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# Repatriation of Native American Remains and Cultural Items: Requirements for Agencies and Institutions

Some federal agencies, museums, and other institutions have, over time, acquired human remains and cultural items related to the Indigenous peoples who originally inhabited the United States. Congress has mandated the return or *repatriation* of some of these remains and artifacts to lineal descendants, modern-day federally recognized tribes (*tribes*), and other groups that have a cultural affiliation with those items. In particular, two federal laws establish requirements and timelines for such repatriations: the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001 et seq.) and the National Museum of the American Indian Act (NMAIA; 20 U.S.C. §80q et seq.). Enacted in 1990, NAGPRA applies to federal agencies and certain museums and institutions receiving federal funding (hereinafter collectively referred to as *entities*). NMAIA, enacted one year prior in 1989, applies to the Smithsonian Institution (SI)—primarily the National Museum of Natural History (NMNH) and the National Museum of the American Indian (NMAI).

## NAGPRA and NMAIA Requirements

The Department of the Interior’s National Park Service (NPS) administers the NAGPRA program and oversees its implementation pursuant to regulations promulgated at 43 C.F.R. Part 10, which were updated in December 2023. SI’s NMNH and NMAI have repatriation procedures and policies to ensure compliance with NMAIA. SI museum policies and officials have stated that SI voluntarily consults the NAGPRA regulations for guidance, where appropriate, although such consultation is not statutorily required.

NAGPRA and NMAIA require entities and SI, respectively, to conduct certain activities pertaining to the repatriation of items within their collections. Specifically, each law requires entities and SI to

- inventory and summarize the Native American (including Alaska Native) and Native Hawaiian human remains, funerary objects, and cultural items in their possession within a certain timeline;
- determine the origins or cultural affiliation of such remains and items; and
- upon request, repatriate them to the appropriate descendant(s), tribe(s), or Native Hawaiian organization(s) (NHOs).

## Inventory and Summary of Human Remains, Funerary Objects, and Cultural Items

Entities subject to NAGPRA and SI are required to inventory Native American and Native Hawaiian human remains and funerary objects in their possession or control within a specified time frame. *Funerary objects* generally refer to objects that, as part of a culture’s death rite or

ceremony, are intentionally placed with individual human remains, either at the time of burial or later (see 20 U.S.C. §80q-14(4) and 25 U.S.C. §30001(3)(A)). Both NAGPRA and NMAIA require the inventory to itemize each of the relevant remains and objects and identify their geographic and cultural affiliation (see “Determination of Cultural Affiliation”).

In addition to this inventory, entities and SI are required to compile a summary of sacred objects, objects of cultural patrimony, and unassociated funerary objects. Funerary objects are considered to be *unassociated* if the human remains with which the objects were placed are not in the control of a museum or federal agency. The summary is in lieu of an object-by-object inventory and must “describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable” (25 U.S.C. §30004 and 20 U.S.C. §80q-9a(a)).

## Determination of Cultural Affiliation

As part of the inventory and summary requirements, NAGPRA and NMAIA direct entities and SI to try to determine the cultural affiliation of the remains and objects or artifacts in their possession. *Cultural affiliation* refers to a reasonable connection between human remains or cultural items and a tribe or NHO based on a relationship of shared group identity. For both NAGPRA entities and SI, cultural affiliation may be determined using available information or documentation that includes geographical, kinship, biological, archeological, linguistic, folkloric, oral tradition, historical evidence, or other information or expert opinion (43 C.F.R. §10.3; NMAI, Repatriation Policy, 2022; NMNH, *Guidelines and Procedures for Repatriation*, 2012). Both laws require consultation with officials and/or traditional religious leaders of tribes and NHOs in determining cultural affiliation and notification to the affected tribes or NHOs if an affiliation is established.

Through this process, it may be determined that no lineal descendant, culturally affiliated tribe, or NHO can be associated with human remains and associated funerary objects. These remains and objects have traditionally been referred to as *culturally unidentifiable* and make up the majority of remains and objects awaiting repatriation under NAGPRA and NMAIA (see “Progress to Date”). NAGPRA requires the development of recommendations for a disposition process for culturally unidentifiable remains (25 U.S.C. §3006(c)(5)). In 2010, NPS issued regulations under NAGPRA requiring agencies and museums to consult with tribes and NHOs from whose tribal or aboriginal lands the culturally unidentifiable remains were removed and to jointly develop plans for transferring control of the remains

(75 *Federal Register* 12402). In December 2023, NPS promulgated revised NAGPRA regulations which removed the categorization of *culturally unidentifiable* and adjusted the standard for establishing cultural affiliation to place increased emphasis on available geographical information and Native American traditional knowledge (87 *Federal Register* 63202).

NMAIA does not address the repatriation and treatment of culturally unaffiliated remains and objects; however, SI's NMNH issued a policy in 2020 for the repatriation of these items. Under the policy, tribes and NHOs must initiate a formal request for the repatriation of the remains or objects and have a "reasonable basis" for making such a request. Repatriation decisions are then made in consultation with the requester, as well as other relevant tribes and NHOs based on the tribal lands and aboriginal lands from which the remains and objects were removed.

### Repatriation

If cultural affiliation is established, both NAGPRA and NMAIA require entities and SI, upon request, to "expeditiously return" such remains or objects to the relevant descendant(s), tribe(s), or NHO(s) (25 U.S.C. §3005 and 20 U.S.C. §80q-9). NAGPRA includes certain exceptions to this repatriation requirement. For example, in instances wherein such items are "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States," entities are required to return such remains or items once the study is completed (25 U.S.C. §3005(b)). In addition, if there are multiple competing requests for repatriation and the appropriate claimant cannot be determined, NAGPRA allows for the retention of such items until the requesting parties agree on their disposition, or the dispute is otherwise resolved (25 U.S.C. §3005(e)). NMAIA does not consider such scenarios for SI; however, SI's internal policies address instances of competing claims in a similar manner to those outlined under NAGPRA.

Neither NAGPRA nor NMAIA require tribes or NHOs to accept culturally affiliated remains or objects. In some instances, repatriation may not be feasible due to a tribe's or NHO's lack of resources or specific cultural beliefs.

### Progress to Date

NAGPRA requires the submission of an annual report to Congress detailing progress and obstacles in implementing the law (25 U.S.C. §3006(h)). The National NAGPRA Program's FY2023 report provides data on the status of repatriation efforts between FY1990 and FY2023, including the following:

- Nearly 117,000 human remains (55% of remains reported) have completed the NAGPRA process.
- As of September 2023, more than 96,000 human remains were pending consultation and/or notice, 95% of which were not yet culturally affiliated.
- More than 2 million associated funerary objects have completed the NAGPRA process.
- More than 358,000 unassociated funerary objects have been published in notices.

- Roughly 684,000 associated funerary objects were pending consultation and/or notice, 96% of which were not yet culturally affiliated.

Unlike NAGPRA, NMAIA does not have an annual reporting requirement. However, since 2011, SI has submitted annual reports detailing its repatriation progress. In its 2021 report (the most recently published), SI reported that it has repatriated or made available for repatriation more than 7,000 human remains; 250,000 funerary objects; and 1,400 sacred objects and/or objects of cultural patrimony.

### Issues for Congress

Congressional issues have centered around the progress in repatriating remains and items held in collections. The majority of culturally affiliated remains and items have been offered for repatriation. However, the issue of how to address culturally unidentifiable objects—which constitute the majority of items in collections awaiting repatriation—remains controversial. According to NPS, the revised 2023 NAGPRA regulations are designed to address perceived barriers to disposition and repatriation of remains and objects that were previously categorized as culturally unidentifiable. In addition, the regulations set revised timelines for covered entities to finalize or update their inventories and summaries based on the new requirements (43 C.F.R. §10.10(d)(2) and §10.9(a)(2)). Under NAGPRA, noncompliance with these timelines or other statutory requirements could result in civil penalties (federal agencies are not subject to civil penalties). The revised regulations establish a higher base penalty amount for noncompliance and allow for potential increases due to a variety of factors (43 C.F.R. §10.11). Opinions have varied among stakeholders as to the appropriate level for civil penalties and the extent to which penalties should be utilized.

Other issues have focused on the degree to which tribes and NHOs are responsible for initiating and conducting certain consultation procedures under NAGPRA and NMAIA. Questions include whether the requirements place an undue financial and practical burden on tribes and NHOs and lessen institutions' responsibility to proactively seek repatriation of their collections or whether entities have the necessary staff capacity to ensure compliance with the law. To assist with consultation and repatriation costs, NAGPRA and NMAIA authorize NPS and SI, respectively, to administer grants. Funding is generally subject to annual appropriations or other sources as available.

Whether covered institutions should consider repatriation beyond what is required under NAGPRA and NMAIA has also been of interest. For example, both laws require repatriation only to lineal descendants, tribes, and NHOs. Groups claiming Indigenous heritage that are not tribes are not addressed in the two laws. In addition, neither law addresses *international repatriation* (i.e., repatriation of collections to indigenous groups outside the United States or repatriation from overseas collections to tribes).

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