

**National NAGPRA Program
Program Manager's Report to the NAGPRA Review Committee
Cumulative Status Review as of September 30, 2007**

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INTRODUCTION

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), provides a process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. These items, as a subset of all movable culture, are basic to the humanity and definition of tribes. Resolution of rights to long separated items through NAGPRA provides a means to restore human rights and provide basic constitutional guarantees of property, along the minimal lines of the common law, to those who have been separated from their ancestors and property due to the historic disparate treatment of Indians in this country. NAGPRA is human rights law. To be associated with this program is a rewarding professional experience, and to be asked to manage the program is an honor and a serious responsibility.

This report will not dwell on the status of the program at the end of July 2004, when I began my time with the Program, nor will it report the specific year end numbers for this fiscal year, which reflect the conclusion of another successful year for the program. The annual reports of program progress are on the website and will be given to this Review Committee in presentations throughout the meeting by the talented staff whose efforts have resulted in the program accomplishments. Rather, this is a report of observations during the last three years of the National NAGPRA Program, the evolution of NAGPRA compliance on a national scale, and pending issues ripe for resolution.

We should begin this examination by reflecting on why there is a law. As Senator Ben Nighthorse Campbell once noted, this is a law that should not have been needed, but exists because it was needed. Since 1906, the federal government has taken active management of sites on federal and Indian lands and given permits for scientific data recovery. Science and the pursuit of knowledge is a worthy endeavor. However, when those with a first party interest in sites on federal and Indian lands are not part of the discussion on granting permits, or the disposition of the items recovered, there is a permanent cloud over the activity. NAGPRA provides a fair and open manner to face responsibility for items under control of the federal government and museums that receive federal funds. The law is not perfect, as there is no way to fully reconstitute long dislodged sites and reconstruct context. NAGPRA sets forth a process to allow all those involved to rationally work through resolution of control of human remains, items from burials, sacred items, and inalienable objects of tribes.

Every NAGPRA notice tells a story and illuminates the reasons for NAGPRA as a law of necessity. Published notices of inventory completion, containing the decisions of museums and federal agencies on the cultural affiliation of human remains and their associated funerary items, and notices of intent to repatriate, containing the agreements of museums and federal agencies and tribes, Alaska Village corporations and Native Hawaiian organizations for burial objects, sacred objects and objects of inalienable cultural patrimony, contain the stories of how the museum or federal agency came into possession and control of the NAGPRA items. These notices contain statements such as:

- Collected from burial sites in 1920, by (named individual) and held in his collection until bequeathed to the museum in 1966.
- Found during road construction and stored.
- Collected from a burial by Dr. ## in 1976, and later donated to the museum.

It must be recognized that NAGPRA does not change ownership of items. Rather it asks the question of to whom these items rightfully belong, against a history of assumptions that Native American human remains and cultural items were of no interest to their descendants and tribes, or that possession conferred the authority of control.

The following report contains observations and an overview of where NAGPRA compliance is today and the issues that confront those with NAGPRA obligations and opportunities. This is not a legal analysis and does not contain opinions on the developing law. The perspective is one of understanding the law, its obligations, opportunities, and limitations. These thoughts are grouped into categories of NAGPRA decision making, process, compliance/enforcement activities, and the relationship of NAGPRA to other laws. Finally, this report will give a candid look at the National NAGPRA Program in terms of where it is today and how it might evolve to continue to serve the NAGPRA constituency.

I. DECISION MAKING

Cultural Affiliation of the “Culturally Unidentifiable”

There are almost 120,000 individuals listed on the National NAGPRA Program database of culturally unidentifiable Native American human remains and associated funerary objects (CUI), compiled from the inventories of museums and federal agencies. This number dwarfs the 33,000 individuals represented in published notices of inventory completion as culturally affiliated to tribes. The public access CUI database was made available November 2005, and in the following two years about 3,000 individuals were culturally affiliated. This prompts the questions of how so many individuals became included in the CUI inventories, rather than on the inventories of those culturally affiliated, and who are these individuals. The answers to both questions are related in part to the decision making process that resulted in the inventories submitted in the first wave of compliance that was due November 16, 1995.

NAGPRA requires the decision on cultural affiliation be arrived at by museums and federal agencies in consultation with tribes. In reality, most inventories were compiled in haste to meet the 1995 deadline, using only information in registrar records. Many of these records were not electronically accessible, and some were hand written. When NAGPRA became law, the curation standards of the Curation Regulations, 36 CFR Part 79, were a year old, and the concepts of retrievable records, maintaining collections of items with the records, and maintaining collections of similar cultures held by federal agencies in close proximity to their point of collection were goals, not typical practices. Museums were plagued by true orphans in their collections and large parts of federal agency collections were, and many still are, in nonfederal repositories. While a number of curators initially complained about onerous NAGPRA responsibilities, needed advancements in record keeping in museums, prompted in part by NAGPRA, have aided general museum management functions. Federal agencies have risen to the obligation of knowing where their collections are, and are taking responsibility for items retrieved from the public lands in the public interest. There is a correlation to be seen between improved collections practices and the ease of NAGPRA compliance.

There is anecdotal evidence of museums and federal agencies that placed individuals on CUI inventories because they held NAGPRA decision making on cultural affiliation to a higher, scientific certainty, standard. Others chose to put the maximum number of human remains in the CUI category to avoid moving forward with the repatriation process until further regulations force decisions to be made. Such reluctant behavior can largely be overcome by education. Decision making in the NAGPRA process requires a reasonable basis for a determination of cultural affiliation, based on the totality of information, held by the museum or federal agency and gained through consultation with tribes. As notices are published that reflect the cultural affiliation for human remains from numerous geographical locations and time strata, it becomes more difficult for others holding collections of the same description to retain them as CUI. Regulations on the disposition of CUI are pending publication of a proposed rule, (note: published Oct. 15, 2007), but the Review Committee continues to hear disposition matters and make recommendations to the Secretary in lieu of the regulations. A second look needs to be taken of the CUI inventories by each originator.

In April 2007, a report was presented to the Review Committee that answers the question, "Who are the CUI?" with a statistical analysis of the facts that describe individuals listed on the database. The study examined CUI inventories submitted from states that cut a swath through the country from Illinois to Florida and account for about half of the CUI listings in just seven states. The study found that the NAGPRA CUI human remains are not typically the type of individual highly publicized in the "Kennewick" case, that is, very old and with no culturally discernable information. Rather, three fourths or more of the study population were found to be of an age within the historic era, collected by scientific means, in a context with other individuals, and with dozens, if not hundreds, of cultural artifacts.

CUI inventories pose a homework assignment for museums and federal agencies. Their task is to go back and reduce the number of entries, through better understanding of the

law and the information that comes from better record keeping, consultation with tribes, and information gained from others holding culturally similar collections. Some of the CUI, known to have a cultural relationship with groups, which are not federally recognized tribes, may be resolved through new regulations, as may be the remainder that are true orphans in the collection, having no information or benefit to the collection, or to science.

Identification and Repatriation of Funerary Objects

685,064 funerary objects associated with individuals are listed in published notices of inventory completion. 828,641 additional funerary objects remain in museums and federal agencies, listed on inventories as funerary objects associated with CUI human remains. An unknown number of funerary objects are held by museum or federal agencies as unassociated with individuals and therefore are only generally referred to in a summary and not itemized. Several issues presently exist: whether funerary objects associated with CUI pass through the NAGPRA disposition process with the human remains; whether unassociated funerary objects must be repatriated; and whether the actual number of associated funerary objects is, or should be, greater than presently reported. Tribes are beginning to ask, “Why do so many of our repatriated ancestors have no funerary objects?”

Assuming that Native Americans, across time and cultural groups, were buried in their clothes and with some items of material culture, and further assuming that scientific examination of sites caused human remains and items to become disaggregated along the lines of pedagogy, some records should exist to tie the people to their accoutrements in situ. It can be expected that tribes will desire to see the excavation records to assist them to locate funerary objects, establish cultural affiliation, and request their repatriation.

NAGPRA tracks the common law of property. The common law traditions of the dead and burials in the United States place funerary objects with the dead to whom they are associated, even when the culture, or religion, or family identity of the person is not known. NAGPRA creates a class of dead who are CUI, not because their cultural relationship is not known, but because the descendants of these people are not of a federally recognized tribe; they are CUI by status rather than knowledge. It would be counter to the common law to determine that because they are CUI by operation of legal status, the funerary objects do not go with the human remains upon disposition.

It is not inconsistent with NAGPRA, or the common law, to retain the unaffiliated, unassociated, funerary objects. Still, a museum should be careful to recognize the interest in these items that may exist in the landowner, on whose land they were found.

Consultation: With Whom, By Whom

Consultation with tribes by museums and federal agencies is central to the NAGPRA process, whether the circumstances arise from collections or new discoveries on the land. Consultation is not defined within NAGPRA, nor is it defined in others laws which

depend on it, such as the National Historic Preservation Act (NHPA), or the National Environmental Policy Act (NEPA). NHPA and its regulations lump tribes in with “stakeholders,” those with an interest in the activity central to the legal process. Only NAGPRA, which is focused upon first party property interests, provides a priority of claim that acknowledges those with property rights.

The National NAGPRA Program website includes maps of current tribal lands, treaty areas with tribes, and areas of tribal aboriginal occupancy. These maps should assist museums and federal agencies to determine the present day tribes that may have an interest in items from an area, so that they may be included in consultation efforts. The Consultation Database lists names and addresses of tribal contacts. Keeping the database up to date is a challenge for the Program, but it furnishes a starting point for the consultation invitation list.

Consistent with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” of November 6, 2000, every federal agency should have a consultation protocol, but most simply have a consultation policy that promotes it. The National Association of Tribal Historic Preservation Officers (NATHPO) did a study a few years ago to determine experiences of tribes and agencies that could be identified as successful consultation. The study revealed that meaningful communication is the key to consultation. Consultations may occur by mail, email, telephone, or in person, but it is preceded by a known agenda, with time for all involved parties to reflect on their concerns and bring pertinent information to the consultation session. Consultation is not consensus. At the end of the NAGPRA consultation process, the museum or federal agency has the non-delegable duty to make a decision on cultural affiliation and to acknowledge and act on claims.

Right of Possession

NAGPRA is property law that affords Constitutional rights to Native Americans, while not denying those rights to others, such as museums. If a museum holds an item that was alienated from the tribe or individual in the first instance, by one with authority to transfer the item, then the museum has the right of possession. A museum may assert or decline to assert its right of possession, as it chooses, but if it asserts the right it must be prepared to establish such right with competent evidence. Proving right of possession and establishing cultural affiliation are on par in terms of the level of evidence, and both begin with evidence in the control of the museum. A tribe may contribute information to help a museum determine cultural affiliation, but it is unlikely that claimants will assist the museum to prove its own assertion of right of possession. Prior to right of possession being an issue, the museum must first acknowledge the validity of the claim of the tribe or individual. Unsupported claims of right of possession to items in museum collections can not be used as a means to overcome the claim of a tribe.

II. PROCESS

Distinguishing Possession and Control

Understanding the difference between possession and control is critical to the NAGPRA process. Universities may have possession of federal collections, but they do not control them. The federal agency has the obligation and authority to make decisions on its collections, even those in non-federal repositories, even when both submit NAGPRA inventories in compliance with the law.

A museum might retain possession of an item repatriated to a tribe, when control, but not physical custody, transfers to the tribe. It is not unusual for the National NAGPRA Program to be asked to supply a template for repatriated collections retained by a museum in a curation agreement. There is no special text for such an agreement. When a museum holds an item that it does not control, it has the item on loan. Repatriation, the transfer of control, is separate from, and may not affect, the possession of an item. Thus tribes that desire repatriation of items, but may not have a suitable repository available, may wish to complete repatriation and enter into a loan agreement, with set terms of use and curation, rather than wait to transfer control.

The NAGPRA process, administered by the National NAGPRA Program, ends with the publication of a notice. The law then directs the parties to determine the specifics of the transfer to the tribe(s). Thus, the National NAGPRA Program does not have a count of human remains and associated funerary objects actually repatriated. A more reliable count may be found in notices of intent to repatriate, as these notices embody a specific agreement on a certain number of items. The exception is, that if one of the parties desires a repatriation grant award, the National NAGPRA Program policies require that, once the notice is published, the tribe or museum may apply for a repatriation grant, but the funds will not be dispersed until the Program receives a letter from the museum or federal agency that evidences a transfer of control. The grant will then fund the transfer of possession. Transfer of control and possession are not assumed to be simultaneous when a tribe picks up an item, or human remains, and signs a receipt for possession. Thus, transfer of possession may occur prior to or after transfer of control, except when a NAGPRA grant is involved.

Finality of Repatriation

The law and regulations do not give an express definition of repatriation. Since the controlling party makes disposition decisions, once control has passed to the lineal descendant or tribe, such that the disposition decision is made and acted upon, repatriation may be seen to have occurred. The item may have never moved, but its legal status may have migrated. This is consistent with the manner in which museums conduct business, transferring ownership (control) of items which are on extended loan.

Notice Content

A published notice must contain sufficient information to put potential parties on notice of whether they may have an interest in an item and whether they desire to make a claim. A tribe may stand down from claiming something claimed by a lineal descendant. In the same manner, a lineal descendant may not pursue a claim for something that is described as cultural patrimony of the tribe. At a minimum, the notice must contain the information listed in the statute or regulations, which includes a description of the item, the place and manner of collection by the museum or federal agency, and the information contributing to the determination of cultural affiliation.

One museum has contested whether the description of an item must include a designation of the NAGPRA category, or categories, that describe it, rather than merely the physical description, referring to such item as merely, “cultural item.” The Program has accepted the museum’s description as adequate for publication under the regulations, as the notice belongs to the museum. However, the program has declined to include extraneous information in a notice, such as an offer by a museum to suggest that it has the right of possession, but wishes to memorialize an agreement outside of the NAGPRA process to compromise the claim. If the practice of general designation is limited, and no problems result, no further examination of such a notice or revision of the regulations may be needed. However, the notice template, with the more complete description will continue to be recommended by the Program.

Future Applicability of the Law

NAGPRA is an ongoing process that applies to new collections, but time parameters for compliance after the initial dates were left to eventual rulemaking. Thus, each museum was left to establish its own rule of reason. The final rule, 43 CFR 10.13, referred to as the “future applicability regulation,” establishes uniform deadlines for inventories and summaries when new collections are received or found in the collection, when the museum receives federal funds and must begin compliance with NAGPRA, or when there is a new federally recognized tribe.

Moving Prior Cultural Affiliation Determinations to Published Notices

When a museum or federal agency submits an inventory containing cultural affiliation determinations, the process does not end there. “Notices of Inventory Completion” must then be published in the ensuing 180 days. A published notice, and not the inventory, establishes the rights of lineal descendants and tribes or Native Hawaiian organizations to request repatriation. A notice is not a notice until the document with the decision is published. A “pending notice,” or “draft notice,” does not convey anything and thus submission of a document to be published does not complete initial compliance. The originating entity must authorize publication before the National NAGPRA Program will

move the notice to publication in the Federal Register. The Program will not edit the notice decision, but will review the notice for completion of content and check the notice against the inventory submission for consistency.

All those individuals in the culturally affiliated inventories, submitted more than six months earlier, should be reflected in published notices. In the spring of 2005, the National NAGPRA Program undertook to reduce or eliminate aging decision documents submitted, but not published, for more than 5 years. As of 2005, there were 300 notices that were 5-10 years in process. As of the end of FY 2007, there are about 100. In the spring of 2007, the National NAGPRA Program began the "Culturally Affiliated Inventories in Notices Project," to report on those individuals not yet in published notices, although decisions of cultural affiliation were reflected in inventories. A similar study of federal agency notices was undertaken by the Makah Tribe in the fall of 2006. Reports of both studies should soon be made public. Regardless of whether the number of individuals is large, it would seem that publishing notices for decisions previously made should be a museum and agency priority.

Disposition of CUI and Unclaimed

Of the 120,000 individuals listed in initial inventories as culturally unidentifiable, a large number should not resist identification. As to those individuals for whom little is known, or where the records are lost, they are of little value to museums or federal agencies and should be candidates for the disposition with care by a fiduciary as foreseen in the law, to be specified in a rule, 43 CFR 10.11. With or without a final rule, the number of individuals in the CUI database, those lacking a disposition, or amended inventory identifying cultural affiliation, should dwindle over the next five years.

That a final rule for unclaimed human remains found on the land after the date of the law, 43 CFR 10.7, is not likely to be promulgated for another three years should not pose much problem for tribes and land managing agencies. In the first 18 years of NAGPRA there has been a learning curve in which the NAGPRA process has seeped into museum and federal agency decision making. Collections have received attention by all museums and federal agencies, given the express compliance steps of inventory and summary, but new discovery events, although fewer in number, have captured headlines due to court action. The ancient remains located outside of Kennewick, Washington, on land controlled by the Corps of Engineers, were not unclaimed. The claims by several federally recognized tribes were simply not recognized by the court and hence may not be subject to the future rule. Other human remains are subject to ongoing disposition decisions, made in the project planning and development process.

Federal agencies are accustomed to working through a maze of laws directing planning and development activities. Some of these are discussed below. As federal agencies continue to build consultation with tribes and disposition of human remains and cultural items plan into their NHPA and NEPA activities, compliance with NAGPRA Section 3, determination of ownership in the event of new discoveries, will fall into place.

The remaining population of CUI, along with those individuals newly discovered on federal and Indian lands for whom no claim has been made, and not addressed in 43 CFR 10.7, will be resolved by a regulation that has yet to be drafted. There is no rush to draft 43 CFR 10.15, as use of the law has not yet attained the maturity necessary to look in an informed manner at the remainder population for whom such a rule would be addressed.

Resolving Interests of Native American Groups

Not all Native Americans are in federally recognized “tribes.” NAGPRA seeks to make cultural, rather than political, connections between exhumed or collected human remains and present day tribes. However, “tribes” have standing to make claims under NAGPRA that politically unrecognized “groups” do not. Thus, tension is inevitable when a Native American group has a cultural connection to human remains or items, and lacks the political standing to avail itself of the NAGPRA process. As a matter of legal status, not fact, such human remains and items are culturally unidentifiable.

There are several means by which such a conundrum can be resolved. One way is to work through the CUI process and request disposition authority from the Secretary of the Interior by making such a request of the NAGPRA Review Committee. It is also possible to partner with a federally recognized tribe that has a cultural relationship, although not cultural affiliation to the human remains or cultural items. Once the tribe has obtained “control,” that tribe has the authority to turn the items over to the group. Finally, the group can pursue a common law remedy in state court, for items in museum collections, and in federal court, where the federal authority is the sole jurisdiction for remains on federal land.

Human remains are not owned, but are subject to disposition. The United States Army Medical Museum turned over body parts, amputated in operations during the Civil War, and held as instructional aids, to the descendants of African American soldiers from whom they were obtained, and the National Park Service repatriated 200 year old remains of a Frenchman located near Lake Champlain to France, at the French embassy. Both actions occurred without a special enabling statute, through the vehicle of the common law.

Understanding the Process and Dispute Resolution

Decision making within the NAGPRA process should resolve disputes that could arise, if all parties understand the process. Initially, the museum or federal agency must make decisions on cultural affiliation of human remains, and acknowledge claims to cultural items. If a claim is not acknowledged, the defect in the claim must be identified to the tribe or lineal descendant.

When human remains and associated funerary objects are listed as culturally affiliated in an inventory, and one of the tribes listed in the notice of inventory completion comes forward, the action is one of acting on a request. If more than one tribe is listed as

culturally affiliated, a dispute is not assumed, as the tribes may act in concert, nominate one among them to move forward, or stand down in the face of a claim by one tribe.

The process regarding cultural items is claims driven. If a tribe makes a claim for a cultural item, there are three parts of the claim to be proved.

1. The claimant is a lineal descendant or a federally recognized tribe;
2. The item is a NAGPRA protected item, unassociated funerary object, sacred object, or object of cultural patrimony; and
3. There is a shared group identity, cultural affiliation, between the tribe and the item.

This is often referred to as the *prima facie* case. That is, standing alone, absent evidence to the contrary, there is competent evidence of a claim. Such a claim can be overcome by proof of a right of possession by the museum. Therefore, the matter of right of possession does not arise, unless and until, the museum acknowledges the claim. If the museum asserts a right of possession, it must give competent evidence to support its claim that it obtained the item in a chain of events that began with alienation from the tribe or individual by one with the authority to do so.

The museum or federal agency must also resolve competing claims, prior to relying on the NAGPRA Review Committee, or thrusting the matter into court. In a competing claims situation, the decision maker must weigh the competing claims. The direction in which the weight of the evidence tips is to the one carrying the preponderance of the evidence. It is an individual decision in which all of the facts produced are considered and weighed to come to a conclusion.

Review Committee: Function, Value, Impact

The NAGPRA Review Committee is of enormous value and is an asset to the process. When resolving disputes, the Committee acts not as a court, pondering matters of law, but as a neutral fact finder, whose insight and opinion should carry considerable weight with the museum or federal agency. Since courts are limited to a bifacial determination on the narrow issues before it, a decision in the course of litigation is certain to disappoint all parties to some degree. Instead, the Review Committee has an unlimited range of suggestions that it can make to actually resolve the issue at hand, without impacting the rights or legal positions of the parties. Although the Review Committee decisions are not binding, they should be viewed as primary dispute resolution.

As a program manager, it is unique, but welcomed, to have a group appointed by the Secretary of the Interior to review program products and productivity and make recommendations. Reports requested of the Program appear on the National NAGPRA Program website on the Review Committee page. Hopefully, the wonderful working relationship between the Program and the Committee will continue, as the Committee comments on proposed regulations and shares its thoughts on program opportunities to better serve NAGPRA constituents as they work through the NAGPRA process.

The database of culturally unidentifiable human remains and associated funerary objects is maintained at the behest of the Review Committee to aid consultation and identification of the listings. The Review Committee called for reports on federal agency compliance and information to understand the CUI. The next set of reports tie these projects together. A list of culturally affiliated human remains not yet in notices, in progress, should be followed by a study that compares and contrasts information used to affiliate individuals that could assist in identification of the current CUI. An observation can be made that while the completed study, "Who Are the CUI?" indicated that 80% of the CUI were exhumed by professionals or in field schools, it is apparent that about 80% of the culturally affiliated individuals were randomly removed by avocationists. Some study is necessary to look more closely at the information used to identify cultural affiliation and to compare the known to what is or should be known about CUI.

III. COMPLIANCE/ENFORCEMENT

Are We Done Yet?

The NAGPRA reality is that after initial compliance there are ongoing obligations. NAGPRA is a means to do business that requires treatment of Native American human remains and certain cultural items in the same manner as other human remains and similar items are usually handled within the rubric of the common law. Museums that receive federal funds and federal agencies are not required to work through the process of inventories, summaries, consultation, and notice publication with non-Native American human remains and the property of other cultural groups, because the history of separate treatment has been overwhelmingly directed at Native Americans and tribes. In situations, not involving Native Americans, where burials may be impacted, there is a great deal of effort and expense typically incurred to identify relatives, or those from a responsible community, place a name on the deceased, respectfully exhume the burial and, just as respectfully, accomplish a reburial. It is unusual for other than Native American burials to be disaggregated and stored in perpetuity for study.

The initial NAGPRA compliance obligations of museums and federal agencies, to compile inventories and summaries and send them to tribes, have largely been accomplished. The National NAGPRA Program receives amended inventories every week, as consultation with tribes, new finds in the collection, or new information on the collection presents a need to amend a prior inventory. The regulations on the future applicability of NAGPRA, 43 CFR 10.13, establish uniform time periods for ongoing compliance obligations, and its publication in 2007 may be correlated to a recent increase in compliance activity. Notice submissions for publication jumped by a third in 2007.

Two areas where compliance with the law could be improved are easily quantifiable. There are individuals identified as culturally affiliated in inventories for whom notices have not yet been published, which represent decisions made and not acted upon. Secondly, where the bulk of a collection is represented in the inventory of unidentifiable

human remains, the obvious question is whether there has been consultation with tribes to fill gaps in the knowledge of those who control the collection.

Quantifying Repatriations

The National NAGPRA Program does not audit collections and thus all inventories and summaries are self reported. There are incentives to comply with the law. A museum that does not report collections subject to NAGPRA is subject to civil penalties and actions can be brought against federal agencies to enforce compliance. In the penalty phase of a civil penalty case, the amount of damage to a lineal descendant, tribe, or Native Hawaiian organization caused by the failure to comply can be quantified, assessed as part of the penalty and, when collected, remitted to the damaged entity.

The NAGPRA process administered by the National NAGPRA Program ends with the publication of a notice. Thereafter, the museum or federal agency and the lineal descendant or tribe(s) completes the process when there is a request for culturally affiliated human remains and cultural items in a notice of inventory completion, or a claim to retrieve cultural items, that is represented in a notice of intent to repatriate. Other than anecdotal information, and voluntary submissions to the good news stories on the NAGPRA website, the program does not have access to a count of actual numbers of repatriations and the total of all individuals involved. The CUI database does include a notes column to reflect those individuals for whom cultural affiliation is eventually determined, or are subject to disposition to a tribe, so there is a means to determine the remainder population of CUI.

Clearing the Log of Civil Penalty Allegations, Continuity of Investigations

When the National NAGPRA Program was granted authority over NAGPRA civil penalty enforcement and obtained staff to move forward with cases, in late calendar year 2005, there were approximately 50 pending matters. By the end of FY 2007, about half the pending matters had been reviewed and resolved, but interest in new submissions was revived. The total of all matters logged is now 110. It is reasonable to expect the backlog to be fully resolved in 2008, but whether the clearance rate can keep pace with new submissions will depend on the extent of interest. Whether more than one investigator is necessary, or whether the case load merits a full time investigator, is something that can be better assessed at the close of FY 2008.

Responsibility for Criminal Enforcement

Other than providing training to law enforcement agents and prosecutors, and assisting with technical materials, the National NAGPRA Program has no responsibility for enforcement of the criminal law. Cases arising on federal lands come within the jurisdiction of agents of each land managing agency. There is a legacy for NAGPRA cases in the years of training and experience that these agents bring to the task from investigating Archaeological Resources Protection Act (ARPA), cases. However, when a

museum charges admission to view Native American human remains, or a tribe spots an item of its cultural patrimony for sale in an auction catalogue or on a website, the jurisdiction falls to the Federal Bureau of Investigation. The FBI, to its credit, has established a talented Art Crime Team, which has been effective in investigating cases of international art theft and theft of major art work, but is not large enough to handle all the matters of vast importance to tribes. If the National Park Service agents, who are generally well versed in cultural property protection, were to receive general authority for NAGPRA cases, along with the necessary funding for agents, they could work with other agencies to strengthen enforcement teams. This would require congressional action.

IV. NAGPRA AND OTHER LAWS

While the National NAGPRA Program is concerned with implementation of the federal law, the context in which this law operates impacts other compliance decisions of museums and federal agencies, as well as the options available to tribes seeking repatriation. NAGPRA has informed state action, resulting in “little NAGPRA” legislation in the states, and has had a similar impact on some tribal codes. In addition, NAGPRA adds a layer of compliance obligations on those already under the jurisdiction of other federal laws and has been a factor in the legal actions of other nations. Finally, while NAGPRA is consistent with the common law of property, it defines protected items under its jurisdiction more narrowly than the range of common law remedies. There are legal remedies that occur outside and beyond the scope of NAGPRA.

Designing State Law to fit with NAGPRA

NAGPRA jurisdiction covers collections in the possession or control of federal agencies and museums that receive federal funds, which includes state and local museums. The NAGPRA definition of a museum is an entity that has NAGPRA collections and receives federal funds. Thus a local coroner’s office that accepts delivery of Native American human remains is a museum for purposes of NAGPRA. The ownership side of NAGPRA, which pertains to excavations on federal and Indian land, does not impact state land. However, when Native American human remains and cultural items are retrieved from state, local government, or private land, and come under state possession or control, the collections side of NAGPRA applies to those collections.

Many states have statutes that direct repatriation of Native American items in state collections, or from state and private land. However, if a state desires to avoid implicating NAGPRA, upon a new discovery, the question is whether the human remains and cultural items flow from the ground and private control directly to a tribe, without passing at some point through state control, which activates NAGPRA obligations. Where that line is drawn is an unresolved matter of fact and law. Existing state laws typically involve state action. Some may direct which tribes have standing to make a claim, or in some way assert state involvement in the disposition decision.

Upon further reflection, those states seeking to avoid NAGPRA compliance might consider the benefits of the process. NAGPRA notices are published in the Federal Register, at no cost to the state, other than the effort to fill in the notice template. NAGPRA provides a due process mechanism to support finality of the repatriation action. The time involved in deciding the cultural affiliation of remains, or consulting with the ultimate recipient, is usually required under state law as in NAGPRA.

California, Iowa, and Colorado have developed protocols for compliance with state law, while also complying with the requirements of NAGPRA. Each of these states has approached the NAGPRA Review Committee for comments on the success of their proposals. All states would be well served to consider these models.

To assist those working at the intersection of state and federal law, the National NAGPRA Program has undertaken a State Burial Laws Project. The task of this project is to compile a comprehensive product containing all state laws which affect burials. These include such items as mortuary law, little NAGPRA statutes, statutes dealing with archaeological resources, criminal laws, health and safety codes, and zoning requirements. The multi-year project, with law students from the American University, Washington College of Law, is nearing completion of the first phase, the posting of the assembled laws in an electronic format. Thereafter, the students will analyze the laws to group them by state and topic in a useful manner. The goal is to have the end product widely available in electronic and hard copy formats.

Fugue of Law

A number of federal laws obligate federal agencies to abide by a planning process for management of cultural, historic, archaeological, and Native American resources located on lands subject to federal jurisdiction. Principal among those that intersect with NAGPRA are the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the Archaeological Resources Protection Act (ARPA). There are efficiencies to be gained by intertwining compliance activities in a fugue of laws, rather than viewing them as independent compliance actions.

The NHPA and NEPA are procedural statutes that apply to certain federal activities, regardless of where the action occurs, but the procedures for each differ slightly. NEPA requires informed decision making with regard to impacts of the activity on the cultural or natural environment and NHPA requires an assessment of impact to National Register eligible properties. In the course of NEPA compliance, there will be a preferred plan of action. In similar fashion under NHPA, there will be a determination of the mitigation that can avoid or reduce adverse effects to protected sites. In the process of assessment in the course of compliance with either law, the determination can and should be made as to whether there is a likelihood of an impact or effect on Native American burials or sites with cultural items. Where avoidance will not occur, the planning process for either law should include a NAGPRA determination, in consultation with affected tribes, as to the disposition of the NAGPRA items that could likely be retrieved.

Within NAGPRA there is a term for such preplanning. It is termed an “intentional excavation.” There may be no discoveries, and the lack of discovery may be desirable, but in the event it occurs, the plan goes immediately into action and time lost on the project is kept to a minimum. Failure to plan is termed an “inadvertent discovery,” which requires the project to shut down in the affected area so that planning may occur.

ARPA and NAGPRA intersect in two ways. If an excavation is to occur in a site that is likely to yield Native American items over 100 years old, an ARPA permit is required to assure that the data recovery is conducted in a responsible manner. Where the work is done by federal government employees, or pursuant to a contract with the government, a formal separate ARPA permit will not be issued, but the contract or work assignment will contain the same requirements as an ARPA permit. ARPA also imposes curation requirements on collections under the control of the federal government. While newly discovered NAGPRA items are not considered to be federally owned, to the extent and for the period of time that they may be under the control of the federal government, or for federal collections existing at the time NAGPRA became law, the ARPA curation regulations at 36 CFR Part 79, will apply. By operation of NAGPRA regulations, an ARPA permit is necessary for excavations within the exterior boundaries of tribal lands, even though any private lands within the reservation, often referred to as “inholdings,” do not otherwise come under the jurisdiction of ARPA.

Tribal Compliance and Tribal Code

Tribes that have collections of Native American human remains and cultural items, or have new discoveries on their lands, are also required to comply with NAGPRA. As a practical matter, the land provisions of NAGPRA give the tribal land owner all priority of rights, second only to those of a lineal descendant, and above other tribes with a cultural affiliation to the human remains or items. Tribal code will control how the tribe deals with human remains and cultural items and how the tribe will work with other tribes. NAGPRA defers to tribal sovereignty.

International Law and NAGPRA

NAGPRA is the most comprehensive and effective law on the resolution of cultural property issues in the western hemisphere. Its influence can also be seen in the evolving laws of other countries. Britain has a recently promulgated human remains law and aboriginal groups in Australia and New Zealand are actively seeking repatriations. American tribes and Native Hawaiian organizations have obtained repatriation of human remains of their ancestors from Scotland, and are working to retrieve remains from the British Museum of Natural History. In these matters the State Department and International Affairs Office in the Department of the Interior have given assistance to the tribes and museums, but are not parties to the agreements. The final agreements are between sovereigns, that is, the foreign nation and the tribe.

Beyond NAGPRA

For those who resist NAGPRA compliance requirements, or see it as unnecessary legislation, one might pose a question, What if there was no NAGPRA? Certainly, the desires of Native American lineal descendants, tribes, and Native Hawaiian organizations to take responsibility for their dead and share in the property rights of all those in the United States would not disappear. Rather, actions would arise in a myriad of ways, to be responded to variously by museums and federal agencies, until some methodology seeped into the legal culture in a painful process of litigation at great expense to all involved. NAGPRA may be seen as a response to a failure in the courts to acknowledge that Native Americans should have access to existing remedies in the justice system. That NAGPRA does exist does not cause those other remedies to disappear. NAGPRA is a process for resolving ownership and control of property separated from people and tribes, but does not exclude other private rights of action. NAGPRA expressly acknowledges that other remedies are available, but does not require a choice of action.

It is generally accepted in American jurisprudence that the devastation of a burial site can cause angst for descendants, which can rise to the level of an action in tort for damages. The pain and suffering of the people of one tribe in the state of Washington, caused by callous actions in the removal of burials, resulted in a lawsuit that was settled for millions of dollars. In Missouri there is a pending action by a tribe brought under federal civil rights statutes for disparate treatment of their dead on the basis of race. An item wrongfully taken in the first instance, that does not fall within the NAGPRA protected categories of human remains and cultural items, can still be sought in court using common law theories pertaining to conversion of assets. Japanese Americans, who lost their livelihood during WWII, successfully obtained reparations using the legal theory of *Coram Nobis*, a resolution for manifest injustice. Native Americans and tribes have also used the courts to seek protection for intangible property and to restrain the public use of terms that disparage them. When viewed against the backdrop of other litigation, NAGPRA is an orderly, efficient, means to resolve a substantial number of concerns.

IV. NATIONAL NAGPRA PROGRAM OPERATIONS

At Home in the National Park Service

In November 2004, the Senate Indian Affairs Committee was to have held an oversight hearing on the implementation of NAGPRA by the Department of the Interior, its sixth such hearing. The purpose of the hearing was to receive testimony on where to move the program, not whether to move it. However, in the summer of 2004, NPS took meaningful steps to reorganize the NAGPRA programs, National NAGPRA and the NPS NAGPRA program, and the Senate hearing never materialized. Instead the Senate and the NAGPRA constituency looked to NPS for leadership. NPS has become an ideal home for the National NAGPRA Program.

In July 2004, the NPS Associate Director for Cultural Resources appointed a new Designated Federal Officer for the NAGPRA Review Committee and he immediately held the first meeting in 18 months. NPS hired a new program manager and provided all

of the support necessary to revamp the National NAGPRA Program. The NPS NAGPRA program also received a new program manager, and the program was moved to the Intermountain Region Office of NPS, in Denver, to further highlight the separation of the National and Park programs. Since that time there have been no further complaints of conflicts of interest, or as to the general operation of the programs.

In May 2005, the Secretary of the Interior issued an order placing responsibility for NAGPRA civil penalty administration in the National NAGPRA Program, as the staff support for the Assistant Secretary for Fish and Wildlife and Parks, who issues all civil penalty notices. The NPS Associate Director for Visitor and Resource Protection, with the support and cooperation of the Superintendent of Effigy Mounds National Park, assigned NPS law enforcement agents to work with the National NAGPRA Program to accomplish NAGPRA civil penalty investigations. The functions of the National and NPS NAGPRA programs were institutionalized within the Departmental Manual of the Department of the Interior in 2007. Technical amendments were made to the NAGPRA regulations in 2005 that specified the responsible party for the National NAGPRA Program as the National NAGPRA Program Manager, deleting references to the Departmental Consulting Archeologist.

The National NAGPRA Program benefits in many ways from the economy of operation within the large family of NPS. NPS law enforcement agents not only work with the Program's civil penalty coordinator to investigate and prepare cases for resolution, the NPS law enforcement budget and park agents also support ARPA/NAGPRA training as a partnership between the two Associate Directorships, Cultural Resources and Visitor and Resource Protection. This partnership improves use of the laws to protect Native American and other cultural resources. The NAGPRA grants program receives ongoing technical and financial management for the grants funds by NPS grants administration staff. The NPS Director's staff review and assist in moving toward publication NAGPRA notices and regulations. Website maintenance and all information technology needs are met through reliance upon the staff of the Heritage Preservation Services (HPS) program in NPS, Cultural Resources. The HPS staff has been instrumental in helping the National NAGPRA Program to bring in its databases from external locations and to migrate program operations to a newer and more stable computer format. The National NAGPRA Program staff has received technology training and other training, otherwise available only to NPS employees, at no cost to the Program. NPS provides offices, personnel, payroll, and travel support services at no incremental expense to the program. Operating expenses of the National NAGPRA Program, not otherwise appropriated by Congress for grants administration and for grants, are made available to National NAGPRA from within the NPS Cultural Resources budget.

Review Committee

It should be apparent by the numerous references above to reports compiled at the request of the Review Committee, that dispute resolution is only one of the major contributions of this body to the success of the NAGPRA process. The Review Committee's continued examination of Program performance provides a valuable assessment of its functions.

When functioning as a dispute resolution body, or when reviewing requests for recommendations to the Secretary for approval of disposition of culturally unidentifiable human remains, the Review Committee works to examine the facts and make recommendations based on their collective view of the facts. It is tempting to have this body examine disputes in a judicial/legal mode, but this has been and should continue to be resisted.

Over the last three years the Review Committee has met in person twice each year, and should continue to do so. Telephonic meetings have been held no more than once each year and help to provide a means to address items that must be resolved short of a six month gap in meetings. It is foreseeable that the Review Committee may meet to hear only disposition requests in the absence of a final CUI rule, and may need additional telephonic meetings.

Grants Program

As implementation needs of NAGPRA constituents have evolved over the 14 years of the grants program, so have the grants projects that are funded. The typical grant application in 1994 described a museum's need to identify objects in its collection as it worked toward initial compliance. Grant requests were initially looked at as either museum or tribal grants, as each approached NAGPRA compliance with different needs. Today the typical grant application describes a consultation project between a museum or museums and a tribe or tribes, that make the distinction of whether the originating paperwork is received from a museum or tribe meaningless. The focus of most recent grant applications is museums and tribes working together to advance the purposes of NAGPRA. It would be a fair characterization of recent grant awards to describe the bulk of the funds as being used to bring museum and tribal people together for consultation and to view the collection.

Several new policies in grants administration have been designed to make the process more transparent and user friendly. The neutral panel that prioritizes the grant proposals evaluates each project in terms of how likely it is to successfully result in published notices of inventory completion or notices of intent to repatriate. After prioritizing the projects, the panel reviews each of the budgets to determine whether the funds requested exceed those necessary to the project, so that the number of grant recipients can be maximized. Each applicant receives a letter from the grants coordinator with helpful information from the panel on how the project may be strengthened or, in the case of unsuccessful applications, how the proposal may be strengthened in coming years. In FY 2007, seven previously unsuccessful grant requesting museums or tribes were successful grant awardees.

Considerable effort has been put into outreach, particularly to underserved tribes or museums that have not received a grant. This effort has included a grants information pamphlet, specialized training on grants offered at regional tribal organization and museum meetings, and individualized consultation on developing grants projects. While

an overall increase in applications has not been realized to the extent desired, the decrease in grant requests over years prior to these efforts has been reversed and increased interest is seen in discussions on future projects.

NAGPRA grant funds are also awarded on a non-competitive basis for the transfer of possession in the process of repatriation. These grants often cover the costs of travel and packaging to bring the human remains or items to the tribe. Repatriation grants, for transfer of possession, are not funded until the museum or federal agency provides a letter to the National NAGPRA Program evidencing that transfer of control has passed to the tribe. The National NAGPRA Program does not require a certain means to transfer control, and each museum or federal agency is left to the means normally employed to transfer property. A notice letter template is provided on the Program website.

Notice Backlog

In 2004, there were approximately 300 notices submitted to the program that were over five years old and had not been published. The rights of tribes are established by the publication of a notice and compliance with the law is not satisfied by mere submission of a draft notice. By the end of FY 2007, the number of aging notice submissions was reduced to 105, representing those prior to 2002.

The aging notices have not merely been shelved, waiting for the originator to decide to approve publication. The notice coordinator has repeatedly contacted the notice originators to determine whether they want to move forward and to offer Program assistance. In some cases the notices are withdrawn, as the museum or federal agency wishes to step back and resubmit a notice after consultation with tribes. In other instances, consultation is proceeding and publication is imminent. As to those notices for which publication in the near future is not likely, the program will deem them withdrawn during FY 2008, and will give notice to the originator that a fresh submission will be acted upon when received.

The publication of regulations may spur the submission of a wave of notices, which may cause the Program to staff notice processing by more than one person. The challenge is to keep up with the pace of incoming notices, while eliminating the backlog.

Outreach

Training and the dissemination of information on NAGPRA are keys to improved rates of compliance with the law. Through a variety of delivery methods, the large program with a small staff reached 1913 participants with training in FY 2007. The Program reached another 2000 people who contacted the program, by phone or email, with questions to be answered by the NAGPRA staff. The program produced an information pamphlet on the overall program and one on grants, which were sent to museum and tribal conferences for distribution.

Successful outreach in the future will depend on leveraging resources through partnerships and expanded use of the website, distance learning stations, and video programs. All of these means were employed in FY 2007.

Staffing Levels

The National NAGPRA Program is a large program that can be efficiently run with a small staff, assuming support from NPS, as described above. In the beginning of FY 2004 there was a staff of eight in the Program, and six after the reorganization. A staff position was added in 2005, to coordinate civil penalties and training. The staff level can be normalized at this level, with much of the remedial work of establishing ongoing policies, internal systems, reducing backlogs of notices, establishing administration of civil penalty cases, and regulation promulgation accomplished. Goals for normalization of the Program are nearing realization.

The Program staff is now performing the following ongoing program specific functions:

- Review and process notices for the Federal Register
- Administration of the grants program
- Civil Penalty investigation and processing for the Assistant Secretary
- Coordinating training, giving training, and producing training materials
- Drafting regulations, consultation on new regulations, processing to publication
- Designated Federal Officer to the NAGPRA Review Committee
- Web and database maintenance
- Program Assistant, Review Committee logistics, program travel and requisitions
- Managerial functions, oversight and coordination with program partners

Interns, Interns, Interns

The National NAGPRA Program is a continual sponsor of intern programs. Interns come to National NAGPRA through the National Center for Preservation Education, the Student Conservation Association, and from law schools that allow students to experience a federal program for course credit. Interns are treated to an active federal working experience, interspersed with events such as field trips to view collections and to meet with NAGPRA staff of museums. Interns have provided the National NAGPRA Program with meaningful reports, posted items to databases, and have helped to staff meetings.

The National NAGPRA Program is committed to diversity in the cultural and experiential composition of the staff. Intern programs provide a means to meet new talent and for students to experiment with potential careers.

CONCLUSION

NAGPRA is an indication of the nation's attitude of respect for humanity, which is an example to the world. NAGPRA is not a punitive law, or one of retribution. Rather, it is a process to foster healing.

Some people may view NAGPRA as a sea change, and others as a mere crack in glacial ice. The fear that NAGPRA would empty shelves in museums has been proven unfounded, and instead there has been an enhanced body of information available to museums, enriched through consultation with tribes. NAGPRA has exposed latent issues of accounting for collections, particularly when a federal agency has collections in nonfederal repositories, or when museums lack adequate inventory systems, or when records of archaeological data recovery have long been separated from the items.

Every NAGPRA notice tells a story. The stories reflect the disparate treatment of Native American burials and cultural property in a manner that would have horrified some of the collectors if their family were to receive such treatment. The notices tell of antiquated collection practices, which may have long been discontinued, but for which the rectification of the past was left undone, until NAGPRA compelled action.

Will NAGPRA always be with us? That depends on how long it takes to resolve questions raised by past actions and develop a culture of respect. The immediate future of the National NAGPRA Program seems secure, functioning well, and positioned appropriately in the National Park Service.