



**Written Testimony of
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**Before the United States Senate Committee on Indian Affairs
For the Oversight Hearing**

**“The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act’s
Promise After 30 Years of Practice.”**

Submitted January 31, 2022

Good morning, Mr. Chairman and Members of the Committee. My name is Valerie Grussing, Ph.D., and I have the honor of serving as the Executive Director of the National Association of Tribal Historic Preservation Officers (NATHPO). I am here today with NATHPO’s Repatriation Advisor, C. Timothy McKeown, Ph.D., who has compiled some of the data presented in my testimony and will be available if needed to respond to technical questions. We thank you for the opportunity to testify as part of this oversight hearing.

NATHPO is the only national organization devoted to supporting Tribal historic preservation programs. Founded in 1998, NATHPO is a 501(c)(3) non-profit membership association of Tribal government officials who implement federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO provides guidance to preservation officials, elected representatives, and the public about national historic preservation legislation, policies, and regulations. NATHPO promotes Tribal sovereignty, develops partnerships, and advocates for Tribes in governmental activities on preservation issues.

Tribal Historic Preservation Officers (THPOs) assume the responsibilities of State Historic Preservation Officers on Tribal lands and advise and work with federal agencies on the management of Tribal historic properties. THPOs also preserve and rejuvenate the unique cultural traditions, practices, and languages of their Tribal communities. The repatriation of Native ancestors, funerary objects, sacred objects, and objects of cultural patrimony is critically important to our members. NATHPO is very active on repatriation issues, most recently in advocating for THPOs’ interests as part of the Department of the Interior’s consultation on a draft proposed revision of the NAGPRA regulations and on the Secretary of the Interior’s Boarding School Initiative. I would like to specifically thank Secretary of the Interior Deborah Haaland, Assistant Secretary for Indian Affairs Bryan Newland, and Assistant Secretary for Fish and Wildlife and Parks Shannon Estenoz for ensuring that Tribes are consulted as part of these initiatives.

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), along with the repatriation provisions of the National Museum of the American Indian Act of 1989 (NMAI Act), establish Federal requirements for Federal agencies and museums, including the Smithsonian Institution, regarding the repatriation or disposition of Native American human remains and other cultural items to lineal descendants, Indian Tribes, and Native Hawaiian organizations. The NMAI Act

was amended in 1996 to bring it more in line with NAGPRA,¹ but NAGPRA itself has never been amended substantively.² It is fitting that after more than three decades of implementing NAGPRA we take this opportunity to assess its effectiveness and consider amendments to enhance Indian Tribes' and Native Hawaiian organizations' ability to protect grave sites and reclaim their ancestors, funerary objects, sacred objects, and objects of cultural patrimony.

NAGPRA includes three separate sets of provisions. The first set governs the protection of Native American graves and the disposition of cultural items excavated or discovered on Federal and Tribal lands after 1990. The second set of provisions requires museums and Federal agencies to prepare summaries and inventories of their collections and, upon request, repatriate cultural items to lineal descendants and culturally affiliated Indian Tribes and Native Hawaiian organizations. The third set of provisions establish criminal penalties for illegal trafficking of Native American human remains and cultural items. I will first address some concerns expressed by tribal governments related to one of the definitions in NAGPRA and then each of these three sets of provisions in turn.

25 U.S.C. § 3001-Definitions

The most problematic definition in the Act is that of "Native American." NAGPRA defines the term to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States." However, in 2004, the United States Court of Appeals for the Ninth Circuit interpreted the term "Native American" to require that human remains and other cultural items "must bear a significant relationship" to a **presently existing** Tribe, people, or culture to be considered Native American.³ Not only was this incorrect opinion antithetical to the purpose and policy underlying NAGPRA, it necessitated passage of separate legislation to enable reburial of the 9,000-year-old human remains at issue in the case, and it created ambiguity which, in at least one case, has led to an acquittal in a NAGPRA trafficking case.⁴ In order to address this issue, NATHPO recommends that the Congress amends NAGPRA's definition of "Native American" to read as follows:

(9) "Native American" means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.

25 U.S.C. § 3002-Ownership

The ownership provisions apply to the discovery, removal, or excavation of Native American cultural items on Federal lands and Tribal lands after 1990. NAGPRA and its implementing regulations require persons who discover Native American human remains or other cultural items on Federal or Tribal lands to immediately stop any ongoing activity and provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal land manager. The Federal land manager then must notify the appropriate Indian Tribes or Native Hawaiian organizations and begin consultation about the disposition of cultural items and complete a plan of action. The activity that resulted in the inadvertent discovery may resume thirty days after certification by the Federal land manager of receipt of the written confirmation of notification, or sooner if a written, binding agreement

¹ Pub. L. 104-278, § 4, Oct. 9, 1996, 110 Stat. 3355.)

² Pub. L. 102-572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516

³ *Bonnichsen v. United States*, 367 F.3d 864, 878 (9th Cir. 2004) (emphasis in original).

⁴ *U.S. v. Deluca*, No. 00 CR 387 (N.D. Ill. Mar. 6, 2002).

is executed between the Federal agency and the appropriate Indian Tribes or Native Hawaiian organizations. Discovered human remains or other cultural items may only be removed or excavated after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, or, in the case of Tribal lands, with the consent of the appropriate Indian Tribe or Native Hawaiian organization. The excavation or removal of cultural items must also comply with the requirements of the Archaeological Resources Protection Act (ARPA). NAGPRA provides a detailed priority listing to determine the ownership or control of discovered or excavated Native American human remains and other cultural items based on lineal descent, Tribal land, cultural affiliation, and aboriginal land. To date, only 218 discoveries and excavations of Native American human remains and other cultural items had occurred on Federal lands,⁵ indicating that NAGPRA has been somewhat successful in fulfilling its grave protection mandate.

NAGPRA sets standards for the disposition of human remains and other cultural items discovered on Federal lands that are recognized by a final judgement of the Indian Claims Commission or the United State Court of Federal Claims.⁶ The advisory committee has adopted this standard in its recommendations regarding the disposition of culturally unidentifiable human remains in museum or Federal agency collections, but elaborated on the basis for determining aboriginal lands. The current regulations allow aboriginal lands to also be determined by a treaty, Act of Congress, or Executive Order.⁷ In order to bring the ownership and repatriation provisions in line, we request that the committee amends the provisions of 25 U.S.C. § 3002 (a)(2)(C) to read as follows:

if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order as the aboriginal land of some Indian Tribe—

The ownership section has proved the most prone to litigation, due in part to the brevity of the statutory provisions as well as the lack of any institutionalized form of alternative dispute resolution. We hear from THPOs that in many cases Federal agency officials are failing to adequately consult with Indian Tribes following inadvertent discoveries and are failing to complete the plans of action required by regulation. To get a better grasp of Federal compliance with NAGPRA's provisions protecting Native American graves and cultural items, we ask the committee to:

request the Government Accountability Office to complete an evaluation of Federal agency compliance with the requirements of 25 U.S.C. § 3002 and its implementing regulations, particularly focusing on consultation, completion of plans of action and comprehensive agreements, publication of notice of intended disposition, and the disposition of so-called "unclaimed" cultural items, and whether establishing a dedicated position to ensure compliance with these provisions at each agency would be beneficial.

25 U.S.C. §§ 3003-3008-Repatriation of Cultural Items in Federal Agency and Museum Collections

The repatriation provisions of NAGPRA require Federal agencies and museums that receive Federal funds to prepare written summaries of cultural items and more detailed inventories of Native American

⁵ Newspaper Notices, <https://grantsdev.cr.nps.gov/NagpraPublic/Home/NID> (accessed January 27, 2022).

⁶ 25 U.S.C. § 3002 (a)(2)(c).

⁷ 43 CFR § 10.11 (c)(1)(ii).

human remains and association funerary objects in their possession or control, consult with Indian Tribes and Native Hawaiian organizations and, upon request, repatriation cultural items. To date, slightly more than 200,000 Native American ancestors have been inventoried, of which museums and Federal agencies have indicated a willingness to repatriate approximately 42%.⁸

NAGPRA establishes a seven-person advisory committee with one of its responsibilities being to compile an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommend specific actions for developing a process for disposition of such remains. After long discussions, development of several drafts, and extensive public consultation, the advisory committee issued its recommendations in 2000.⁹ The advisory committee noted that although the legal standing of funerary objects associated with culturally unidentifiable human remains is not addressed in NAGPRA, the statute does not prohibit their voluntary repatriation by museums or Federal agencies to the extent allowed by Federal law. Regulations implementing the advisory committee's recommendations were promulgated in 2010.¹⁰ The regulations require museums and Federal agencies that cannot prove right of possession to offer to transfer control of culturally unidentifiable human remains to the Indian Tribe or Native Hawaiian organization from whose Tribal land, at the time of the excavation or removal, the human remains were removed, or to the Indian Tribe or Tribes that are recognized as aboriginal to the area from which the human remains were removed. The regulations also recommend that a museum or Federal agency transfer control of funerary objects that are associated with culturally unidentifiable human remains if Federal or State law does not preclude it. NATHPO feels strongly that Native American funerary objects in museum or Federal agency collections should be returned along with Native ancestors with which they were lovingly buried. We request that the committee amend the advisory committee's responsibilities at 25 U.S.C. § 3006 (c) as follows to explicitly authorize a requirement that human remains and associated funerary objects be returned together:

(5) compiling an inventory of culturally unidentifiable human remains and associated funerary objects 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 and objects;

NAGPRA also authorizes the Secretary of the Interior to assess civil penalties on museums that fail to comply with the repatriation provisions of the Act. Information obtained by Dr. McKeown shows that, to date, 21 museums have failed to comply, one twice, and that \$64,646.34 in penalties were assessed. We also know that in 2017 the National Park Service had a backlog of allegations against another 62 museums that had not been investigated and that no failures to comply have been determined since then.

⁸ 2021 Native American Graves Protection and Repatriation Act.

https://public.tableau.com/app/profile/nationalnagpra/viz/2021NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed January 30, 2022).

⁹ Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36462 (June 8, 2000).

¹⁰ See 43 CFR § 10.11- Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains; Final Rule, 75 Fed. Reg. 12377 (Mar 15, 2010).

| Museum | Failure to Comply | Failure to Comply | | | | | Amount Paid |
|------------------------------------|-------------------|-------------------|------------|------------|--------------|---------------|---------------------|
| | | Transfer | No Summary | No Consult | No Inventory | No Repatriate | |
| East Carolina University | 2006 | | | | 1 | | \$ 3,750.00 |
| Northern Illinois University | 2006 | | | | 1 | | \$ 2,500.00 |
| St. Joseph Museum | 2007 | 1 | | | | | \$ 1,420.00 |
| Pierce College | 2007 | | | | 1 | | \$ 3,750.00 |
| Pacific Lutheran College | 2007 | | | | 1 | | |
| Safety Harbor Museum | 2008 | | | 2 | | | \$ 439.34 |
| University of Puget Sound | 2008 | | | | 1 | | \$ 2,500.00 |
| Texas Parks & Wildlife | 2008 | | | | 1 | | \$ 5,000.00 |
| City of Harrisburg, PA | 2009 | | 1 | 1 | | | \$ 9,820.00 |
| Nelson-Atkins Museum | 2009 | | | | | 1 | 0.00 |
| Bishop Museum | 2008 | | | | | 5 | \$ 13,500.00 |
| University of Massachusetts | 2010 | | | | 1 | | |
| Oregon State University | 2010 | | | | 1 | | 0.00 |
| Bishop Museum | 2010 | | 1 | | | | 0.00 |
| Harvard University | 2010 | | | | 1 | | 0.00 |
| Hamilton County Parks & Recreation | 2012 | | 1 | 1 | 1 | | \$ 6,533.00 |
| Andover Newton Theological School | 2015 | | 1 | | | | \$ 4,900.00 |
| University of California-Berkeley | 2015 | | | | 1 | | |
| St. Joseph Museum | 2016 | | | | 1 | 2 | \$ 5,535.00 |
| Marshall University | 2015 | | | | 1 | | \$ 4,999.00 |
| Freemont County Coroner | 2016 | 2 | | | | | |
| C. Timothy McKeown 2022 | | 3 | 4 | 4 | 13 | 8 | \$ 64,646.34 |

NATHPO is very concerned that civil enforcement of NAGPRA has been carried out without any degree of public scrutiny, that the penalties assessed are typically mitigated or unknown, and that since 2016 it appears to have completely stopped. We ask the committee to:

request the Government Accountability Office to complete an evaluation of the implementation of the civil enforcement provisions of NAGPRA and its implementing regulations, particularly focusing on ensuring that all allegations are adequately investigated in a timely manner, that the full range of penalties are considered, and that the results of these investigations are publicly known.

NAGPRA authorizes the Secretary of the Interior to make grants to Indian Tribes and Native Hawaiian organizations for the purpose of assisting such Tribes and organizations in the repatriation of Native American cultural items, and to museums for the purpose of assisting the museums in conducting the inventories and summaries.¹¹ Grants funding may not be used for the initiation of new scientific studies of Native American human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.¹² In 1990, the Congressional Budget Office estimated that NAGPRA would cost the Federal Government between \$20 and \$50 million.¹³ At the end of FY2020, \$50.02 million in grants had been awarded,¹⁴ yet the remains of over 117,000 Native American ancestors still sit on museum and Federal agency shelves.¹⁵ Funding needs from Tribes exceed the available grant appropriation and the maximum grant cap ensures that progress

¹¹ 25 U.S.C. § 3008.

¹² 25 U.S.C. § 3003 (b)(2).

¹³ Letter from Robert D. Reischauer, director, Congressional Budget Office to Representative Morris Udall (October 15, 1990).

¹⁴ National NAGPRA Program, Fiscal Year 2020 Report.

¹⁵ 2021 Native American Graves Protection and Repatriation Act.

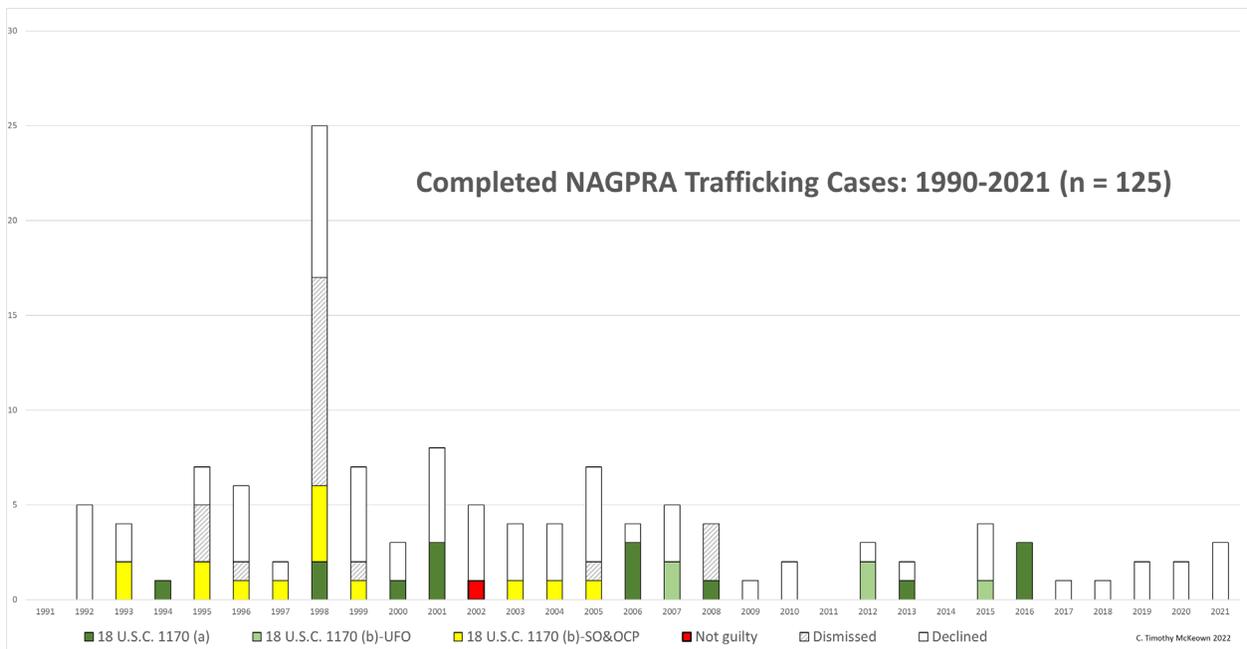
https://public.tableau.com/app/profile/nationalnagpra/viz/2021NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed January 30, 2022).

towards repatriation is piecemeal and slow. Some THPOs have also expressed concern that some museums may be using grant money to acquire and preserve additional scientific information on human remains and associated funerary objects. We ask the committee to:

request the Government Accountability Office to complete an evaluation of the NAGPRA grant program, particularly focusing on how funding has been used in the past, identifying which of those activities can be shown to most directly result in the repatriation of Native American cultural items, and make suggestions as to how the grants may be most effectively used to maximize repatriation.

18 U.S.C. § 1170-Illegal Trafficking in Native American Human Remains and Cultural Items

The criminal provisions of NAGPRA make it a crime to knowingly sell, purchase, use for profit, or transport for sale or profit Native American human remains or cultural items under certain conditions. For human remains, law enforcement must prove beyond a reasonable doubt that the financial incident occurred without the right of possession, meaning that the defendant cannot show that the human remains were obtained with the voluntary consent of an individual or group that had authority of alienation. Proving illegal trafficking of cultural items is more complicated. Law enforcement must prove beyond a reasonable doubt that the financial incident violated NAGPRA, meaning that the cultural items were either removed from Federal or Tribal lands without a permit, or were obtained from a Federal agency or museum that failed to comply with repatriation provisions of NAGPRA. Data obtained by Dr. McKeown from the Department of Justice and the United States Courts¹⁶ indicates that, to date, 125 investigations of illegal trafficking of Native American human remains and cultural items have been opened resulting in 34 convictions.



¹⁶ Data compiled from the Office of the United States Attorneys, National Caseload Data, FY2021 Data Files, and Pacer.gov

These data indicate that convictions for trafficking of Native American human remains under 18 U.S.C. 1170 (a) and funerary objects under 18 U.S.C. § 1170 (b) are relatively infrequent but have continued since NAGPRA was enacted. Convictions for trafficking of Native American sacred objects and objects of cultural patrimony under 18 U.S.C. § 1170 (b) are limited to 1993 to 2005, and further all were convicted in the United States District Courts for the Districts of New Mexico, Arizona, and Utah. The single not guilty verdict in 2004 stands out. Several factors seem to be responsible for this pattern. First, 18 U.S.C. § 1170 (b) convictions requiring proof that the cultural items were obtained in violation of NAGPRA are just more difficult. Second, the not guilty verdict in 2004 seems to reflect a chilling effect of the Ninth Circuit's interpretation of the definition of "Native American" in *Bonnichsen*. Third, the localization of convictions for illegal trafficking of Native American sacred objects and objects of cultural patrimony correlates with the activities of the Four Corners Interagency ARPA Task Force in the early 1990s and the continued activities of the law enforcement personnel involved in that project into the early 2000s. Last, during the 2010s, auctions of Native American sacred objects and objects of cultural patrimony appear to have moved outside of the United States, primarily to France.

Addressing this pattern requires a multi-faceted approach. First, we ask the committee to amend the definition of "Native American" as previously shown to provide a uniform and clear standard for the prosecution of trafficking cases. Second, we request the committee to amend 18 U.S.C. § 1170 requiring the government to show beyond a reasonable doubt the trafficked human remains and other cultural items were obtained without right of possession:

~~(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains or other cultural items of a Native American without the right of possession to those remains or items as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 510 years, or both.~~

~~(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.~~

Third, we request the committee to establish and fund an interagency investigative effort like the Four Corners ARPA Task Force that will focus specifically on stopping illegal trafficking of Native American human remains and cultural items. Last, we request that the Senate pass the Safeguard Tribal Objects of Cultural Patrimony Act to stop the illegal export of Native American sacred objects and objects of cultural patrimony. Taken together, these five actions will clarify the statutory prohibition, provide the necessary expertise to investigate offenses, and chill the overseas market for Native ancestors and sacred objects.

Administrative Placement of NAGPRA Implementation Responsibilities

In 2020, then-Representative Haaland introduced H.R. 8298 to amend NAGPRA. One of her key proposals was to redelegate enforcement and other activities previously assigned to the National Park Service to the Office of the Assistant Secretary for Indian Affairs instead. NAGPRA is clearly Indian law, not only is it enshrined under Title 25 of the United States Code with oversight by this committee, but Indian Tribes are the obvious and primary beneficiaries. Implementation of NAGPRA should be

administered accordingly and not under the rubric of “cultural resources.” We recognize that Secretary Haaland has the authority to implement this redelegation by means of Secretarial Order with follow-up revision of the Departmental Manual. If, for some reason, this change is not implemented in a timely fashion, we request that this committee amend 25 U.S.C. § 3013 as follows:

25 U.S.C. § 3013. Implementation and Enforcement

(a) The Office of the Assistant Secretary for Indian Affairs shall be the office for implementation and enforcement and other activities delegated by the Secretary.

(b) The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.

NMAI Act Judicial Jurisdiction and Enforcement

An additional issue we request you consider is the process for the return of Native American sacred objects and objects of cultural patrimony from the Smithsonian Institution. At least one group of Indian Tribes has unsuccessfully tried to recover such items from the National Museum of Natural History and has exhausted their administrative appeals, despite a unanimous recommendation to repatriate from the Smithsonian's own repatriation advisory committee. In such a situation under NAGPRA, an Indian Tribe would be able to challenge the failure to repatriate such cultural items to the United States District Courts (25 U.S.C. § 2013). However, the NMAI Act does not include a similar grant of jurisdiction. NATHPO recommends amending the NMAI Act to add the following provision:

20 U.S.C. § 80 q-16. Jurisdiction and Enforcement. The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

We thank you for the opportunity to testify as part of this oversight hearing, and we commend the committee for this opportunity to assess NAGPRA, with intent to enhance Indian Tribes’ and Native Hawaiian organizations’ ability to protect grave sites and reclaim their ancestors, funerary objects, sacred objects, and objects of cultural patrimony.