

**GAO**

Testimony  
Before the Committee on Indian Affairs,  
U.S. Senate

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For Release on Delivery  
Expected at 2:15 p.m. EDT  
Thursday, June 16, 2011

## INDIAN ISSUES

# Key Federal Agencies' and the Smithsonian Institution's Efforts to Identify and Repatriate Indian Human Remains and Objects

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**G A O**

Accountability \* Integrity \* Reliability

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Highlights of [GAO-11-755T](#), a statement before the Committee on Indian Affairs, U.S. Senate

## Why GAO Did This Study

The National Museum of the American Indian Act of 1989 (NMAI Act), as amended in 1996, generally requires the Smithsonian Institution to inventory and identify the origins of its Indian and Native Hawaiian human remains and objects placed with them (funerary objects) and repatriate them to culturally affiliated Indian tribes upon request. According to the Smithsonian, two of its museums—the American Indian and the Natural History Museums—have items that are subject to the NMAI Act. The Native American Graves Protection and Repatriation Act (NAGPRA), enacted in 1990, includes similar requirements for federal agencies and museums. The National NAGPRA office, within the Department of the Interior's National Park Service, facilitates the governmentwide implementation of NAGPRA. Each act requires the establishment of a committee to monitor and review repatriation activities.

GAO's testimony is based on its July 2010 report on NAGPRA implementation ([GAO-10-768](#)) and its May 2011 report on Smithsonian repatriation ([GAO-11-515](#)). The testimony focuses on the extent to which key federal agencies have complied with NAGPRA's requirements and the extent to which the Smithsonian has fulfilled its repatriation requirements.

The relevant agencies agreed with the recommendations in both reports and GAO is making no new recommendations at this time.

View [GAO-11-755T](#) or key components. For more information, contact Anu K. Mittal at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov).

June 16, 2011

## INDIAN ISSUES

### Key Federal Agencies' and the Smithsonian Institution's Efforts to Identify and Repatriate Indian Human Remains and Objects

#### What GAO Found

GAO found that almost 20 years after NAGPRA was enacted, eight key federal agencies with significant historical collections—Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management, Bureau of Reclamation, U.S. Fish and Wildlife Service and National Park Service; Agriculture's U.S. Forest Service; the U.S. Army Corps of Engineers; and the Tennessee Valley Authority—have not fully complied with the requirements of the act. All of the agencies acknowledged that they still have additional work to do and some have not fully complied with NAGPRA's requirement to publish notices of inventory completion for all of their culturally affiliated human remains and associated funerary objects in the *Federal Register*. In addition, GAO found two areas of concern with the National NAGPRA office's activities. First, National NAGPRA had developed a list of Indian tribes for the purposes of carrying out NAGPRA that was inconsistent with BIA's official list of federally recognized tribes and an Interior legal opinion. Second, National NAGPRA did not always screen nominations for NAGPRA Review Committee positions properly. GAO found that repatriations were generally not tracked or reported governmentwide. However, based on GAO's compilation of federal agencies' repatriation data, through September 30, 2009, federal agencies had repatriated 55 percent of the human remains and 68 percent of the associated funerary objects that had been published in notices of inventory completion.

With regard to the repatriation activities of the Smithsonian, GAO found that since the NMAI Act was enacted more than 21 years ago, the Smithsonian has offered to repatriate about 5,000 human remains, which account for approximately one-third of the total estimated human remains in its collections. GAO found that the Smithsonian has adopted a lengthy and resource-intensive inventory and identification process, which may account for the slow progress of repatriation at the museums. In some cases, through this process, the Smithsonian did not offer to repatriate human remains and objects because it determined that they could not be culturally affiliated with a tribe. GAO also found that the Smithsonian established a Repatriation Review Committee to monitor and review the repatriation activities of the Natural History Museum but not those of the American Indian Museum. Although the Smithsonian believes Congress intended to limit the committee's jurisdiction to the Natural History Museum, the statutory language and its legislative history do not support that view. GAO also found that neither the Smithsonian nor the review committee had provided regular information to Congress on the repatriation progress at the Smithsonian, and the Smithsonian had no independent administrative appeals process by which tribes could challenge a repatriation decision in the event of a dispute. Through December 31, 2010, the Smithsonian estimated that, of the items it had offered for repatriation, about three-quarters of the Indian human remains (4,330 out of 5,980) and about half of the funerary objects (99,550 out of 212,220) have been repatriated. In addition, the Smithsonian had not offered to repatriate approximately 340 human remains and 310 funerary objects it could not culturally affiliate, and it does not have a policy on the disposition of these items.

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Chairman Akaka, Vice Chairman Barrasso, and Members of the Committee:

I am pleased to be here today to participate in your hearing on federal efforts to repatriate Indian and Native Hawaiian human remains and certain cultural objects. Many federal agencies have acquired thousands of Indian human remains, funerary objects, sacred objects, and objects of cultural patrimony over hundreds of years. Similarly the Smithsonian Institution has acquired its collections since its establishment in 1846. These human remains and cultural objects have long been a concern for many Indian tribes and Native Hawaiian communities, who have been determined to provide an appropriate resting place for their ancestors. The National Museum of the American Indian Act (NMAI Act) and the Native American Graves Protection and Repatriation Act (NAGPRA) were enacted, in 1989 and 1990 respectively, in part to address these concerns.<sup>1</sup> The acts generally require the Smithsonian Institution and federal agencies to take certain actions to identify the Indian and Native Hawaiian human remains and cultural objects in their collections, affiliate those remains and objects to a tribe, and upon request repatriate the items to the tribes.<sup>2</sup>

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<sup>1</sup>National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336-47 (1989), *codified as amended at* 20 U.S.C. §§ 80q to 80q-15. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048-58 (1990), *codified at* 25 U.S.C. §§ 3001-3013. NAGPRA uses the term *Native American*, while the NMAI Act uses the term *Indian*. In this statement's discussion of each law, we will use the term used in that law. In the rare instances where we refer to the items covered by both acts collectively, we will simply use the term *Indian*.

<sup>2</sup>NAGPRA defines a federal agency as any department, agency, or instrumentality of the United States, except the Smithsonian Institution. NAGPRA also applies to museums and defines them as any institution or state or local government agency, including any institution of higher learning, that receives federal funds and has possession of, or control over, Native American cultural items, except the Smithsonian Institution. In addition, unless otherwise specified, in this statement the terms objects and cultural objects refer to funerary objects, sacred objects, and objects of cultural patrimony.

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In July 2010, we reported on the implementation of NAGPRA by eight key federal agencies with significant historical collections.<sup>3</sup> These agencies included the Department of the Interior’s Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS); the Department of Agriculture’s U.S. Forest Service; the U.S. Army Corps of Engineers (Corps); and the Tennessee Valley Authority (TVA). In May 2011, we reported on the Smithsonian Institution’s implementation of the NMAI Act’s repatriation requirements as they relate to the collections held by the National Museum of the American Indian and the National Museum of Natural History.<sup>4</sup> Our testimony today summarizes the findings of both of these reports and also includes information on some recent actions that the agencies have taken in response to the recommendations we made in our reports. Both of these reports were performance audits that were conducted in accordance with generally accepted government auditing standards. A detailed description of our scope and methodology is presented in each issued report.

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## Background

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### NAGPRA Requirements

NAGPRA requires federal agencies to (1) identify their Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, (2) try and determine if a cultural affiliation exists with a present day Indian tribe or Native Hawaiian organization, and (3) generally repatriate the culturally affiliated items to the applicable Indian tribe(s) or Native Hawaiian organization(s) under the terms and conditions

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<sup>3</sup>GAO, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*, [GAO-10-768](#) (Washington, D.C.: July 28, 2010). NAGPRA has a separate provision for Native American items newly excavated or discovered on federal or tribal lands after the date of enactment, referred to as new or inadvertent discoveries and intentional excavations. New or inadvertent discoveries and intentional excavations are covered in section 3 of the act (25 U.S.C. § 3002) and the identification and repatriation of NAGPRA items within collections that existed on or before the date of enactment, referred to as historical collections, are covered in sections 5, 6, and 7 (25 U.S.C. §§ 3003-3005). In accordance with NAGPRA’s implementing regulations, section 5, 6, and 7 also apply to collections federal agencies and museums acquire, from sources other than federal or tribal land, after NAGPRA’s enactment. Our July 2010 report focused on federal agencies’ historical collections.

<sup>4</sup>GAO, *Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects*, [GAO-11-515](#) (Washington, D.C.: May 25, 2011).

prescribed in the act. NAGPRA covers five types of Native American cultural items (see table 1).

**Table 1: Five Types of Native American Cultural Items Covered by NAGPRA**

Item	Definition
Human remains	Physical remains of the body of a person of Native American ancestry. 43 C.F.R. § 10.2(d)(1).
Associated funerary objects	Objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. 25 U.S.C. § 3001(3)(A).
Unassociated funerary objects	Objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. 25 U.S.C. § 3001(3)(B).
Sacred objects	Specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. 25 U.S.C. § 3001(3)(C).
Objects of cultural patrimony	Objects having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. 25 U.S.C. § 3001(3)(D).

Source: NAGPRA and its implementing regulations.

NAGPRA’s requirements for federal agencies, museums, and the Secretary of the Interior, particularly the ones most relevant to their historical collections, which were the focus of our July 2010 report, include the following:

- *Compile an inventory and establish cultural affiliation.* Section 5 of NAGPRA requires that each federal agency and museum compile an inventory of any holdings or collections of Native American human remains and associated funerary objects that are in its possession or control. The act requires that the inventories be completed no later than 5 years after its enactment—by November 16, 1995—and in consultation with tribal government officials, Native Hawaiian organization officials, and traditional religious leaders. In the inventory, agencies and museums are required to establish geographic and cultural affiliation to the extent possible based on information in their possession. Cultural affiliation denotes a relationship of shared group identity which can be reasonably

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traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.<sup>5</sup> Affiliating NAGPRA items with a present day Indian tribe or Native Hawaiian organization is the key to deciding to whom the human remains and objects should be repatriated. If a cultural affiliation can be made, the act requires that the agency or museum notify the affected Indian tribes or Native Hawaiian organizations no later than 6 months after the completion of the inventory. The agency or museum was also required to provide a copy of each notice—known as a notice of inventory completion—to the Secretary of the Interior for publication in the *Federal Register*. The items for which no cultural affiliation can be made are referred to as culturally unidentifiable.<sup>6</sup>

- *Compile a summary of other NAGPRA items.* Section 6 of NAGPRA requires that each federal agency and museum prepare a written summary of any holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony in its possession or control, based on the available information in their possession. The act requires that the summaries be completed no later than 3 years after its enactment—by November 16, 1993. Preparation of the summaries was to be followed by federal agency consultation with tribal government officials, Native Hawaiian organization officials, and traditional religious leaders. After a valid claim is received by an agency or museum, and if the other terms and conditions in the act are met, a notice of intent to repatriate must be published in the *Federal Register* before any item identified in a summary can be repatriated.<sup>7</sup>
- *Repatriate culturally affiliated human remains and objects.* Section 7 of NAGPRA and its implementing regulations generally require that, upon the request of an Indian tribe or Native Hawaiian organization, all culturally affiliated NAGPRA items be returned to the applicable Indian tribe or

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<sup>5</sup>25 U.S.C. § 3001(2).

<sup>6</sup>NAGPRA's implementing regulations direct federal agencies and museums to retain possession of culturally unidentifiable human remains pending promulgation of 43 C.F.R. § 10.11 (the regulation to govern the disposition of culturally unidentifiable human remains) unless legally required to do otherwise, or recommended to do otherwise by the Secretary of the Interior. Recommendations regarding the disposition of culturally unidentifiable human remains may be requested prior to final promulgation of 43 C.F.R. § 10.11. 43 C.F.R. § 10.9(e)(6). The regulation to govern the disposition of culturally unidentifiable human remains, 43 C.F.R. § 10.11, was promulgated on March 15, 2010, and became effective on May 14, 2010. 75 Fed. Reg. 12378 (Mar. 15, 2010).

<sup>7</sup>43 C.F.R. § 10.8(f).

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Native Hawaiian organization expeditiously—but no sooner than 30 days after the applicable notice is published in the *Federal Register*—if the terms and conditions prescribed in the act are met.

NAGPRA assigns certain duties to the Secretary of the Interior, which are carried out by the National NAGPRA Program Office (National NAGPRA) within NPS. In accordance with NAGPRA's implementing regulations, National NAGPRA has developed a list of Indian tribes and Native Hawaiian organizations for the purposes of carrying out the act. The list is comprised of federally recognized tribes, Native Hawaiian organizations, and, at various points in the last 20 years, corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA).<sup>8</sup> Since the enactment of two recognition laws in 1994,<sup>9</sup> BIA has regularly published a comprehensive list of recognized tribes—commonly referred to as the list of federally recognized tribes—that federal agencies are supposed to use to identify federally recognized tribes. The recognition of Alaska Native entities eligible for the special programs and services provided by the United States to Indians because of their status as Indians has been controversial. Since a 1993 legal opinion by the Solicitor of the Department of the Interior,<sup>10</sup> BIA's list of federally recognized tribes has not included any ANCSA group, regional, urban, and village corporations.

Finally, NAGPRA requires the establishment of a committee to monitor and review the implementation of inventory, identification and repatriation activities under the act. Among other things, the Review Committee is responsible for, upon request, reviewing and making findings related to the identity or cultural affiliation of cultural items or the return of such items and facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, and federal agencies or museum relating to the return of such items. We refer to these findings, recommendations and facilitation of disputes that do not involve culturally unidentifiable human remains simply as disputes; the Review Committee also makes recommendations regarding the disposition of culturally unidentifiable human remains. The NAGPRA Review Committee was established in 1991.

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<sup>8</sup>Pub. L. No. 92-203, 85 Stat. 688 (1971), *codified as amended at* 43 U.S.C. §§ 1601-1629h.

<sup>9</sup>The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Title I (1994); Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, Title II (1994).

<sup>10</sup>Op. Sol. Int. M-36975 (Jan. 11, 1993).

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## NMAI Act Requirements

The NMAI Act sections 11 and 13 generally require the Smithsonian to (1) inventory the Indian and Native Hawaiian human remains and funerary objects in its possession or control, (2) identify the origins of the Indian and Native Hawaiian human remains and funerary objects using the “best available scientific and historical documentation,” and (3) upon request repatriate them to lineal descendants or culturally affiliated Indian tribes and Native Hawaiian organizations. As originally written, the act did not set a deadline for the completion of these tasks, but amendments in 1996 added a June 1, 1998, deadline for the completion of inventories.<sup>11</sup> The 1996 amendments also require the Smithsonian to prepare summaries for unassociated funerary objects, sacred objects, and objects of cultural patrimony by December 31, 1996.

The NMAI Act uses the same definitions as NAGPRA for unassociated funerary objects, sacred objects, and objects of cultural patrimony,<sup>12</sup> but the NMAI Act does not define human remains and it does not use the term associated funerary objects. Instead, the NMAI Act requires Indian funerary objects—which it defines as objects that, as part of the death rite or ceremony of a culture, are intentionally placed with individual human remains, either at the time of death or later—to be included in inventories and unassociated funerary objects to be included in summaries.

The Smithsonian has identified two museums that hold collections subject to the NMAI Act: the National Museum of the American Indian and the National Museum of Natural History. Final repatriation decisions for the American Indian Museum are made by its Board of Trustees and the Secretary of the Smithsonian has delegated responsibility for making final repatriation decisions for the Natural History Museum to the Smithsonian’s Under Secretary for Science.

According to Smithsonian officials, when new collections are acquired, the Smithsonian assigns an identification number—referred to as a catalog number—to each item or set of items at the time of the acquisition or, in some cases, many years later. A single catalog number may include one or more human bones, bone fragments, or objects, and it may include the remains of one or more individuals. All of this information is stored in the

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<sup>11</sup>National Museum of the American Indian Act Amendments of 1996, Pub. L. No. 104-278, 110 Stat. 3355 (1996). Unless noted otherwise, subsequent references in this report to the NMAI Act are references to the act as amended.

<sup>12</sup>20 U.S.C. § 80q-9a(a).

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museums' electronic catalog system, which is partly based on historical paper card catalogs. Generally, each catalog number in the electronic catalog system includes basic information on the item or set of items, such as a brief description of the item, where the item was collected, and when it was taken into the museum's collection. Since the NMAI Act was enacted, the Smithsonian has identified approximately 19,780 catalog numbers that potentially include Indian human remains (about 19,150 within the Natural History Museum collections and about 630 within the American Indian Museum collections). Finally, like NAGPRA, the NMAI Act requires the establishment of a committee to monitor and review the inventory, identification, and return of Indian human remains and cultural objects. The Smithsonian Review Committee was established in 1990 for this purpose.<sup>13</sup>

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## After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with NAGPRA

As we reported in July 2010, federal agencies have not yet fully complied with all of the requirements of NAGPRA. Specifically, we found that while the eight key federal agencies generally prepared their summaries and inventories on time, they had not fully complied with other NAGPRA requirements. In addition, we found that while the NAGPRA Review Committee had conducted a number of activities to fulfill its responsibilities under NAGPRA, its recommendations have had mixed success. Furthermore, while National NAGPRA has taken several actions to implement the act's requirements, in some cases it has not effectively carried out its responsibilities. Finally, although the key agencies have repatriated many NAGPRA items, repatriation activity has generally not been tracked or reported governmentwide.

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## Key Federal Agencies Have Not Fully Complied with NAGPRA for Their Historical Collections

The eight key federal agencies we reviewed in our July 2010 report generally prepared their summaries and inventories by the statutory deadlines, but the amount of work put into identifying their NAGPRA items and the quality of the documents prepared varied widely. Of these eight agencies, the Corps, the Forest Service, and NPS did the most extensive work to identify their NAGPRA items, and therefore they had the highest confidence level that they had identified all of them and included them in the summaries and inventories that they prepared. In contrast,

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<sup>13</sup>The Smithsonian refers to its Review Committee as the Repatriation Review Committee. In this statement, we will refer to it as the Smithsonian Review Committee to clearly differentiate it from the NAGPRA Review Committee.

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relative to these agencies, we determined that BLM, BOR, and FWS were moderately successful in identifying their NAGPRA items and including them in their summaries and inventories, and BIA and TVA had done the least amount of work. As a result, these five agencies had less confidence that they had identified all of their NAGPRA items and included them in summaries and inventories. In addition, not all of the culturally affiliated human remains and associated funerary objects had been published in a *Federal Register* notice as required. For example, at the time of our report, BOR had culturally affiliated 76 human remains but had not published them in a *Federal Register* notice. All of the agencies acknowledged that they still have additional work to do and some had not fully complied with NAGPRA's requirement to publish notices of inventory completion for all of their culturally affiliated human remains and associated funerary objects in the *Federal Register*.

As a result of these findings, we recommended the agencies develop and provide to Congress a needs assessment listing specific actions, resources, and time needed to complete the inventories and summaries required by NAGPRA. We further recommended that the agencies develop a timetable for the expeditious publication in the *Federal Register* of notices of inventory completion for all remaining Native American human remains and associated funerary objects that have been culturally affiliated in inventories. The Departments of Agriculture and the Interior and TVA agreed with our recommendations. For example, Interior stated that this effort is under way in most of its bureaus and that it is committed to completing the process. It added that one of the greatest challenges to completing summaries and inventories of all NAGPRA items is locating collections and acquiring information from the facilities where the collections are stored.

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### The NAGPRA Review Committee Has Monitored Compliance with NAGPRA Implementation and Made Recommendations with Mixed Success

We found that the NAGPRA Review Committee, to fulfill its responsibilities under NAGPRA, had monitored federal agency and museum compliance, made recommendations to improve implementation, and assisted the Secretary in the development of regulations. As we reported, the committee's recommendations to facilitate the resolution of disposition requests involving culturally unidentifiable human remains have generally been implemented (52 of 61 requests has been fully implemented). In disposition requests, parties generally agreed in advance to their preferred manner of disposition and, in accordance with the regulations, came to the committee to complete the process and obtain a final recommendation from the Secretary. In contrast to the amicable nature of disposition requests, disputes are generally contentious, and we

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found that the NAGPRA Review Committee's recommendations have had a low implementation rate. Specifically, of the 12 disputes that we reviewed, the committee's recommendations were fully implemented for 1 dispute, partially implemented in 3 others, not implemented for 5, and the status of 3 cases is unknown.

Moreover, we found that some actions recommended by the committee exceeded NAGPRA's scope, such as recommending repatriation of culturally unidentifiable human remains to non-federally recognized Indian groups. However, we found that the committee, National NAGPRA, and Interior officials had since taken steps to address this issue.

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### National NAGPRA Has, in Some Cases, Not Effectively Carried Out Its Responsibilities

We reported that National NAGPRA had taken several actions to help the Secretary carry out responsibilities under NAGPRA. For example, National NAGPRA had published federal agency and museum notices in the Federal Register; increasing this number in recent years, while reducing the backlog of notices awaiting publication. Furthermore, it had administered a NAGPRA grants program that from fiscal years 1994 through 2009 resulted in 628 grants awarded to Indian tribes, Native Hawaiian organizations, and museums totaling \$33 million. It had also administered the nomination process for NAGPRA Review Committee members.

Overall, we found that most of the actions performed by National NAGPRA were consistent with the act, but we identified concerns with a few actions. Specifically, National NAGPRA had developed a list of Indian tribes for the purposes of carrying out NAGPRA, but at various points in the last 20 years the list had not been consistent with BIA's policy or an Interior Solicitor legal opinion analyzing the status of Alaska Native villages as Indian tribes. As a result, we recommended that National NAGPRA, in conjunction with Interior's Office of the Solicitor, reassess whether ANCSA corporations should be considered as eligible entities for the purposes of carrying out NAGPRA. Interior agreed with this recommendation and, after our report was issued, Interior's Office of the Solicitor issued a memorandum in March 2011 stating that NAGPRA clearly does not include Alaska regional and village corporations within its definition of Indian tribes and that the legislative history confirms that this was an intentional omission on the part of Congress. The memorandum also states that while the National NAGPRA Program's list of Indian tribes for purposes of NAGPRA must not include ANCSA regional and village corporations, National NAGPRA is currently bound by its regulatory definition of Indian tribe that contradicts the statutory definition by including ANCSA corporations. Because of this, the Solicitor suggests that

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the regulatory definition be changed as soon as feasible, followed by a corresponding change in the list.

We also found that National NAGPRA did not always properly screen nominations for the NAGPRA Review Committee and, in 2004, 2005, and 2006, inappropriately recruited nominees for the committee, in one case recommending the nominee to the Secretary for appointment. As a result, we recommended that the Secretary of the Interior direct National NAGPRA to strictly adhere to the nomination process prescribed in the act and, working with Interior's Office of the Solicitor as appropriate, ensure that all NAGPRA Review Committee nominations are properly screened to confirm that the nominees and nominating entities meet statutory requirements. Interior agreed with this recommendation, stating that the committee nomination procedures were revised in 2008 to ensure full transparency and that it will ask the Solicitor's Office to review these procedures.

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### Repatriations Are Not Tracked or Reported Governmentwide, but According to Data Collected by GAO, Many NAGPRA Items Have Been Repatriated

In July 2010 we reported that while agencies are required to permanently document their repatriation activities, they are not required to compile and report that information to anyone. Of the federal agencies that have published notices of inventory completion, we determined that only three have tracked and compiled agencywide data on their repatriations—the Forest Service, NPS, and the Corps. These three agencies, however, along with other federal agencies that have published notices of inventory completion, do not regularly report comprehensive data on their repatriations to National NAGPRA, the NAGPRA Review Committee, or Congress. Through data provided by these three agencies, along with our survey of other federal agencies, we found that federal agencies had repatriated a total of 55 percent of human remains and 68 percent of associated funerary objects that had been published in notices of inventory completion as of September 30, 2009. Agency officials identified several reasons why some human remains and associated funerary objects had not been repatriated, including the lack of repatriation requests from culturally affiliated entities, repatriation requests from disputing parties, a lack of reburial sites, and a lack of financial resources to complete the repatriation. Federal agencies had also published 78 notices of intent to repatriate that covered 34,234 unassociated funerary objects, sacred objects, or objects of cultural patrimony.

Due to a lack of governmentwide reporting, we recommended the Secretaries of Agriculture, Defense, and the Interior and the Chief Executive Officer of the Tennessee Valley Authority direct their cultural

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resource management programs to report their repatriation data to National NAGPRA on a regular basis, but no less than annually, for each notice of inventory completion they have or will publish. Furthermore, we recommended that National NAGPRA make this information readily available to Indian tribes and Native Hawaiian organizations and that the NAGPRA Review Committee publish the information in its annual report to Congress. The Departments of Agriculture and the Interior and TVA agreed with this recommendation, and Interior stated that its agencies will work toward completing an annual report beginning in 2011.

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## The Smithsonian Still Has Much Work to Do to Identify and Repatriate Indian Human Remains and Objects

In our May 2011 report we found that the Smithsonian Institution still had much work remaining with regard to the repatriation activities required by the NMAI Act. Specifically, we found that while the American Indian and Natural History Museums generally prepared summaries and inventories within the statutory deadlines the process that the Smithsonian relies on is lengthy and resource intensive. Consequently, after more than 2 decades, the museums have offered to repatriate the Indian human remains in only about one-third of the catalog numbers identified as possibly including such remains since the act was passed. In addition, we found that the Smithsonian established a Review Committee to meet the statutory requirements, but limited its oversight of repatriation activities. Finally, we found that while the Smithsonian has repatriated most of the human remains and many of the objects that it has offered for repatriation, it has no policy on how to address items that are culturally unidentifiable.

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## Since 1989, the Smithsonian Has Prepared Required Summaries and Inventories and Has Offered to Repatriate about One-Third of Its Indian Human Remains

We found that while the American Indian and Natural History Museums had generally prepared summaries and inventories within the deadlines established in the NMAI Act, their inventories and the process they used to prepare them have raised questions about their compliance with some of the act's statutory requirements. The first question was the extent to which the museums prepared their inventories in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, as required by the NMAI Act. Section 11 of the act directs the Secretary of the Smithsonian, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, to inventory the Indian human remains and funerary objects in the possession or control of the Smithsonian and, using the best available scientific and historical documentation, identify the origins of such remains and objects. However, the Smithsonian generally began the consultation process with Indian tribes after the inventories from both museums were distributed. The Smithsonian maintains that it is in full

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compliance with the statutory requirements for preparing inventories and that section 11 does not require that consultation occur prior to the inventory being completed.

The second question is the extent to which the Natural History Museum's inventories—which were finalized after the 1996 amendments—identified geographic and cultural affiliations to the extent practicable based on available information held by the Smithsonian, as required by the amendments. The museum's inventories generally identified geographic and cultural affiliations only where such information was readily available in the museum's electronic catalog. However, the Smithsonian states that it does not interpret section 11 as necessarily requiring that the inventory and identification process to occur simultaneously, and therefore it has adopted a two-step process to fulfill section 11's requirements. The legislative history of the 1996 amendments provides little clear guidance concerning the meaning of section 11. However, we also found that the two-step process that the Smithsonian has adopted is a lengthy and resource-intensive one and that, at the pace that the Smithsonian is applying this process, it will take several more decades to complete this effort.

As a result of the identification and inventory process the Smithsonian is using, since the passage of the NMAI Act in 1989 through December 2010, the Smithsonian estimates that it has offered to repatriate approximately one-third of the estimated 19,780 catalog numbers identified as possibly including Indian human remains. The American Indian Museum had offered to repatriate human remains in about 40 percent (about 250) of its estimated 630 catalog numbers. The Natural History Museum had offered to repatriate human remains in about 25 percent (about 5,040) of its estimated 19,150 catalog numbers containing Indian human remains. In some cases, through this process, the Smithsonian did not offer to repatriate human remains and objects because it determined that they could not be culturally affiliated with a tribe. The congressional committee reports accompanying the 1989 act indicate that the Smithsonian estimated that the identification and inventory of Indian human remains as well as notification of affected tribes and return of the remains and funerary objects would take 5 years.<sup>14</sup> However, more than 21 years later, these efforts are still under way. In light of this slow progress, we suggested that Congress may wish to consider ways to expedite the

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<sup>14</sup>H. Rep. No. 101-340(I), at 33 (1989); H. Rep. No. 101-340(II), at 42 (1989).

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Smithsonian's repatriation process including, but not limited to, directing the Smithsonian to make cultural affiliation determinations as efficiently and effectively as possible.

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### The Smithsonian Review Committee's Oversight and Reporting Are Limited

In May 2011, we reported that the Smithsonian Review Committee had conducted numerous activities to implement the special committee provisions in the NMAI Act, but its oversight and reporting activities have been limited. For example, we found that contrary to the NMAI Act, the committee does not monitor and review the American Indian Museum's inventory, identification, and repatriation activities, although it does monitor and review the Natural History Museum's inventory, identification, and repatriation activities. Although the law does not limit the applicability of the Smithsonian Review Committee to the Natural History Museum, the Secretary established a committee to meet this requirement in 1990 that oversees only the Natural History Museum's repatriation activities and is housed within that museum. Although the Smithsonian believes Congress intended to limit the committee's jurisdiction to the Natural History Museum, the statutory language and its legislative history do not support that view. The Smithsonian provided several reasons to support this contention but, as we reported in May 2011, these reasons are unpersuasive. Therefore, we recommended that the Smithsonian's Board of Regents direct the Secretary of the Smithsonian to expand the Smithsonian Review Committee's jurisdiction to include the American Indian Museum, as required by the NMAI Act, to improve oversight of Smithsonian repatriation activities. With this expanded role for the committee, we further recommended that the Board of Regents and the Secretary should consider where the most appropriate location for the Smithsonian Review Committee should be within the Smithsonian's organizational structure. The Smithsonian agreed with this recommendation, stating that the advisory nature of the committee could be expanded to include consultation with the American Indian Museum.

In our May 2011 report, we also found that neither the Smithsonian nor the Smithsonian Review Committee submits reports to Congress on the progress of repatriation activities at the Smithsonian. Although section 12 of the NMAI Act requires the Secretary, at the conclusion of the work of the committee, to so certify by report to Congress, there is no annual reporting requirement similar to the one required for the NAGPRA Review Committee. As we stated earlier, in 1989, it was estimated that the Smithsonian Review Committee would conclude its work in about 5 years and cease to exist at the end of fiscal year 1995. Yet the committee's monitoring and review of repatriation activities at the Natural History

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Museum has been ongoing since the committee was established in 1990. As a result, we recommended that the Board of Regents, through the Secretary, direct the Smithsonian Review Committee to report annually to Congress on the Smithsonian's implementation of its repatriation requirements in the NMAI Act. The Smithsonian agreed with this recommendation, stating that it will submit, on a voluntary basis, annual reports to Congress. The Smithsonian further stated that although the format and presentation are matters to be discussed internally, it intends to use the National NAGPRA report as a guide and framework for its discussion and report.

Finally, during our review of the Smithsonian Review Committee activities we determined that no independent administrative appeals process exists to challenge the Smithsonian's cultural affiliation and repatriation decisions, in the event of a dispute. As a result, we recommended that the Board of Regents establish an independent administrative appeals process for Indian tribes and Native Hawaiian organizations to appeal decisions to either the Board of Regents or another entity that can make binding decisions for the Smithsonian Institution to provide tribes with an opportunity to appeal cultural affiliation and repatriation decisions made by the Secretary and the American Indian Museum's Board of Trustees. The Smithsonian agreed with this recommendation, stating that it will review its dispute resolution procedures, with the understanding that the goal is to ensure that claimants have proper avenues to seek redress from Smithsonian repatriation decisions, including a process for the review of final management determinations.

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### **Most Human Remains and Many Objects Offered for Repatriation Have Been Repatriated, but the Smithsonian Has No Policy on Culturally Unidentifiable Items**

In May 2011 we reported that the Smithsonian estimates that, of the items it has offered for repatriation, as of December 31, 2010, it has repatriated about three-quarters (4,330 out of 5,980) of the Indian human remains, about half (99,550 out of 212,220) of the funerary objects, and nearly all (1,140 out of 1,240) sacred objects and objects of cultural patrimony. Some items have not been repatriated for a variety of reasons, including tribes' lack of resources, cultural beliefs, and tribal government issues.

In addition, we found that, in the inventory and identification process, the Smithsonian determined that some human remains and funerary objects were culturally unidentifiable. In some of those cases it did not offer to repatriate the items and it does not have a policy on how to undertake the ultimate disposition of such items. Specifically, our report found that according to Natural History Museum officials about 340 human remains and about 310 funerary objects are culturally unidentifiable. The NMAI Act

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does not discuss how the Smithsonian should handle human remains and objects that cannot be culturally affiliated, and neither museum's repatriation policies describe how they will handle such items. In contrast, a recent NAGPRA regulation that took effect in May 2010 requires, among other things, federal agencies and museums to consult with federally recognized Indian tribes and Native Hawaiian organizations from whose tribal or aboriginal lands the remains were removed before offering to transfer control of the culturally unidentifiable human remains.<sup>15</sup> Although Smithsonian officials told us that the Smithsonian generally looks to NAGPRA and the NAGPRA regulations as a guide to its repatriation process, where appropriate, in a May 2010 letter commenting on the NAGPRA regulation on disposition of culturally unidentifiable remains, the Directors of the American Indian and Natural History Museums cited overall disagreement with the regulation, suggesting that it "favors speed and efficiency in making these dispositions at the expense of accuracy." Nevertheless, in our May 2011 report, we recommended that the Smithsonian's Board of Regents direct the Secretary and the American Indian Museum's Board of Trustees to develop policies for the Natural History and American Indian Museums for the handling of items in their collections that cannot be culturally affiliated to provide for a clear and transparent repatriation process. The Smithsonian agreed with this recommendation, stating that both the American Indian and Natural History Museums, in the interests of transparency, are committed to developing policies in this regard and that such policies will give guidance to Native communities and the public as to how the Smithsonian will handle and treat such remains.

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In conclusion, Chairman Akaka, Vice Chairman Barrasso, and Members of the Committee, our two studies clearly show that while federal agencies and the Smithsonian have made progress in identifying and repatriating thousands of Indian human remains and objects, after 2 decades of effort, much work still remains to be done to address the goals of both NAGPRA and the NMAI Act. In this context, we believe that it is imperative for the agencies to implement our recommendations to ensure that the requirements of both acts are met and that the processes they employ to fulfill the requirements are both efficient and effective.

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<sup>15</sup>75 Fed. Reg. 12378 (Mar. 15, 2010). The final rule also allows museums and federal agencies to transfer control of funerary objects associated with culturally unidentifiable human remains and recommends that such transfers occur if not precluded by federal or state law.

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This concludes my prepared statement. I would be pleased to answer any questions that you may have at this time.

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## GAO Contacts and Acknowledgments

For further information about this testimony, please contact Anu K. Mittal at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Jeffery D. Malcolm, Assistant Director; Mark Keenan; and Jeanette Soares also made key contributions to this statement. In addition, Allison Bawden, Pamela Davidson, Emily Hanawalt, Cheryl Harris, Catherine Hurley, Rich Johnson, Sandra Kerr, Jill Lacey, Anita Lee, Ruben Montes de Oca, David Schneider, John Scott, Ben Shouse, and Maria Soriano also made key contributions to the reports on which this statement is based.

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