



## **ASSOCIATION ON AMERICAN INDIAN AFFAIRS**

Protecting Sovereignty ◦ Preserving Culture  
Educating Youth ◦ Building Capacity  
SINCE 1922

February 16, 2022

*Via email only*

Chairman Sen. Brian Schatz  
Senate Committee on Indian Affairs  
Vice Chairperson Sen. Lisa Murkowski  
Senate Committee on Indian Affairs  
c/o K\_Williams@indian.senate.gov,  
Amber\_Ebarb@indian.senate.gov,  
Darren\_Modzelewski@indian.senate.gov  
John\_Simermeyer@indian.senate.gov

**Re: Comments regarding Oversight Hearing on "The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act's Promise After 30 Years of Practice."**

Dear Chair Schatz and Vice Chair Murkowski,

We are so grateful for your attention to the Native American Graves Protection and Repatriation Act (NAGPRA). While the Association on American Indian Affairs is not a "Tribe" to which the government owes a trust relationship to - and we in no way wish to co-opt this process - the Association feels strongly that our collaborative work with Native Nations and expertise must be shared with you fully. The Association is the oldest non-profit serving Indian Country, and is celebrating our 100 years of service, since 1922! The Association has been a leading organization protecting Sacred Places, and cultural and religious practices since its founding. Regarding NAGPRA and our repatriation efforts, we have devoted significant resources analyzing and evaluating the effectiveness of the Act as well as its regulations, including how the Act can be improved to better reflect Congress' intent.

The Association's work in repatriation and protecting the Sacred is led by our grassroots efforts with Tribal practitioners, museums, academics, lawyers, artists, federal agencies and others on the ground. The Association's Annual Repatriation Conference brings practitioners and specialists together from diverse backgrounds and provides training and technical assistance to Native Nations and institutions. The Association's 7<sup>th</sup> Annual Repatriation Conference was held virtually over three weeks in November 2021 with 700 participants. This year, the 8<sup>th</sup> Annual Repatriation Conference will be a hybrid event held October 11, 12 & 13.

The Association also has a Repatriation Working Group, made up of diverse experts involved in repatriation efforts, and a Tribal Partners Working Group, a closed group that provides a safe space to discuss cultural and spiritual, as well as practical issues regarding repatriation and protecting the Sacred. These grassroots groups support the direction of our organization's activities, advocacy and training regarding NAGPRA, and other matters of domestic and international repatriation, and protection of Sacred Places.

The Association began its review of potential amendments to NAGPRA most recently starting in 2018 with its Repatriation Working Group and other partners. The RWG went line-by-line developing potential amendments that are based in our experience implementing the Act and its regulations. Hand in hand with Tribal and museum practitioners, we have also developed strong positions on revisions to the NAGPRA regulations. Through this work, the Association has developed recommendations about whether the problems with NAGPRA have come from the Act itself, or from the current regulations.

It is clear to us that the biggest problem with NAGPRA compliance comes from the language of the current regulations. The Act continues to be a strong human rights statute - with the main problem that those in control of recommending and developing the regulations that are currently in force created complicated bureaucratic processes that has allowed institutions to get away with 30 years of refusing to repatriate and properly consult with Native Nations (or Tribes) and Native Hawaiian Organizations (NHOs).

We are not providing full details of our recommendations - instead, we are providing a summarized version of these amendments that will hopefully lead to further discussion. Based on the lessons learned over 31 years of NAGPRA, there are four categories of amendments that are needed to align the Act to Congress' intent. First, there are several definitions in 25 U.S.C. § 3001 that require amendment, and a couple other definitions that should be included to improve implementation.

Second, the Act must improve compliance and enforcement, with amendments within the Act and its criminal provisions. Third, the jurisdiction of the Act must be expanded to apply regardless of where stolen and looted Ancestors and cultural items are held or are discovered. Finally, amendments to the Act could be included to support repatriation of children and others that are in marked or unmarked graves of boarding schools and other institutions so that lineal descendants and Native Nations can bring their stolen Ancestors home for reburial.

The following recommendations are summarized for brevity and follow the framework of the Act.

### **25 USC § 3001 - Definitions**

**"Cultural Items"** should be defined as understood by the affiliated Tribe or NHO and not by the museum or federal agency. In other words, the Tribe or NHO understanding of whether an item fits in a particular category should be presumed to be correct as the Tribe or NHO is the primary expert of their own cultural heritage.

**"Funerary object"** is defined by two separate definitions - one for associated funerary objects and one for unassociated funerary objects. This has caused confusion for institutions with split collections whose funerary objects have been split away from their Ancestors. The definition of

**DONATE AT [WWW.INDIAN-AFFAIRS.ORG](http://WWW.INDIAN-AFFAIRS.ORG)**

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 [General@Indian-Affairs.org](mailto:General@Indian-Affairs.org)

unassociated funerary object has also been unworkable for other significant reasons. "Unassociated funerary objects" must be connected to a specific Ancestor or burial site, which has prevented these items from being repatriated. This information is often unknown because of the poor record-keeping of many institutions. However, Tribes understand the types of items that were included in their burials. Unfortunately, graves have been disturbed for the very purpose of removing funerary objects to be sold and exhibited as "art" because these items have been more valuable and easier to traffic than human remains. Tribes and institutions should not have to connect funerary objects to specific Ancestors or known burial sites. All funerary objects should be treated the same, with the Tribe or NHO as the primary expert to categorize the cultural item correctly.

**"Indian Tribe."** Native American Ancestors and cultural items have been looted and unconscionably taken over the course of colonial history before there was a class of Tribes referred to as "federally recognized Tribes." The Act's definition of "Indian Tribe" has been used inconsistently in the past by regulators, sometimes including state recognized Tribes that are eligible for special programs, and sometimes restricted to federally recognized Tribes alone. The definition should clearly state that this remedial human rights Act applies to federal and state recognized Tribes, as state Tribes are "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The Act already applies to lineal descendants and Native Hawaiian organizations, which are not federally recognized Tribes. It is illogical that NAGPRA would not be available as a remedy to state recognized Tribes and Indigenous Peoples who can prove descendancy or ownership.

**"Native American"** should be amended to include "or was": "means of, or relating to, a tribe, people, or culture that is **or was** indigenous to the United States." This amendment is required because of the faulty reasoning of the Ninth Circuit Court of Appeals in the Kennewick Man case.

**"Consultation"** is not defined in the Act though it is a main tenet of this work. Given the absolute remedial, restorative purpose of NAGPRA, consultation must be defined differently from other contexts. Consultation, for NAGPRA purposes, must be defined to require obtaining the consent of Tribes or NHOs and that, unless consultation shows otherwise, that the Ancestor and cultural items are viewed with the presumption of Tribal or NHO ownership.<sup>1</sup> Consultation must be more than providing notice, considering that the Act's language recognizes that the institution must prove it has a "right of possession." (In other words, the Act's language presumes repatriation should occur and the only exception is when the institution can prove it has a "right of possession.")

**"Possession or Control"** is used throughout the Act but not defined, though the phrase is significant in the declaration of legal responsibilities under the Act.<sup>2</sup> Whether an institution has possession or control, it is obligated to comply with NAGPRA. "Possession or control" in NAGPRA does not equate to a legal interest, unless the institution can prove that it has a "right

---

<sup>1</sup> Please note that the term "ownership" does not truly define how Tribes and NHOs care for Ancestors, their burial belongings and sacred and cultural patrimony. In fact, the term "ownership" can be offensive to our values. This term is being used in our comments to best translate a western legal concept. Instead of ownership, we would prefer terms such as "rightful caretaker."

<sup>2</sup> For example: "Each Federal agency and each museum which has **possession or control** over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory...", 25 U.S.C. 3003(a) (emphasis added).

**DONATE AT [WWW.INDIAN-AFFAIRS.ORG](http://WWW.INDIAN-AFFAIRS.ORG)**

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 [General@Indian-Affairs.org](mailto:General@Indian-Affairs.org)

of possession" as clearly defined in the Act. This is one of the most important concepts that drives the Act's successful implementation!

The regulations, as well as guidance provided by different federal agency leadership over time, has defined "control" and "possession" separately, and includes a type of legal interest. To illustrate this, the meaning of "right of possession" used in the Act must be understood. The Act provides a one-and-only exception to repatriation. If an institution can prove a "right of possession" then repatriation shall not occur:

"Right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. .... The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

25 U.S.C. § 3001(13). Thus, the Act establishes that agencies and museums shall not have any rightful legal interest to Ancestors and cultural items unless they can prove an authoritative transfer from a Tribe or NHO to the institution at the time the item was taken.

Thus, the Act's use of the phrase "possession or control" does not and cannot create a legal interest that the Act itself forbids and that the agency or museum has not proven. Institutions justify using Ancestors and cultural items anyway they wish, permitting them to exhibit, research (even with federal monies) and loan Ancestors and cultural items to even international institutions without first fulfilling their NAGPRA responsibilities for repatriation and disposition - though they do not have a "right of possession." Agencies and museums do not have current legal rights in cultural items without this determination - to the contrary, they have legal duties to comply with NAGPRA and restore rightful ownership to Tribes and NHOs.

We recommend then that "possession or control" be defined together as a single term or phrase - as they appear in the Act - as a type of naked possession or control and treated like a bailment, albeit one unintended by the rightful owners (Tribes and NHOs). In that context, legal rights never transfer from institution to Tribe, but are instead acknowledged and restored, and the entity with temporary and naked "possession or control" has a duty to safeguard and restore items to the proper owners. The NAGPRA process, through consultation, affiliation, notice, and repatriation would then acknowledge (instead of transferring a legal interest that the agency or museum does not have) the Tribe(s) or NHO(s) proper and legal ownership.

### **25 USC § 3002. Ownership: An opportunity to rectify the return of children from Boarding Schools**

The Act allows for the removal of Ancestors and their burial belongings from federal or Tribal lands. This process may also be used to disinter and repatriate children from marked and unmarked burials from past or present Boarding School and other institutional properties. Federal agencies, such as the U.S. Army, have denied that NAGPRA applies to excavate and return children from marked and unmarked boarding school cemeteries.

Rather than following NAGPRA, the U.S. Army chose to use their own internal procedures,

**DONATE AT [WWW.INDIAN-AFFAIRS.ORG](http://WWW.INDIAN-AFFAIRS.ORG)**

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029  
(240) 314-7155 [General@Indian-Affairs.org](mailto:General@Indian-Affairs.org)

applicable to soldiers' graves. Those regulations, adopted without regard to the fiduciary obligations central to NAGPRA and without Tribal consultation, only allow for a lineal descendant to disinter their Ancestor (and not an affiliated Native Nation or NHO), and further burdens the process by requiring affidavits and other information not required by NAGPRA. The Army asserts that the *Thorpe v. Borough of Jim Thorpe* case from the Third Circuit Court of Appeals prevents the application of NAGPRA to disinter a known grave or cemetery of a Native American (at least in that circuit). The Army's argument is misplaced. The judge in the that case declined to apply the repatriation provisions of NAGPRA, after determining that the city was not a museum - and that the federal nexus was too attenuated to invoke the NAGPRA repatriation remedy. The court did not review the graves protection provisions, section 3002. As an agency of the United States, the Army explicitly bears the federal NAGPRA responsibility. The Army must act with respect to the graves protection provisions intended to address children's marked and unmarked graves located on lands that housed U.S. funded boarding schools. Those graves protections provisions, rather than the repatriation provisions construed in *Thorpe*, apply to remedy hundreds of years of wrongful takings of Native American children - and to give them a proper burial.

Moreover, to support the excavation and return of children from boarding schools and other institutions, the application of NAGPRA should apply beyond federal and Tribal lands. There are many environmental statutes that apply nationally regardless of ownership of land, such as the Endangered Species Act, the Bald and Golden Eagle Protection Act, the Clean Water Act and the Clean Air Act. The only way to prevent a checkerboarded regulatory scheme and allow for graves protection and repatriation in line with Congress stated priorities in NAGPRA and other laws, is to require the application of NAGPRA to all lands and hands that hold Native burials and cultural heritage.

### **25 USC § 3003. Inventory for Human Remains and Associated Funerary Objects**

Subsection(b)(2) of this provision states that inventories "shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects." As expressed above, an institution must prove it has a "right of possession." Yet, this permissive omission of outright banning research has given many institutions enough legal room to continue to perform destructive research on Ancestors and cultural items in which they have no "right of possession." How can an institution perform research on collections that it does not own, and where the "right of possession" has not been determined? The Act should be revised to clearly ban new research unless "right of possession" is established by a burden of proof that is higher than a preponderance of the evidence, or unless, pursuant to 3005(b), items are indispensable for completion of a specific scientific study of major benefit to the United States.

If a Tribe and an institution mutually wish to perform more comprehensive investigations about Ancestors or cultural items, NAGPRA does not prevent that effort, see 25 U.S.C. § 3009, but it most certainly does not require it and should be banned unless an institution has the "right of possession" of the Ancestor.

**DONATE AT [WWW.INDIAN-AFFAIRS.ORG](http://WWW.INDIAN-AFFAIRS.ORG)**

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029  
(240) 314-7155 [General@Indian-Affairs.org](mailto:General@Indian-Affairs.org)

## **25 USC § 3004. Summary for Unassociated Funerary Objects, Sacred Objects and Cultural Patrimony**

As written, the Act allows the institution to determine whether the objects in its collections are “cultural items” pursuant to the Act. As previously stated, institutions often do not have the expertise to determine this, without consultation with the potentially affiliated Tribe or NHO. However, the language of the Act places the determination of whether an object is a “cultural item” solely in the hands of the institution.

Summaries should require an institution to provide a catalogue or summary of its Native American collection and allow the Tribe or NHO to determine what items fit which categories, and then proceed with repatriation. After all, a Tribe or NHO has the primary expertise over their own cultural heritage.

## **25 USC § 3005. Repatriation**

This provision of the Act, particularly subsection (a)(4), has caused a majority of problems and has fed into the large numbers of “culturally unidentifiable” inventories. First, this subsection has been used by institutions to demand that Tribes and NHOs prove by a preponderance of the evidence that Ancestors and cultural items are affiliated. However, this section only applies where there is no information to affiliate. Any successful institution or Tribal practitioner will tell you that you only need geographic evidence to establish affiliation under the law.

Institutions have used (a)(4) even where there is enough information to affiliate in order to delay repatriation and burden the Tribe to gather more information - including demands for sacred knowledge that is not required to show affiliation - and even to get the Tribe to perform more research. This provision has been financially, as well as emotionally and spiritually, costly for Tribes and NHOs.

The provision should be clarified to limit inclusion of Ancestors and cultural items on the CUI list only where there is **no** information available, including geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion, or **no Tribe or NHO** that seeks to affiliate and repatriate.

## **25 USC § 3007. Penalty**

Subsection (a) should be amended to replace “may” with “shall” in order to improve outcomes that incentivize compliance with the Act. “Any museum that fails to comply with the requirements of this chapter **may shall** be assessed a civil penalty...” Moreover, any penalty assessed should go back into the civil penalty program to fund this investigative work and increase efficient and effective compliance with the Act.

Subsection (b)(1) must also be revised to remove the requirement that penalties be assessed according to the “the archaeological, historical, or commercial value of the item involved.” This has been viewed as offensive by many Native Nations and ignores the cultural and spiritual value and the harm suffered by the Native Nation from the refusal of the institution to comply with the law.

**DONATE AT [WWW.INDIAN-AFFAIRS.ORG](http://WWW.INDIAN-AFFAIRS.ORG)**

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 [General@Indian-Affairs.org](mailto:General@Indian-Affairs.org)



## **25 USC § 3008. Grants**

The language of the Act gives the Secretary authorization to provide grants to Tribes and NHOs for “repatriation,” and grants to museums for completing inventories. The language should more generally allow grants to Tribes, NHOs and museums for all efforts under sections 3003, 3004 and 3005 of the Act. This will support Tribes and museums to collaborate for funding to support these efforts - instead of needlessly creating two different buckets of funding and relegating Tribes to seek funding for only the act of repatriation.

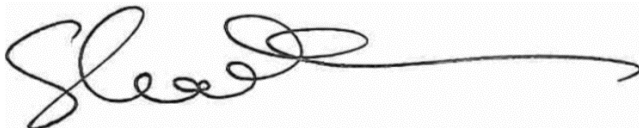
## **18 USC § 1170 Illegal trafficking in Native American human remains and cultural items**

The current version of the Safeguarding Tribal Objects of Patrimony Act before the Senate and House amends the illegal trafficking provision of NAGPRA by increasing penalties for violations of NAGPRA. However, this amendment will not offer the deterrence necessary to stop illegal trafficking. It could, however, provide stronger deterrence against trafficking and improper export if the intent requirement was amended.

Currently, 18 USC § 1170 requires an individual to “know” that the act is illegal: “Whomever knowingly sells...”. This intent requirement is difficult to prove, and therefore a higher criminal penalty will not prove a deterrence effect for the trafficking of cultural items. Revising the trafficking provision to include a general level of intent, such as merely an intent to sell (instead of the knowledge that the selling is illegal), as well as no requirement of intent (strict liability), would easily strengthen Congress’ efforts to end trafficking. These lower or no intent crimes could provide misdemeanor or 1-2 year penalties, depending on scope of the crime, and would have a higher deterrence effect on trafficking than merely increasing the penalty amount.

Thank you for this opportunity to provide comments. If you have any questions or concerns, do not hesitate to reach out to me at [shannon@indian-affairs.org](mailto:shannon@indian-affairs.org) or 240-314-7155.

Yakoke,



Shannon O’Loughlin, Choctaw  
Chief Executive & Attorney

### **BOARD OF DIRECTORS**

Frank Ettawageshik (Odawa), President  
Jonathan Perry (Wampanoag), Vice-President  
Joseph Daniels, Sr. (Potawatomi), Treasurer  
Dee Ann DeRoin (Ioway), Secretary  
Alfred R. Ketzler, Sr. (Athabascan)  
Bradford R. Keeler (Cherokee)  
John Echohawk (Pawnee)  
Sandy White Hawk (Lakota)  
Rory Wheeler (Seneca)

### **DONATE AT [WWW.INDIAN-AFFAIRS.ORG](http://WWW.INDIAN-AFFAIRS.ORG)**

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029  
(240) 314-7155 [General@Indian-Affairs.org](mailto:General@Indian-Affairs.org)