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

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, at times, made an effort to require the return or *repatriation* of some of these remains and artifacts to lineal descendants, modern-day federally recognized 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. Ch. 32) and the National Museum of the American Indian Act (NMAIA; 20 U.S.C. §80q et seq.). NAGPRA, enacted in 1990, applies to federal agencies and certain museums and institutions receiving federal funding. NMAIA, enacted one year prior in 1989, applies to the Smithsonian Institution (SI) (primarily the National Museum of Natural History and the National Museum of the American Indian).

## 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. SI’s National Museum of Natural History and National Museum of the American Indian have established their own repatriation procedures and policies that comply with NMAIA. Museum policies and officials have stated that SI voluntarily consults the NAGPRA regulations where appropriate for guidance.

NAGPRA and NMAIA differ in scope and include a wide range of provisions (e.g., NAGPRA also addresses remains and cultural items excavated from federal or tribal lands following enactment). Both NAGPRA and NMAIA require institutions to conduct certain activities pertaining to the repatriation of items within their collections. Specifically, both laws require entities to

- inventory or 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 NMAIA 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 object* generally refers 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 laws 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 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 to try to determine the *cultural affiliation* of the remains and objects or artifacts in their possession. Cultural affiliation means there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between a present-day Indian tribe or NHO and an identifiable earlier group (see 25 U.S.C. §3001 and SI repatriation policies). Under NAGPRA regulations, cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion (43 C.F.R. §10.14). For SI, NMAIA specifies that affiliation should be determined “using the best available scientific and historical documentation” (20 U.S.C. §80q-9). 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.

## Repatriation

If cultural affiliation is established, both NAGPRA and NMAIA require entities, 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 carves out 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 following completion of the study (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 internal policies address instances of competing claims in a similar manner to those outlined under NAGPRA.

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

### Culturally Unidentifiable

Through the inventory and summary processes, it may be determined that no lineal descendant or culturally affiliated tribe or NHO can be identified or associated with certain human remains and associated funerary objects. These remains and objects are generally referred to as *culturally unidentifiable*. The vast majority of remains and objects awaiting repatriation under NAGPRA and NMAIA are in this category (see “Progress to Date”).

NAGPRA and NMAIA differ in their treatment of culturally unidentifiable remains and objects. NAGPRA requires NPS to consider recommendations for developing a disposition process for these remains. In 2010, NPS issued regulations requiring agencies and museums to consult with tribes and NHOs from whose tribal or aboriginal lands the remains were removed and to jointly develop plans for transferring control of the culturally unidentifiable human remains (43 C.F.R. §10.11). Although not required by NMAIA, SI’s National Museum of Natural History issued a similar policy in 2020 for the repatriation of *culturally unaffiliated* remains and objects.

### Progress to Date

NAGPRA requires the submission of a report to Congress detailing progress and obstacles in implementing the law (25 U.S.C. §3006(h)). The National NAGPRA Program’s FY2022 report provides data on the status of repatriation efforts between FY1990 and FY2022, including the following:

- 92% of culturally affiliated human remains (more than 77,000 remains) have completed the NAGPRA process.
- As of September 2022, more than 108,000 human remains were pending consultation and/or notice, 94% of which were not yet culturally affiliated.
- More than 1.86 million associated funerary objects have completed the NAGPRA process.

- More than 353,000 unassociated funerary objects have been repatriated.
- As of September 2022, roughly 765,000 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 February 2022, SI reported that since the enactment of NMAIA, it has repatriated more than 6,000 human remains, 250,000 funerary objects, and 1,400 sacred objects and/or objects of cultural patrimony.

### Issues for Congress

Congressional concerns have been raised around the progress in repatriating remains and items held in collections. Although the majority of culturally affiliated remains and items have been offered for repatriation, the issue of how to address culturally unidentifiable objects—which constitute the majority of items in collections—remains controversial. Some stakeholders have suggested that the 2010 NAGPRA regulations addressing culturally unidentifiable repatriation emphasize speed over accuracy because requesting tribes and NHOs need only demonstrate a geographic connection to the area where the remains were discovered. Others view the standards and processes by which agencies and museums establish cultural affiliation as onerous and inadequate in their consideration of traditional knowledge held by tribes and NHOs. In October 2022, NPS issued proposed regulations that would, amongst other proposals, remove the term culturally unidentifiable and establish a simplified standard for establishing affiliation (87 *Federal Register* 63202). According to NPS, the proposal is intended to address the perceived barriers to repatriation.

Other critiques have focused on the degree to which tribes and NHOs are responsible for initiating and conducting certain consultation procedures under NAGPRA and NMAIA. Some argue that such requirements place an undue financial and practical burden on tribes and NHOs and relieve institutions of their responsibility to proactively seek repatriation of their collections. To assist with consultation and repatriation costs, both NAGPRA and NMAIA authorize NPS and SI, respectively, to administer grants to eligible entities. Funding for such grants is generally subject to annual appropriations or other sources, as available.

Whether or to what degree covered institutions should consider repatriation beyond what is required under NAGPRA and NMAIA has also been of congressional interest. For example, both laws require repatriation only to lineal descendants, federally recognized tribes, and NHOs. Groups claiming indigenous heritage that are not federally recognized are not discussed or considered 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 federally recognized tribes and NHOs).

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