastern US (Syracuse, NY) and one in the western US (Reno, NV), to hear concerns and provide counsel or findings of fact relative to NAGPRA cases.

The Review Committee notes considerable progress in repatriation activities by both federal agencies and museums, and in the successful repatriation of human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony by tribes and Native Hawaiian organizations. To date some 2,033 notices have been published, covering 40,864 individual human remains and 1,023,169 associated funerary objects. Federal agencies (excluding the Smithsonian Institution) report having fully repatriated 9,850 of the 15,488 minimum number of individual human remains in their control.

Barriers noted in 2011 include:

- Lack of sufficient funding by all parties, including the National NAGPRA Program, to adequately comply with the provisions of the Act
- Confusion regarding responsibility for reporting certain federal collections held in non-federal museums
- Confusion regarding applicability of specific time frames for responses by museums to different kinds of requests or responsibilities
- Need for amendment of certain aspects of current NAGPRA regulations, specifically 43 CFR 10.11
- Lack of access to federal land for reburial of human remains and associated funerary objects resulting from repatriations or dispositions
- Conflicting cultural protocols, and specifically misunderstandings arising from Native American gifting practices showing courtesy and respect which are forbidden under FACA ethical guidelines

Based on a combination of progress observed to date, barriers encountered, and the results of both public comments at the Review Committee's meetings and listening sessions held by the National NAGPRA Program, the Review Committee respectfully offers several recommendations to Congress:

1. Increase funding for the National NAGPRA Program to at least \$4.5 million annually, to support both Program activities supporting compliance by museums and federal agencies and grants to support both repatriations and continued consultation and collections documentation.
2. Request that the General Accounting Office conduct an assessment of compliance by museums and an assessment of the effectiveness of grants previously awarded to both museums and tribes to support NAGPRA-related activities.

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3. **Enact further legislation to better protect Native American burials.**
4. **Open Congressional hearings to better understand progress made and barriers encountered from the perspective of both Native communities and museums or federal agencies.**
5. **Develop frameworks for ensuring that federally associated collections held by non-federal museums are accurately inventoried and fully reported.**
6. **Request that the National Park Service amend portions of the current regulations under 43 CFR 10.11 to better reflect the intent of the Act.**
7. **Consider amending the statutory definition of “Native American.”**

## *NAGPRA: An Overview*

In 1990 Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001 et seq.), marking a significant turning point in the long and complex relationship between Native communities and universities, museums, and Federal agencies. NAGPRA legislation includes three primary provisions: 1) it provides for the repatriation of ancestral Native American human remains and cultural items in museum and Federal agency collections to Indian tribes or Native Hawaiian organizations; 2) it prohibits trafficking of such Native American cultural items; and 3) it provides for the disposition of Native American cultural items -- human remains, funerary objects, sacred objects, and objects of cultural patrimony -- removed from Federal or tribal lands to lineal descendants or Indian tribes or Native Hawaiian organizations based on geographic or cultural affiliation.

**NAGPRA** directs the Secretary of the Interior to establish and maintain the Native American Graves Protection and Repatriation Review Committee to monitor and review the requirements of the Act. The Review Committee operates in accordance with the Federal Advisory Committee Act and a charter issued by the Secretary of the Interior. The Committee's actions and findings are advisory, although they may be admissible in court proceedings.

The Review Committee has ten formally defined responsibilities:

1. Designating one of the members of the committee as chairman;
2. Monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;
3. Upon the request of any affected party, reviewing and making findings related to: A. The identity or cultural affiliation of cultural items, or B. The return of such items;
4. Facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;
5. 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;
6. Consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;
7. Consulting with the Secretary in the development of regulations to carry out this Act;
8. Performing such other related functions as the Secretary may assign to the committee;
9. Making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated; and

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10. Submitting an annual report to the Congress on the progress made, and any barriers encountered, in implementing the Act during the previous year.

This report is respectfully submitted to Congress, as required by NAGPRA, to identify progress made and barriers encountered in implementing the requirements of the Act.

## *Review Committee Activity Summary*

During FY 2011, the following individuals served on the Native American Graves Protection and Repatriation Review Committee: Sonya Atalay, Donna Augustine (term expired on October 27, 2010), Alan Goodman (term expired on March 2, 2011), Eric Hemenway, Dan Monroe (term expired on January 12, 2011), Rosita Worl, Mervin Wright, Jr., Adrian John (term began on October 27, 2010), Alex Barker (term began on April 28, 2011), and LindaLee Farm (term began on April 28, 2011).

The Review Committee held two meetings in 2011, one in Syracuse, New York and the other in Reno, Nevada. The Syracuse meeting was hosted by the Haudenosaunee Standing Committee on Burial Rules and Regulations, the Onondaga Nation and the Nations of the Haudenosaunee Confederacy, and by the Syracuse University College of Law, Center for Indigenous Law, Governance and Citizenship. The Reno meeting was hosted by the Reno-Sparks Indian Community, Pyramid Lake Paiute Tribe and the National Judicial College/National Tribal Judicial Center at Reno.

Review Committee meetings are opportunities for the Committee to engage directly with representatives from museums, Federal agencies, tribes, and Native Hawaiian organizations to better understand both successes and remaining barriers to effective implementation of the Act. Face-to-face meetings are thus crucial to the ability of the Review Committee to effectively discharge its responsibilities, and we are pleased to return to biennial face-to-face meetings in place of the telephonic meetings which had been common in recent years. In order to allow the broadest range of Native communities and museums, universities and agencies to engage with the committee, meetings are held in venues across the nation; over the past five years the Review Committee has held meetings and heard reports from local communities in Juneau (AK), Denver (CO), Washington DC, Phoenix (AZ), DePere (WI), San Diego (CA), Seattle (WA), Sarasota (FL), Syracuse (NY) and Reno (NV). It is the view of the Review Committee that a minimum of two face-to-face meetings per year, supplemented as required by telephonic meetings, are necessary to accomplish its statutory purpose.

Forty-Fourth Meeting, Syracuse, New York

The Review Committee convened in Syracuse, New York, on June 21-22, 2011. The Committee welcomed two new members, Alex W. Barker and LindaLee Kuuleilani Farm. Barker, an archaeologist active in both the Old and New Worlds, is Director of the Museum of Art and Archaeology at the University of Missouri, has previously chaired the ethics committees of both the Society for American Archaeology and the American

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Anthropological Association, and was nominated to the Review Committee by the Society for American Archaeology, American Anthropological Association, and the American Association of Museums. LindaLee Kuuleilani (Cissy) Farm is a partner at Goodsill Anderson Quinn & Stifel, LLP, a Hawaii-based law firm, where she concentrates her law practice in a number of areas including Native Hawaiian rights, land use and appellate advocacy. Since 2003, she has represented the Bernice Pauahi Bishop Museum on a variety of NAGPRA issues, including as lead counsel in litigation, and was nominated to the Review Committee by the Natural Science Collections Alliance.

The Committee discussed the recently completed GAO Report *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (No. GAO-10-768). Several issues raised by the GAO report require further consideration by the Review Committee. National NAGPRA Program staff updated the Committee on federal responses to the five recommendations made by GAO:

1. The GAO requested that Federal agencies review their resources, needs and timelines necessary to come into compliance with NAGPRA Section 5 (summaries) and Section 6 (inventories). Program staff reported that all federal agencies have responded and that, as of the June meeting, these responses were under review by the Department of the Interior and would be reported directly to Congress through the U.S. Senate Committee on Indian Affairs and the U.S. House Committee on Natural Resources. The posture of each Federal agency differs based on the size and complexity of its holdings, and it is anticipated that the resulting reports will candidly describe the needs of each agency in completing their inventories and summaries.
2. The GAO requested that Federal agencies develop a timetable for the expeditious publication of Notices of Inventory Completion for all remaining Native American human remains and associated funerary objects that have been culturally affiliated in inventories. Program staff indicated that the differing needs and situations of the individual Federal agencies would result in differing responses to this recommendation, but that compliance was anticipated.
3. The GAO requested that the National NAGPRA Program, in conjunction with the DOI Office of the Solicitor, should reassess whether Alaska Native Claims Settlement Act (ANCSA) corporations should be considered as Indian tribes for the purposes of carrying out NAGPRA. Program staff reported that following review by Department of the Interior Office of the Solicitor staff the regulations were being revised to bring the regulatory language into line with the language of the statute. On July 5, 2011, the Department of the Interior published a revision of the 43 CFR 10 regulations which removed and reserved 43 CFR 10.2(b)2, which included language differing from that of NAGPRA, in order to bring the regulations into closer accord with the statutory language of the Act.
4. The GAO requested that the National NAGPRA Program strictly adhere to the process prescribed in the Act to ensure that all Review Committee nominations are properly screened to confirm that the nominees and nominating entities meet statutory requirements. Program staff stated that the GAO report did not

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specifically identify any missteps taken by the National NAGPRA Program in past nominations, and that they considered steps taken from 2008 to be effective.

5. The GAO requested that DOI ask each Federal agency to report their repatriation data to the National NAGPRA Program on a regular basis, but no less than annually, for each Notice of Inventory Completion they have published or will publish, and upon receipt of the above information, that the National NAGPRA Program forward it to the Review Committee to provide to Congress. These data, provided by the National NAGPRA Program, are included in this report.

The Review Committee also discussed the GAO Report *Smithsonian Institution: Much Work Needed to Identify and Repatriate Indian Human Remains and Objects* (No. GAO-11-515), and heard a presentation by Ms. Jacquetta Swift, Repatriation manager at the National Museum of the American Indian (NMAI) regarding efforts to comply with the requirements of the National Museum of the American Indian Act (NMIHA).<sup>1</sup> The GAO Report recommended that Congress consider methods to expedite the Smithsonian's compliance effort, and also offered four specific recommendations to the Smithsonian itself: 1) that the current Smithsonian Institution's Repatriation Review Committee's jurisdiction be expanded to include the NMAI, and not just the NMNH; 2) that the Smithsonian Institution report to Congress on its repatriation activities; 3) that the Smithsonian Institution establish an independent appeals process; and 4) that the Smithsonian Institution develop a policy for human remains and objects that cannot be culturally affiliated. Ms. Swift indicated that the Smithsonian is working on each of these recommendations, and stated the highest priority of NMAI is the return of all human remains and associated funerary objects to their communities of origin, both nationally and internationally.

The Committee discussed recent congressional hearings on NAGPRA, including the June 16, 2011, Senate Indian Affairs Committee Oversight Hearing on *Finding Our Way Home: Achieving the Policy Goals of NAGPRA*. Mr. Wright, a member of the Review Committee, testified at the hearing and stated his view that Congress had the right intention when it enacted a law to address the human right of Native Americans to have their ancestors treated with respect, including the right to be buried and stay buried and that the burial rite includes both human remains and funerary objects and that the two cannot be separated.

The Review Committee also received an interim report on the year-to-date activities of the National NAGPRA Program. In June of 2011 the Program surpassed 2,000 notices published, representing more than 45,000 individuals and more than 1,000,000 associated funerary objects, as well as many thousands of sacred objects, objects of cultural patrimony, or other designated cultural items. The number and quality of grant proposals submitted to the Department of the Interior has also increased; in 2011 the Department lacked the resources to fully fund all proposals recommended for support by the grant

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<sup>1</sup> NAGPRA proper does not apply to the Smithsonian Institution, which is instead subject to the National Museum of the American Indian act which mandates broadly similar activities.

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review panel. In addition to a larger number of meritorious proposals,<sup>2</sup> this also reflected the failure of overall program budgets to keep pace with increasing compliance activities, increasing numbers of repatriation grants which are funded on a non-competitive basis prior to NAGPRA grant awards, and a recent decision to include repatriation support funding for tribes seeking repatriations from Federal agencies.

Ms. Sherry Hutt, National NAGPRA Program Manager, discussed the continuing activities of the NAGPRA Program's Database and Website Coordinator, Ms. Mariah Soriano, who maintains the Program's seven databases: the Native American Consultation Database (NACD); the Notices of Inventory Completion (NIC) Database; the Notices of Intent to Repatriate (NIR) Database; the Notices of Intended Disposition (NID) Database; the Culturally Unidentifiable (CUI) Native American Inventories Database; the Culturally Affiliated (CA) Native American Inventories Database; and the Summaries Database. Current efforts include updating of database records, linkages of data between databases, and creation of new mechanisms for uploading data by museum and federal agency personnel. Another effort currently underway is the digitization of inventories and summaries. All of these efforts should help assure greater data integrity and assist in the identification and correction of gaps or discrepancies in recorded data.

The National NAGPRA Program has expanded the use of webinars for training and outreach, with recent sessions addressing grants, databases, notices, and regulations; 2011 sessions focused on 43 CFR 10.11, *Final Rule, the Disposition of Culturally Unidentifiable Human Remains into the NAGPRA Process* on July 20, 2011, and *Coordinating Compliance with Section 3 of NAGPRA and Section 106 of the National Historic Protection Act* on September 15, 2011. The Review Committee has previously requested evaluations of the effectiveness of this training program, and Program staff will provide these evaluation results at a future date.

One of the primary topics considered by the Review Committee was its response to an inquiry from the National NAGPRA Program regarding revision of the current NAGPRA regulations under 43 CFR 10. Program staff indicated that the Department of the Interior was considering discretionary review of the existing regulations, and sought the advice of the Review Committee regarding: 1) whether such review was needed; and 2) if so, which parts in particular required revision.

At this meeting concerns were raised by one member of the Committee (Mr. Wright) regarding the 2010 Review Committee Report to Congress because of its endorsement of these regulations, noting previously expressed concerns regarding the regulations raised by both the scientific community and the tribal community; later in the meeting all members of the Committee voted to ask the Department to revisit and amend this section the NAGPRA regulations. We wish to make clear to Congress that the Review Committee believes that the current NAGPRA regulations, and specifically the current regulations in 43 CFR 10.11, need to be amended based on consultation and listening

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<sup>2</sup> The Review Committee wishes to note that the increase in number and quality of proposals may be due to the continuing outreach efforts of Program staff, and particularly Program Grants Coordinator Sangita Chari.

sessions that have already taken place, and based on concerns previously expressed by the Review Committee as well as comments provided in writing by a range of individuals, tribes, Native communities, museums, universities and scientific and cultural organizations. These listening sessions have included general sessions open to museums, universities, agencies, tribes, Native communities and others, defined periods for written public comment, as well as separate and closed government-to-government consultations with tribes.<sup>3</sup>

The Review Committee also heard presentations by several individuals and groups. The Peabody Museum of Archaeology and Ethnography at Harvard University reported on its ongoing compliance efforts.<sup>4</sup> The Peabody Museum has completed the requirements to enable repatriation of approximately 3,100 individual human remains and over 10,000 funerary objects, representing approximately 13 percent of the total number of human remains and funerary objects available for repatriation nationally. For culturally affiliated collections, physical repatriation has been completed for over 2,900 individual human remains, 3,900 funerary objects, 1 sacred object, 73 objects of cultural patrimony, and 18 objects that constitute both a sacred object and an object of cultural patrimony. Harvard reported that the 43 CFR 10.11 rule continues to be of significant concern regarding the resources that will be required to implement it at the university level. The remains of nearly 7,000 individuals at the Peabody Museum, coming from almost every U.S. state, are impacted by the rule. The rule will also impact the Peabody Museum's ability to work towards mutual goals of education and research, and will require significant time to implement.

The Review Committee also heard a joint presentation by the National Park Service Southeast Region and the Choctaw Nation of Oklahoma<sup>5</sup> regarding the largest repatriation in the NPS Southeast Region's history, completed in March 2011 when a total of 124 individuals and numerous associated funerary objects were brought home and reburied in their original resting places on Natchez Trace Parkway property. State of the art geophysical technology, including ground penetrating radar, 3D LiDar scanning, gradiometer and base station survey grade GPS was used to relocate the original burial locations and trenches from the 1950s and 1960s, in order to place burials and objects within their exact original orientations. A significant coalition of southeastern tribes attended the reburial ceremony, including representatives of the Choctaw Nation of Oklahoma, Jena Band of Choctaw Indians, Louisiana, Choctaw Band of Mississippi, Muscogee (Creek) Nation, and Chitimacha Tribe of Louisiana.

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<sup>3</sup> Ms. Farm asked whether Native Hawaiian communities had been included in these closed discussions, and legal staff from the Department of the Interior indicated they were not, as these consultations had taken place under the Executive Order on Consultation; individuals from Native Hawaiian organizations who requested to be part of that consultation meeting were asked to call into the public listening session, due to the government-to-government consultation nature of the meeting with the tribal governments.

<sup>4</sup> The Peabody's report was presented by Ms. Diana Loren, Associate Curator, Peabody Museum of Archaeology & Ethnology.

<sup>5</sup> The presentation was prepared by Ms. Margo Schwadron of the NPS Southeast Region and Mr. Ian Thompson, Choctaw Nation of Oklahoma, and read by Ms. Schwadron.

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The Review Committee also heard a presentation by National Association of Tribal Historic Preservation Officers (NATHPO).<sup>6</sup> The presentation identified what NATHPO considers to be barriers to implementation of NAGPRA. These include: 1) culturally unidentifiable human remains, for which NATHPO feels the burden is on tribes to try to identify collections, resulting in an exhausting, time-consuming and expensive process; 2) undetermined collections, for which cultural affiliation has been determined but repatriation has not yet occurred; and 3) the large amount of catalogue numbers in the Smithsonian Institution collections, which will be another time-consuming and expensive process for tribal review. NATHPO also indicated it was interested in recommending that the GAO look at museums in terms of their NAGPRA work, and specifically noted that some \$33 million in NAGPRA grants have been awarded to museums and Indian tribes, and GAO should assess how appropriately and effectively these funds had been used. NATHPO also expressed some concern regarding the digitization of NAGPRA records, including publicly accessible inventories and summaries, and asked that tribes be consulted before any final decisions regarding this process are made.

NATHPO also asked for clarification regarding the status of decisions made at the November 2010 Review Committee meeting. Counsel from the Office of the Solicitor summarized the general process following a decision by the Review Committee under Section 8(c)(3), findings of fact, or Section 8(c)(4), dispute recommendations. The Review Committee's recommendations are advisory. As general practice the Department receives those recommendations and publishes them for the public in a Federal Register notice. The Secretary of the Interior does not have a role in implementing these recommendations. A number of ethical questions were raised regarding the November 2010 meeting of the Review Committee, and publication of the notices for the disputes are now under review both by the Departmental Ethics Office and the Division of General Law. Counsel stated that no decision has been made regarding whether the notices from the November 2010 meeting will be published.

The Review Committee also heard a presentation by the Columbia Plateau Intertribal Repatriation Group,<sup>7</sup> consisting of tribes and bands from the Columbia Plateau states of Washington, Idaho, and Oregon, and including the Confederated Tribes and Bands of the Yakama Nation, Washington, the Confederated Tribes of the Umatilla Indian Reservation, Oregon, the Confederated Tribes of the Warm Springs of Oregon, the Nez Perce Tribe, Idaho, and the Wanapum Band of Priest Rapids, a nonfederally recognized group. The Columbia Plateau Intertribal Repatriation Group listed several challenges it had encountered in working with the CUI Database: individuals listed on multiple databases; new databases being created unbeknownst to institutions or affected tribes; lack of updates on the databases when information about collections is updated, for example, regarding control or affiliation; incorrectly listing collections that are not subject to NAGPRA; and confusing database fields.

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<sup>6</sup> The NATHPO report was presented by Ms. Bambi Kraus, Tlingit from Kake, AK, and Director of the National Association of Tribal Historic Preservation Officers.

<sup>7</sup> The Columbia Plateau Intertribal Repatriation Group remarks were presented by Ms. Jacqueline Cook, Repatriation Specialist for the Confederated Tribes of the Colville Indian Reservation.

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The Review Committee heard a presentation from its hosts, the Haudenosaunee Standing Committee on Burial Rules and Regulations,<sup>8</sup> which represents the Tonawanda Band of Seneca Indians of New York, Cayuga Nation of New York, Onondaga Nation of New York, Tuscarora Nation of New York, and the Mohawk Nation. The Haudenosaunee Standing Committee on Burial Rules and Regulations feel that museums have been resistant to repatriation, and that confederacies of tribes face additional hurdles in seeking repatriations of ancestral remains. It was noted that the efforts of groups like the Haudenosaunee were made more difficult because the tribes comprising the confederacy spanned both sides of the U.S./Canadian border. The Haudenosaunee Standing Committee on Burial Rules and Regulations described recent repatriation efforts in West Virginia, where the Haudenosaunee Standing Committee on Burial Rules and Regulations worked with the Eastern Band of Shawnee to seek repatriation of human remains and associated objects, and faced a range of challenges because of specific provisions of West Virginia burial laws.

Mr. Wright shared a letter from Ms. Vernalda Grant from the San Carlos Apache Tribe. The letter was addressed to Secretary Salazar and described the tribe's opposition to existing policies that: 1) permit museums to refer to objects claimed under NAGPRA as cultural items instead of by specific category (unassociated funerary objects, sacred objects, and/or objects of cultural patrimony) in Notices of Intent to Repatriate; and 2) prevent the Review Committee from hearing requests on repatriation and the repatriation process if claimed items have already been obtained prior to the Review Committee meetings.

## Forty-Fifth Meeting, Reno Nevada

The Review Committee convened in Reno, Nevada, on November 8-9, 2011. Chairman Worl was unable to attend, and Mr. Wright was elected to chair the 45th Review Committee meeting.

The Review Committee heard a presentation from the National NAGPRA Program regarding its continuing activities, and progress in implementing provisions of the Act.<sup>9</sup> Selected data from the National NAGPRA Program report, particularly statistical information regarding repatriation and compliance activities, are included in this report to Congress. The Department is currently in the pre-regulatory rulemaking stage in its discretionary review of 43 CFR 10, and it was stated that this review is informed by the feedback received from museums, tribes and Native communities, and as a result of dialogue with all parties. It was also emphasized that the Department has no pre-conceived ideas regarding the nature or scope of these changes. While a civil penalties investigator has not been part of Program staff for much of FY2011, a contract-based civil penalties analyst has been added. It was also announced that Mr. David Tarler of

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<sup>8</sup> The Haudenosaunee Standing Committee on Burial Rules and Regulations presentation was made by Mr. Pete Jemison, Seneca Nation of New York.

<sup>9</sup> The presentation regarding National NAGPRA Program activities was made by Sherry Hutt, Manager, National NAGPRA Program.

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NPS would step down as Designated Federal Officer (DFO) as of the 46th Review Committee meeting in Santa Fe to allow him to focus on the development of regulations, and be replaced as DFO by Sherry Hutt, National NAGPRA Program Manager. The expanded use of webinars was also discussed, with an emphasis on the use of webinars to address focused and specific topics which might be of deep interest to a relatively small audience with limited funds for travel; as an example, one webinar topic planned for the coming year addresses “NAGPRA on Tribal Lands.” National NAGPRA plans to digitize key documents for internal use and to transfer paper-based NAGPRA Program records to the National Archives and Records Administration (NARA), which will then reply to future responses to Freedom of Information Act (FOIA) requests.

The Review Committee heard a presentation from the National Park Service’s Park NAGPRA Program.<sup>10</sup> NPS Park NAGPRA staff addressed the issue of reburial of human remains and cultural items repatriated under NAGPRA, and noted that allowing such reburial of remains originating outside current park boundaries would require amendment of current Department policies, and would require action at the Department level. Approximately 92% of human remains and 49% of associated funerary objects already published have been repatriated to date; it was noted the relatively low percentage of AFOs reflects the very large number of beads associated with a single burial. The Review Committee also heard a presentation regarding student internship programs administered by the Park NAGPRA Program.

The Review Committee received correspondence regarding compliance activities by the Bureau of Indian Affairs and the Bureau of Land Management. The Review Committee invited representatives of the Bureau of Indian Affairs and Bureau of Land Management to make presentations regarding NAGPRA-related issues concerning human remains and cultural items from Wizard Beach and Spirit Cave at its 46th meeting in Santa Fe. The Review Committee heard a statement from members of the Fallon Paiute-Shoshone Tribe concerning human remains from Spirit Cave, expressing concern that there has been no resolution of the case to date, as well as a statement by Mr. Ben Aleck, Coordinator of the NAGPRA Program for the Pyramid Lake Paiute Tribe, similarly expressing concern that continuing efforts to secure the disposition or repatriation of these remains had not yet been accomplished.

The Review Committee also heard a presentation regarding FY2011 compliance and repatriation activities by the Department of Agriculture US Forest Service.<sup>11</sup> It was noted that the numbers officially recorded for Forest Service repatriation activities by the National NAGPRA Program understate the FY2011 totals, because additional repatriations took place after the deadline for agency reporting but prior to the end of FY2011. The corrected cumulative totals should be 1,096 individual human remains and 17,403 associated funerary objects. In FY2011 the Forest Service repatriated 267

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<sup>10</sup> Comments regarding the National Park Service Park NAGPRA Program activities were presented by Mary Carroll, Lead, Park NAGPRA Program, and student assistant Brenda Todd.

<sup>11</sup> Information regarding the US Forest Service’s compliance and repatriation efforts was presented by Frank Wozniak, National NAGPRA Coordinator, USDA Forest Service.

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individual human remains, 853 associated funerary objects and 1,758 unassociated funerary objects. Disparities between various reported totals for human remains and cultural items were addressed, and generally these disparities reflect duplicate entries arising from joint administration of lands or the presence of human remains or cultural items in notices from both the federal agency responsible for collections and the institution currently holding them. An additional set of human remains had been earlier repatriated prior to publication of notice; that notice has now been submitted. Forest Service representatives did not feel they currently face any significant barriers to compliance with the Act.

Draft Dispute Procedures and Findings Procedures for the Review Committee were considered, and remain under review.<sup>12</sup> Members of the subcommittee specifically expressed concern that claims by their respective groups had been denied by museums, and that this reflected inappropriate requests for information by museums, and that the dispute procedures being developed should address these concerns. Additional information will be presented by the subcommittee to the Review Committee at its 46th meeting in Santa Fe. Comments were also provided by Mr. Lalo Franco of the Santa Rosa Rancheria Tachi Yokut Tribe, supporting the idea of dispute procedures and informal dispute resolution methods being developed for use prior to disputes coming to the Review Committee.

The Review Committee heard public comments from the Peabody Museum of Archaeology and Ethnology at Harvard University. About 23% of the Peabody Museum's total activities are committed to NAGPRA compliance. 3137 human remains, over 10000 funerary objects. Physical repatriation 2 events, 4 consultation visits. The Peabody Museum also added staff to respond to the new requirements under 43 CFR 10.11, and noted that the amount of effort involved in compliance was seriously underestimated.<sup>13</sup>

The Review Committee heard concerns from representatives of the Pueblo of Acoma that the lack of land for reburial constituted a real and continuing barrier to completion of repatriation. The Review Committee separately recommends to Congress that appropriate mechanisms be developed to allow for the use of Federal land for interment of repatriated human remains and cultural items.

The Review Committee received a resolution establishing the Central Valley NAGPRA Consortium (CCNC), comprising the Ione Band of Miwok, Santa Rosa Rancheria Tachi Yokut Tribe, Shingle Springs Band of Miwok Indians, acknowledging their shared group identity and desire to promote repatriation of human remains and cultural items under the provisions of the Act.<sup>14</sup>

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<sup>12</sup> The subcommittee included Ms. Atalay, Mr. Hemenway, and Ms. Worl, and was resented by Ms. Atalay and Mr. Worl.

<sup>13</sup> The report from the Peabody Museum was presented by Ms. Patricia Capone, NAGPRA Coordinator for the Peabody Museum of Archaeology and Ethnology.

<sup>14</sup> The resolution was presented to the Review Committee by Mr. Lalo Franco of the Santa Rosa Rancheria Tachi Yokut Tribe.

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The Review Committee also heard comment from Santa Rosa Rancheria concerning their discussions with the Phoebe Hearst Museum at the University of California.<sup>15</sup> Some remains have already been affiliated, others have not yet been affiliated. Representatives stated that their NAGPRA team has concluded that all of their remains should come home together.

The County of Los Angeles brought a case to the Review Committee asking that it act on an Agreement Concerning the Reburial of Culturally Unidentifiable Human Remains and Associated Funerary Objects For which a “Tribal Land” or “Aboriginal Land” Provenience Cannot Be Determined.<sup>16</sup> The historic-period cemetery population from Our Lady Queen of Angels Church in downtown Los Angeles included a range of individuals, some of whom were likely of Native American ancestry, some of whom were not; in the absence of more detailed osteological or genetic study it is not possible to make these determinations. Several burials included artifacts consonant with traditional Native American material culture, but their presence alone is not necessarily a reliable indicator of ethnicity or descent, nor does the absence of such materials indicate that other burials are not Native American. As a result of consultation with all parties concerned, including Native American and non-Native American groups and the Catholic Archdiocese it has been proposed that all of the remains be re-interred at the Campo Santo Memorial Garden without additional analysis at this time, with each set of human remains and accompanying objects be re-interred in their original locations. This approach appears to reflect consultation with and approval of the affected parties, and reflects a consistent approach to human remains regardless of ancestry or affiliation. In this instance, as the same treatment and disposition is agreeable to all Native and non-Native parties concerned, the Review Committee concludes that it cannot make a determination whether the remains are Native American or not, and therefore believes that Los Angeles County may proceed under other law. The Review Committee requests that the letter from the Secretary reflect this view.

## Review Committee Procedures

In 2010 the Review Committee established a subcommittee (consisting of Ms. Sonya Atalay, Mr. Eric Hemenway and Review Committee Chair Ms. Rosita Worl) charged with soliciting input from museums, federal agencies, and tribes to develop more specific dispute procedure guidelines to be followed during disputes heard by the Review Committee. This subcommittee began its work in 2010, and its efforts continue in 2011. Two forms have also been created and posted on the National NAGPRA Program’s website to assist in submitting requests to the Review Committee. One of the forms is for a request that, pursuant to its section 8 (c)(3) responsibility, the Review Committee make

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<sup>15</sup> Ms. Melody Johnson of the xxx Rancheria offered the presentation.

<sup>16</sup> The presentation regarding this request was made by Shiraz Tangri, Alston & Bird LLP, Dawn McDivitt, Office of the Chief Executive of the County of Los Angeles, John Dietler, SWCA Environmental Consultants, Antonia Hernandez, LA Plaza de Cultura y Artes Project, and Joseph Ontiveros, Soboba Band of Luiseno Indians.

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findings of fact regarding the identity or cultural affiliation of cultural items, or the return of such items, where a dispute between parties is not clearly evident. The other form is for a request that, pursuant to its section 8 (c)(4) responsibility, the Review Committee convene parties and facilitate the resolution of a dispute related to the return of cultural items, where a dispute is clearly evident.

## Other Review Committee Matters

Previous Review Committee Reports to Congress have called for more frequent and detailed communication between staff of the National NAGPRA Program and members of the Review Committee. We are pleased to report that this is taking place, both through more frequent contact and through periodic memos describing ongoing activities and actions of the Program. Continued improvements in National NAGPRA Program databases should also improve the ability of the Program to provide reports to the Review Committee regarding specific aspects of implementation of the Act.

More comprehensive formal training in federal ethics rules and FACA procedures is now provided to all members of the Review Committee. At the June 2011 meeting this included extensive training with the Ethics Program Manager and Deputy Ethics Counselor for the National Park Service, Richard Grant, and Review Committee members have maintained their contacts and continued discussions regarding certain issues subsequent to those training sessions.

In its recently released *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act* (No. GAO-10-768, July 2010) the GAO recognized a “perceived bias” of the Review Committee toward tribal interests. In its 2010 Report to Congress the Review Committee took exception to these conclusions and rejected them. The Review Committee wishes to express its strong commitment to finding a balance between the vital, valid and acknowledged interests of tribes and Native communities to reclaim ancestral human remains and cultural items with the vital, valid and acknowledged role of museums and scientific and cultural organizations to preserve, document and interpret the past for the benefit of a broader public.

## *Progress Made*

Museums and Federal agencies in consultation with tribes and Native communities continue to be very active in NAGPRA compliance. Because NAGPRA concerns the remains of individual humans and culturally significant or sacred items it would be a mistake to measure success purely in terms of numbers. That is not, ultimately, the best way to gauge the success of the process of documentation, consultation and repatriation or to understand its impact on all parties concerned. We explicitly recognize that numbers tell only part of the story, but it is nevertheless a part worth telling.

The National NAGPRA Program reports the following statistics, briefly stated:

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**Summaries Received:** 1,576 total, 465 reporting no collection requiring a summary.

**Inventories Received:** 1,337 total, from 1,187 institutions, 255 reporting no collections.

**Notices of Inventory Completion:** 84 NIC published in FY 2011, 1,488 published overall.

**Notices of Intent to Repatriate:** 25 NIR published in 2011, 545 published overall.

**Notices of Intended Disposition:** 111 NID notices reported for 978 individuals (MNI), 8,708 associated funerary objects, 64 unassociated funerary objects, and 3 objects of cultural patrimony.

**Notice Processing:** 130 received, 109 published, total backlog of 78, with 17 of these predating 2007.

**Culturally Unidentifiable Human Remains:** 734 inventories from 672 institutions, representing 126,496 MNI, 936,642 associated funerary objects; of these individuals 5,574 MNI subsequently culturally affiliated and 4,016 MNI transferred as CUI dispositions (172 MNI and 537 associated funerary objects transferred under 43 CFR 10.11).

**Culturally Affiliated Human Remains:** 536 inventories from 452 institutions, representing 54,352 MNI and 1,126,741 associated funerary objects; 38,343 in current Notices of Inventory Completion.

**Excavation and Discoveries:** 105 notices accounting for 966 MNI, 1,416 AFO, 64 UFO and 3 objects of cultural patrimony.

The National NAGPRA Program views the publication of notices as one of the best indicators of overall NAGPRA activity, and in 2011 a total of 109 notices of all kinds were published in the Federal Register, with more than 2,000 notices published to date.<sup>17</sup> Information regarding these notices, including historical data showing the trend in publication, is provided in Table 1.

<b>Table 1. Notices published by year, including minimum number of individuals represented by those notices.</b>			
<b>Year</b>	<b>Published Notices</b>	<b>Minimum Number of Individuals</b>	<b>Notices Received</b>
1992	2	15	3
1993	14	40	14
1994	13	1,851	19
1995	36	806	37
1996	59	2,290	198

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<sup>17</sup> At the time this document was written (November 2011) the total number of published notices was 2,033.

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1997	122	1,194	187
1998	82	5,280	202
1999	108	6,441	156
2000	110	2,026	186
2001	199	2,959	130
2002	143	3,157	109
2003	85	666	83
2004	103	1,528	63
2005	108	2,337	77
2006	100	1,373	96
2007	108	747	135
2008	180	3,757	146
2009	200	1,531	159
2010	152	1,628	140
<b>2011</b>	<b>109</b>	<b>1,697</b>	<b>130</b>
<b>TOTAL</b>	<b>2,033</b>	<b>40,864</b>	<b>2,270<sup>18</sup></b>

To date there have been 1,488 Notices of Inventory Completion published accounting for 40,864 human remains and 1,023,169 associated funerary objects. In 2011 84 such notices were published, accounting for 1,697 human remains and 13,416 associated funerary objects. There have similarly been 545 Notices of Intent to Repatriate, accounting for 148,972 unassociated funerary objects, 4,332 sacred objects, 964 objects of cultural patrimony, and 292 undesignated cultural items (usually representing items where the museum and tribe could not agree on the appropriate category for the items, but repatriation continued in good faith). Over the course of 2011 a total of 25 Notices of Intent to Repatriate were published, accounting for 2,757 unassociated funerary objects, 18 sacred objects, 6 objects of cultural patrimony, and 44 sacred objects which were also objects of cultural patrimony.

These numbers are remarkable, particularly when each is understood as the outcome of a sustained and deliberate process of documentation, study, consultation and collaboration between one or more museums, institutions or Federal agencies with a range of tribes or Native communities.

<p><b>Table 2. Minimum number of individuals and associated funerary objects published in Notices of Inventory Completion by Federal Agencies and Repatriated as of Sept. 30, 2011</b></p>
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<sup>18</sup> Over the past 21 years, there were 159 draft notices submitted that were removed from the publication process and closed as duplicates or submitted for non-notice publication events, such as repatriation prior to the law, notices submitted that should have been a newspaper notice of a new discovery on the land, or submissions by museums that did not have control or did not receive Federal funds, which were replaced with notice publication by the Federal agency. The key to understanding advances in the NAGPRA process is to compare the total individuals in the inventories to the numbers represented in a notice.

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Agency	MNI	MNI Repatriated	AFO	AFO Repatriated
US Dept. of Agriculture, Forest Service	5355	1032	34322	16951
US Dept. of Defense, Air Force	38	29	85	61
US Dept. of Defense, Armed Forces Inst. of Pathology, National Museum of Health & Medicine	16	10	0	0
US Dept. of Defense, Army COE, MCX	867	793	44752	41822
US Dept. of Defense, Army	105	105	1557	1557
US Dept. of Defense, Navy	218	218	6744	6744
US Dept. of Defense, Navy, Marine Corps	1596	1596	739	739
US Dept. of Energy	6	6	1340	1340
US Dept. of Homeland Security, U.S. Coast Guard	2	2	0	0
US Dept. of Interior, Indian Affairs	830	553	12081	10204
US Dept. of Interior, Bureau of Land Management	1575	1064	19035	14261
US Dept. of Interior, Fish and Wildlife Service	164	66	628	372
US Dept. of Interior, Indian Arts and Crafts Board	1	0	0	0
US Dept. of Interior, National Park Service	4142	3816	83531	38937
US Dept. of Interior, Bureau of Reclamation	564	558	3342	3330
US Dept. of Justice (Federal Bureau of Investigation and Marshals Service)	9	2	2	1
<b>Total</b>	<b>15488</b>	<b>9850</b>	<b>208158</b>	<b>136319</b>

Table 2 summarizes the minimum number of individuals and associated funerary objects already published by Federal agencies. While the numbers are impressive, it should be noted that not all of the individuals published in Notices of Inventory Completion have been repatriated, nor have their associated funerary objects. This may be even more of an issue for non-federal repositories, museums, universities and similar institutions. Table 3 compares the total numbers of MNI reported in Notices of Inventory Completion to the total number of MNI reported to National NAGPRA as transferred or repatriated to tribes of Native communities.

<b>Table 3. Control Transfer or Repatriation to Tribes on Notices of Inventory Completion as reported to National NAGPRA Program</b>		
Institutional Type	MNI Repatriated	MNI Reported
Museums and Universities	1,631	25,376
Federal Agencies	9,850	15,488
<b>Total</b>	<b>11,481</b>	<b>40,864</b>

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The low numbers of transfers or repatriations reported by museums and similar institutions may be misleading, as Federal agencies are required to report such figures to the National NAGPRA Program, and museums are not; the table compares mandatory data collected from Federal agencies against anecdotal data voluntarily reported by some museums. The Review Committee has been advised that the costs of repatriation remain a significant barrier to the transfer or repatriation of human remains from Federal agencies or museums to tribes, despite the continued availability of repatriation support grants through the National NAGPRA Program.

Over the course of 2011 a total of 3 allegations against museums under NAGPRA were investigated, with none of the allegations found to be substantiated; to date 169 alleged counts in 32 allegations against 28 museums have been investigated, with 148 of these (87.5%) found to be unsubstantiated.

The Review Committee is also pleased to note several other important ways in which progress was made in 2011. Here we highlight the most notable areas of progress:

*Increased training opportunities offered by the National NAGPRA Program:* More than 1,000 individuals received training through the National NAGPRA Program. Training programs in FY2011 were offered in conjunction with the American Association of Museums; The George Washington University; the Inter Tribal Council of Arizona; National Association of Tribal Historic Preservation Officers; National Park Service; National Preservation Institute; Peoria Tribe of Oklahoma; U.S. Department of Health and Human Services; U.S. Department of Homeland Security; U.S. Department of the Interior; U.S. Department of Justice; and U.S. Forest Service. In addition to on-site training programs new web-based training modules are becoming available, including 8 webinars including "International Repatriation," "NAGPRA Notices: Types, Process and Content," "NAGPRA Databases: An Overview," "NAGPRA Open Forum," "NAGPRA Databases: Culturally Unidentifiable and Culturally Affiliated Inventories," "Integrating 43 C.F.R. 10.11 into the NAGPRA Process," and "Coordinating Compliance with Section 3 of NAGPRA and Section 106 of the National Historic Preservation Act." Of the 1,096 individuals participating in NAGPRA training in FY2011, 336 (30.6%) did so through webinars. An 8-segment video series on NAGPRA has also been completed, with distribution to the public planned for 2012.

*Increased training for Review Committee members:* As noted elsewhere in this report, training for Review Committee members has also been increased, with formal training sessions for all Review Committee members scheduled prior to all 2011 Review Committee meetings. This is a welcome development, and we are grateful to Department of the Interior staff, including staff of the National NAGPRA Program, staff of the DoI Office of Solicitor, and the Ethics Program Manager and Deputy Ethics Counselor for the National Park Service, Richard Grant, for their efforts in this regard.

*Progress in development and promulgation of reserved sections of the regulations under 43 CFR 10:* Previous Review Committee Reports to Congress have noted that reserved sections of the 43 CFR 10 regulations have not been completed and promulgated.

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Currently the Department seems quite active in preparing and promulgating rules for these reserved sections. While we view some of the results as problematic and in need of revision, we note that the Department has heard concerns regarding the absence of these sections and worked toward their completion.

*Clarification of eligible entities:* The GAO Report recommended that the National NAGPRA Program and the Department of the Interior's Office of the Solicitor reassess whether ANCSA corporations (established under the Alaska Native Claims Settlement Act) should be considered eligible entities for the purpose of carrying out the provisions of NAGPRA. Confusion was felt to exist between the statutory language of NAGPRA and the resulting regulations, which instead of the Act's language employed definitions from the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450b; ISDEAA). After review the Department's Office of the Solicitor recommended that the National NAGPRA Program employ the Bureau of Indian Affairs list of federally-recognized tribes, and thus include Alaskan tribes but not include Alaska regional and village corporations. On July 5, 2011, the Department of the Interior published a revision of the 43 CFR 10 regulations which removed and reserved 43 CFR 10.2(b)2, which included language differing from that of NAGPRA, in order to bring the regulations into closer accord with the statutory language of the Act.

*Availability of more specific data regarding repatriations and transfers of control to tribes or Native communities:* As noted above, increasingly fine-grained data are available regarding both general compliance activities and specifically the minimum number of individuals (MNI, generally assumed to be the most conservative estimate of the total number of individuals represented by a given set of human remains), which have been actually transferred or repatriated to a tribe or Native community. These data are invaluable, but because museums may repatriate or transfer published human remains or cultural items without notifying the National NAGPRA Program it is likely that the numbers reported for museums significantly under-represent the total number of individuals repatriated.

*Grants to support repatriation activities, Grants to support documentation and consultation activities:* More than \$3 million in grants were requested during 2011, with \$1.76 million awarded. All requests for repatriation project grants were awarded on a non-competitive basis in order to facilitate the transfer or repatriation of human remains and cultural items to communities. For the first time in 2011 more grants were recommended for funding by the grant review panel than could be accommodated by available resources. This is at once a barrier (as resources are insufficient to meet the need) and evidence of progress, as the panel noted a larger number of higher quality proposals submitted. Data from the National NAGPRA Program suggests that 62% of submitted grants were awarded funds, and 23% receiving Consultation/Documentation grants had been declined the previous year, suggesting that feedback from Program staff and the review panel has assisted applicants in successfully seeking funds to support NAGPRA projects.

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## Barriers Encountered

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Despite these real and substantive advances, numerous barriers to full compliance and to achieving the larger intent of NAGPRA remain.

*Lack of sufficient funding:* Funding in the form of either NAGPRA grants or support for the National NAGPRA Program has not kept pace with increases in the compliance and disposition activities required to effectively implement the Act. This issue has been consistently raised by the Review Committee, by scientific, museum and cultural organizations, and by tribes and Native communities. The Review Committee has heard from Indian tribes that one very significant barrier is that many tribes simply lack the financial capacity to handle NAGPRA implementation. Likewise, museums often lack staff to do NAGPRA compliance work, and must rely on staff with other full time responsibilities; both may be forced to rely on part-time or less experienced individuals not able to set aside the time needed to become familiar with NAGPRA requirements and perform ongoing NAGPRA tasks. Issues of staff, training, and funding are particularly evident at universities, as many of these institutions have cut, or are in the process of cutting, their budgets, and in state and local governments, which are continually challenged to do more with fewer dedicated resources. We recognize that these are very challenging budgetary times, but compliance requires qualified staff, suitable facilities for maintaining inventoried human remains and cultural items, time to engage in thorough consultation efforts, and resources for the processes of repatriation and disposition for all parties concerned. All of these activities require substantial funding. As two recent GAO reports on NAGPRA compliance in Federal agencies and the Smithsonian's repatriation efforts indicate, more than 20 years after passage of the Native American Graves Protection and Repatriation Act and the National Museum of the American Indian Act we are still in a position where full compliance by these entities alone may take another two decades.

*Confusion regarding responsibility for certain collections:* Federal agencies and institutions receiving federal funds and which possess or control human remains and associated funerary objects are required to list these remains and cultural items in an inventory, and considerable progress is being made in these continuing efforts. There are, however areas of ambiguity in cases where institutions hold remains or cultural items on behalf of a Federal agency, in which it may be unclear whether the Federal agency controlling these remains or items, or the institution holding them on behalf of that agency, is responsible for their inventory and reporting. Some institutions having custody of Federal collections did not list certain human remains and funerary objects in an inventory because they assumed that the Federal agency having control did so, according to some reports. The Review Committee is thus concerned that there may be human remains and associated funerary objects that are not currently in inventories because both the institution holding the remains or items and the agency responsible for the remains or items assumes the other has included them in their inventory and reports. This concern could be addressed through structured discussion between Federal agencies and those institutions having custody of their collections, resulting in explicit agreements assigning responsibility for reporting and inventorying these remains and items. It is noted that this is likely to require additional support for institutions holding such collections, either to support inventory and documentation of and consultation regarding

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collections for which they are not responsible, or to fund the appropriate packing and return of these collections to the Federal agencies responsible for them by statute.

*Confusion regarding time frames:* Tribes and Native communities have expressed concern that no time frame for compliance is provided in certain parts of the regulations, feeling that museums and other collections-holding institutions may be delaying compliance, and have therefore called for mandatory time frames for all compliance activities. Museums, on the other hand, have continued to express concern with the restrictive nature of the current “90-day rule” or other rules that impose arbitrary time frames for responses to complex requests requiring considerable staff time and other resources to properly complete, or which may require consultation or coordination with multiple parties to whom such time frames do not necessarily apply. Confusion regarding aspects of the “90-day rule” is reported by all concerned, and this is one area of the existing regulations which the National NAGPRA Program reports it is reviewing to provide greater clarity regarding definitions and processes.

*Need for revision of 43 CFR 10.11:* It is the unanimous opinion of the Review Committee that the current regulations under 43 CFR 10.11 regarding the disposition of culturally unidentifiable or unaffiliated human remains are flawed and need to be amended. At its Forty-Fourth meeting in Syracuse concerns were raised by one member of the Committee (Mr. Wright) regarding the 2010 Review Committee Report to Congress because of its endorsement of these regulations, noting concerns regarding the regulations raised by both the scientific community and the tribal community; later in the meeting all members of the Committee voted to ask the Department to revisit and amend this section the NAGPRA regulations. It is our understanding that the Department is currently considering discretionary review of the existing regulations, and we strongly encourage them to undertake such revision. We wish to make clear to Congress that the Review Committee believes that the current NAGPRA Regulations, and specifically the current regulations in 43CR10.11, need to be amended based on consultation and listening sessions that have already taken place, and based on concerns previously expressed by the Review Committee as well as comments provided in writing by a range of organizations, individuals, tribes and Native communities.

*Lack of land to allow reburial of some repatriated remains:* Some tribes have specifically noted that the lack of land for reburial of repatriated human remains or of culturally unidentifiable human remains following disposition under NAGPRA presents a significant barrier to repatriation. Conflicting information has been presented to the Review Committee regarding the ability, authority or willingness of Federal agencies to allow reburial on federal land. Provisions allowing for the reburial or reinterment of human remains and cultural items, and clarification of such policies to all parties concerned, may be worthwhile.

*Competing cultural protocols:* One barrier--or at least point of potential tension--which became apparent in 2010 is the significant difference between how Federal ethics rules and Native communities understand courtesy and appropriate behavior. Under FACA guidelines gifts above a certain value may not be accepted by FACA committee members. At the Syracuse Review Committee meeting members of the committee were given gifts as an act of hospitality and welcome by our hosts from the Haudenosaunee

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people; while these were deeply appreciated, acceptance violated applicable ethics rules and the gifts needed to be returned or appropriate disposition arranged. While minor in itself, this episode illustrates the continuing challenges of multiple communities of practice working together toward common goals but doing so with very different understandings of both how those goals should be achieved and in some instances how to reckon progress toward them. We acknowledge the kindness and generosity of our hosts, and apologize for any misunderstanding or inconvenience caused by the Committee's inability to accept the gifts as offered.

## *Recommendations*

**Recommendation 1: INCREASE FUNDING FOR NAGPRA PROGRAM.** The National NAGPRA Program budget has not been significantly increased for some two decades. While much progress has been made, both the experience of the Committee and the results of two recent GAO audits confirm how much remains to be done. One of the clear and often-remarked barriers to further and faster progress is a lack of adequate resources on the part of all parties concerned. We respectfully recommend increasing the National NAGPRA Program's budget to \$4.5 million annually, with direct allocations for NAGPRA grants to Indian tribes, Native Hawaiian organizations, and museums, and to support additional contractor positions to help manage publication of Federal Register notices, a civil penalties investigator, or additional staff as needed.

Currently grant funding is provided by the National NAGPRA Program for two distinct kinds of activities: 1) repatriation; and 2) consultation/documentation. The former category of funding defrays costs associated with repatriation of human remains or cultural items at the conclusion of the NAGPRA review process and documentation of any known condition or treatment issues which might impact human health, and decontamination of items if appropriate. Over the past five years repatriation funding requests--which are awarded on a non-competitive basis prior to consideration of NAGPRA grants using monies from the same pool--have increased by some 300%, and have been fully honored. NAGPRA grants, which are available to tribes, Native communities, universities, state or local government agencies, or museums, are allocated from remaining resources after distribution of funds to support repatriations, support the costs of consultation, compliance and other tasks mandated by the Act. Because requests for repatriation funding have, at least thus far, been fully honored, any additional programmatic funds available as grants could support the necessary consultation and documentation work of tribes, Native communities, museums and universities to fully comply with the provisions of the Act in a timely manner.

**Recommendation 2: FUTURE GAO STUDY ON COMPLIANCE BY MUSEUMS AND ASSESSMENT OF EFFECTIVENESS OF GRANT AWARDS.** The General Accounting Office has now completed separate assessments of compliance by the Smithsonian Institution and by other Federal agencies subject to the Act. An equivalent assessment of compliance by museums, state and local government agencies, private institutions, and institutions of higher learning would be beneficial, along with an assessment of how effectively and appropriately these institutions, tribes and Native

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communities have used the NAGPRA grant monies awarded to them in implementing the provisions of the Act. This would have the effect of completing an assessment of all affected parties, and providing needed information to Congress regarding how to best allocate scarce resources to accomplish its intentions in framing this important legislation.

**Recommendation 3: ENACT FURTHER LEGISLATION TO PROTECT NATIVE AMERICAN BURIALS.** NAGPRA is concerned with, among other things, the protection and repatriation of Native American human remains. Currently, the issue of “protection” is covered in Section 4 of the Act, the criminal section (codified at 18 U.S.C. 1170). The Review Committee has heard concerns from tribes that the differences in burial laws among states are frustrating and result in uneven protection for burial sites and human remains. The Review Committee feels that there needs to be more comprehensive protection of burials, and that such protection should be equal to the protections given to non-Native American burials. Such protection is not currently covered in the NAGPRA legislation, but is an important part of what needs to be accomplished in years to come. The Committee recommends that Congress consider legislative means through which such protections can be accomplished, starting with a comprehensive study of the current state-by-state burial laws.

**Recommendation 4: OPEN HEARINGS TO DETERMINE PROGRESS MADE AND BARRIERS ENCOUNTERED.** One of the stated roles of the Review Committee is to report on progress made and barriers encountered in implementation of the Act. While the Review Committee has done so in its annual reports, Congressional hearings regarding the Act and its implementation may be worthwhile for several reasons. It is self-evident that tribes, Native communities, museums, and related institutions are best able to express their own experiences in implementing the Act, and can offer firsthand testimony regarding both successes and remaining barriers, as well as describing how the Act has impacted them.

**Recommendation 5: DEVELOP MECHANISMS FOR DETERMINING RESPONSIBILITY FOR REPORTING FEDERAL COLLECTIONS HELD BY NON-FEDERAL INSTITUTIONS.** Some collections may remain uninventoried and unreported because of confusion between the Federal agency responsible for a collection and the non-federal institution holding that collection, with each assuming that the other is responsible for compliance under NAGPRA. We recommend a clear and consistent mechanism be developed for structured discussion between Federal agencies and those institutions having custody of their collections, resulting in explicit agreements assigning responsibility for reporting and inventorying these remains and items. Appropriate funding needs to be provided to either support compliance by the institution currently holding the collections, or to support appropriate packaging and transport of such collections to the federal agency responsible for them.

**Recommendation 6: AMEND REGULATIONS REGARDING CULTURALLY UNIDENTIFIABLE HUMAN REMAINS, 43 CFR 10.11.** Tribes, Native communities, museums, and scientific and cultural organizations have all commented repeatedly that

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they find the current regulations regarding culturally unidentifiable human remains problematic, and the Review Committee voted unanimously at its June 2011 meeting to ask the Department of the Interior to amend these regulations based on the results of listening sessions, written comments from a range of stakeholders, and previous recommendations of the Review Committee. The Department has indicated that it is considering discretionary review of all parts of the NAGPRA regulations, and while most parts of the regulations have proven robust and advanced the stated intent of the Act, it is the consensus of the Review Committee and the affected parties that provisions of 43 CFR 10.11 are problematic and require amendment

Recommendation 7: CHANGING THE DEFINITION OF NATIVE AMERICAN. The Review Committee recommends that Congress consider amending the Act by changing the definition of "Native American" at 25 U.S.C. 3001 (9) by adding the words "or was" so that it reads: "'Native American' means of, or relating to, a tribe, people, or culture that is, or was, indigenous to the United States." This is a complex and contentious issue, for which there is strongly felt support and opposition.