



United States Government Accountability Office

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

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For Release on Delivery  
Expected at 2:30 p.m EDT  
Wednesday, February 2, 2022

# NATIVE AMERICAN ISSUES

## Federal Agency Efforts and Challenges Repatriating Cultural Items

Statement of Anna Maria Ortiz, Director,  
Natural Resources and Environment

# GAO Highlights

Highlights of [GAO-22-105685](#), a testimony before the Committee on Indian Affairs, U.S. Senate

## Why GAO Did This Study

When NAGPRA was enacted in 1990, it was estimated that federal agencies and museums had tens of thousands of Native American human remains, funerary objects, and sacred objects in their possession. Such cultural items were added to collections through archeological excavations intended to advance scientific knowledge and preserve cultural items or through discoveries during federal construction projects. The items also have a long history of being stolen from federal and tribal lands and being added to private or institutional collections.

Among other things, NAGPRA requires federal agencies and museums to return certain Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony unless the museum or federal agency can provide that it has a right of possession to the objects. The National NAGPRA Program, within the Department of the Interior's National Park Service, facilitates government-wide implementation of NAGPRA.

This testimony provides information on (1) federal agencies' efforts to implement NAGPRA; and (2) challenges related to NAGPRA's implementation. It is based on reports GAO issued related to implementation and enforcement of NAGPRA from July 2010 through March 2021. It also includes information about consultation requirements under NAGPRA.

## What GAO Recommends

GAO made recommendations in prior reports to address NAGPRA implementation challenges. Agencies generally agreed but have not yet fully implemented all of them.

View [GAO-22-105685](#). For more information, contact Anna Maria Ortiz at (202) 512-3841 or [ortiza@gao.gov](mailto:ortiza@gao.gov).

February 2, 2022

## NATIVE AMERICAN ISSUES

### Federal Agency Efforts and Challenges Repatriating Cultural Items

## What GAO Found

In 2010, GAO reported on implementation of the Native American Graves Protection and Repatriation Act (NAGPRA), which governs Native American cultural items, such as human remains, held by federal agencies and certain museums. GAO concluded that (1) federal agencies had not fully complied with all requirements; (2) the National NAGPRA Program had taken actions to implement the NAGPRA requirements but had not carried out all responsibilities; and (3) federal agencies had repatriated many items covered by NAGPRA, such as human remains, but had generally not tracked or reported on their efforts.

Federal agencies have implemented all of GAO's 2010 recommendations for improving the implementation of NAGPRA. As a result of addressing one recommendation, annual data on the status of federal agencies' repatriation efforts are readily available to Congress and the public. According to the National NAGPRA Program's fiscal year 2020 report, in fiscal years 1990 through 2020, agencies repatriated 91.5 percent of the human remains in their collections that were culturally affiliated with a present-day Indian tribe or Native Hawaiian organization. However, the report notes that more work is needed, especially to repatriate more than 116,000 Native American human remains still in collections, of which 95 percent have not been culturally affiliated.

#### Image from a Department of State Social Media Campaign to Raise Awareness about Protecting Native American Cultural Items



Source: Department of State. | [GAO-22-105685](#)

Federal agencies have made progress in implementing NAGPRA, but tribes and tribal organizations indicate that several challenges remain including challenges with (1) consulting with tribes and tribal organizations, (2) better protecting Native American cultural items, and (3) addressing challenges in the limited scope of the law and enforcement. GAO has also identified such challenges and made a total of 41 recommendations in its 2018, 2019, and 2021 reports. For example, in March 2019, GAO recommended that federal agencies take steps to improve their tribal consultation process. As of January 2022, GAO had closed 13 of the 41 recommendations as implemented, and 28 remained open.

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February 2, 2022

Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee:

Thank you for the opportunity to discuss examples from our prior reports regarding the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>1</sup> Federal agencies and museums have acquired Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony over hundreds of years. When NAGPRA was enacted on November 16, 1990, it was estimated that federal agencies and museums had tens of thousands of such items in their historical collections.

NAGPRA reflects the unique relationship between the federal government and Indian tribes and Native Hawaiian organizations.<sup>2</sup> Among other things, NAGPRA requires federal agencies and museums to return certain Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony unless the museum or federal agency can provide that it has a right of possession to the objects.<sup>3</sup> A Senate committee report that preceded the final version of NAGPRA and informed the drafting of the act stated that human remains “must at all times be treated with dignity and respect,” and that the legislation would encourage a continuing dialogue between museums and Indian tribes

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<sup>1</sup>Pub. L. No. 101-601, 104 Stat. 3048-58 (1990) (*codified as amended at 25 U.S.C. §§ 3001-3013*); 18 U.S.C. § 1170. The implementing regulations for the act are at 43 C.F.R. pt. 10.

<sup>2</sup>25 U.S.C. § 3010. As Congress outlined in the Indian Trust Asset Reform Act, “through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians.” Pub. L. No. 114-178, § 101(3) (2016) (*codified at 25 U.S.C. § 5601(3)*). The act also notes that historic federal-tribal relations and understandings have benefited the people of the United States for centuries and established “enduring and enforceable [f]ederal obligations to which the national honor has been committed.” Pub. L. No. 114-178, § 101(5) (2016) (*codified at 25 U.S.C. § 5601(5)*).

<sup>3</sup>25 U.S.C. § 3005(c). Right of possession means possession obtained with the voluntary consent of an individual or group that had authority of alienation. 25 U.S.C. § 3001(13). The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless that would result in a Fifth Amendment taking by the United States.

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and Native Hawaiian organizations and will promote a greater understanding between the groups.<sup>4</sup>

Some federal agencies, such as the Department of the Interior's (Interior) National Park Service, acquired their collections of Native American cultural items through archeological excavations intended to advance scientific knowledge and preserve cultural items. Others, such as the U.S. Army Corps of Engineers and the Tennessee Valley Authority, have made discoveries when pursuing construction projects that are part of their missions. In addition, according to federal agency officials and representatives of tribal associations that we interviewed, Native American cultural items have a long history of being stolen from federal and tribal lands and added to private or institutional collections or sold for profit. This practice may involve disturbing or destroying graves, ceremonial sites, and archeological sites that have historical, cultural, and scientific importance.

In several previously issued reports, we found that federal agencies could improve the implementation of NAGPRA, better protect Native American cultural items, and take additional actions to facilitate consultation with tribes on infrastructure projects, which may affect tribes' cultural resources, such as sacred sites and burial sites.<sup>5</sup>

This testimony provides information on (1) federal agencies' efforts to implement NAGPRA over the last 30 years; and (2) challenges related to the implementation and enforcement of NAGPRA, such as those identified in our prior reports and expressed by Indian tribes and Native American advocacy organizations. This testimony is based on reports that we issued from July 2010 through March 2021. These reports examined NAGPRA and other federal laws related to protecting Native American cultural items, as well as issues related to federal consultation with Indian

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<sup>4</sup>S. Rep. No. 101-473, at 4 (1990).

<sup>5</sup>GAO, *Native American Cultural Resources: Improved Information Could Enhance Agencies' Efforts to Analyze and Respond to Risks of Theft and Damage*, [GAO-21-110](#) (Washington, D.C.: Mar. 4, 2021); *Native American Issues: Examples of Certain Federal Requirements That Apply to Cultural Resources and Factors That Impact Tribal Consultation*, [GAO-20-466T](#) (Washington, D.C.: Feb. 26, 2020); *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, [GAO-19-22](#) (Washington, D.C.: Mar. 20, 2019); *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions*, [GAO-18-537](#) (Washington, D.C.: Aug. 6, 2018); and *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).

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tribes. This testimony also includes information about the consultation requirements under NAGPRA.

In conducting our previously issued work, we reviewed relevant federal laws, regulations, and policies; reviewed agency documentation; reviewed oral and written comments that tribes submitted to several federal agencies regarding NAGPRA implementation; and interviewed tribal and federal officials. More detailed information on our objectives, scope and methodology for that work can be found in the issued reports.

To update information on federal progress since our reports were issued, we reviewed the status of recommendations we made and examined federal reports with information on NAGPRA implementation. We also reviewed comments from tribal representatives on Interior's draft proposed revisions to NAGPRA regulations.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

NAGPRA requires federal agencies and museums<sup>6</sup> to (1) identify the Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony in their possession;<sup>7</sup> (2) try to determine whether remains and objects or artifacts in their possession have a cultural affiliation with a present-day Indian tribe or Native Hawaiian

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<sup>6</sup>Museum means any institution or state or local government agency (including institutions of higher learning) that receives federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution and or any other federal agency. 25 U.S.C. § 3001(8).

<sup>7</sup>Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States. 25 U.S.C. § 3001(9).

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organization;<sup>8</sup> and (3) generally repatriate any culturally affiliated items to the applicable Indian tribe(s) or Native Hawaiian organization(s) under the terms and conditions prescribed in the act.<sup>9</sup> NAGPRA applies to Native American cultural items, which the law defines as human remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>10</sup> Native American is defined as meaning of, or relating to, a tribe, people, or culture that is indigenous to the United States.<sup>11</sup>

NAGPRA and its implementing regulations contain provisions governing Native American cultural items controlled or possessed by federal agencies and museums, intentional excavations and inadvertent

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<sup>8</sup>“Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 25 U.S.C. § 3001(7). “Native Hawaiian organization” means any organization which (1) serves and represents the interests of Native Hawaiians, (2) has as a primary and stated purpose the provision of services to Native Hawaiians, and (3) has expertise in Native Hawaiian affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai’i Nei. 25 U.S.C. § 3001(11).

<sup>9</sup>NAGPRA requires repatriation to lineal descendants under certain circumstances, for example when a direct lineal descendant of an individual who owned a sacred object requests repatriation. In this report, we refer to repatriation of culturally affiliated human remains and objects to Indian tribes and Native Hawaiian organizations but intend that reference to include lineal descendants when applicable.

<sup>10</sup>25 U.S.C. § 3001(3). Funerary objects include associated funerary objects and unassociated funerary objects. Associated funerary objects are objects that, as a 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 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 are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with the 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).

<sup>11</sup>25 U.S.C. § 3001(9).

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discovery of Native American cultural items on federal<sup>12</sup> or tribal land,<sup>13</sup> and a criminal prohibition. Table 1 summarizes these provisions.

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<sup>12</sup>Federal land is any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971. 25 U.S.C. § 3001(5).

<sup>13</sup>Tribal land is all lands within the boundaries of any Indian reservation; all dependent Indian communities; and any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3. 25 U.S.C. § 3001(15).

**Table 1: Summary of Provisions in the Native American Graves Protection and Repatriation Act (NAGPRA) and Its Implementing Regulations**

Type of provision	Summary
Collections	<p>NAGPRA requires federal agencies and museums—defined as any institution or state or local government agency that receives federal funds—in possession of, or control over, Native American cultural items to identify those items; try to determine if a cultural affiliation exists with a present-day Indian tribe or Native Hawaiian organization; and generally repatriate the culturally affiliated items to the applicable tribe or organization under the terms and conditions specified in the act.</p> <p>For human remains that federal agencies and museums cannot culturally affiliate, NAGPRA regulations require museums and federal agencies to consult with tribes or Native Hawaiian organizations that request the return of the remains and with federally recognized tribe and Native Hawaiian organizations from whose tribal or aboriginal lands the remains were removed before offering to transfer control of the remains.</p>
Intentional excavation	<p>NAGPRA prohibits the intentional removal from, or excavation of, Native American cultural items from federal or tribal lands unless a permit has been issued, the appropriate Indian tribe or Native Hawaiian organization has been consulted with, and the tribe or organization consents to excavation or removal of the items from tribal land. NAGPRA regulations establish requirements for these consultations.</p>
Inadvertent discovery	<p>Since its enactment, NAGPRA has required any persons who know, or has reason to know, that they have discovered Native American cultural items on federal or tribal lands to notify the federal land management agency responsible for the land or the appropriate Indian tribe or Native Hawaiian organization, respectively.<sup>a</sup> NAGPRA regulations establish requirements for federal agencies to consult with Indian tribes and Native Hawaiian organizations regarding these discoveries. If the discovery occurred in connection with an ongoing activity, such as construction, mining, or logging, the NAGPRA regulations require the activity in the area of the discovery to cease.</p>
Criminal	<p>NAGPRA prohibits the sale, purchase, use for profit, or transport for sale or profit of (1) Native American human remains without the right of possession<sup>b</sup> as provided in the act and (2) any Native American cultural items obtained in violation of the act. The act imposes criminal penalties for knowingly violating this prohibition.</p>

Source: 25 U.S.C. §§ 3001-3013; 18 U.S.C. § 1170; 43 C.F.R. pt. 10. | GAO-22-105685

<sup>a</sup>For federal land selected by but not yet conveyed to Alaska Native Corporations and groups, notification must be provided to both the federal land management agency and the appropriate corporation or group. 25 U.S.C. § 3002(d)(1).

<sup>b</sup>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).

The National NAGPRA Program, within Interior’s National Park Service, facilitates the government-wide implementation of NAGPRA. All federal agencies with collections, federal land, or both (including the Department of the Interior’s Bureau of Indian Affairs and the Department of Agriculture’s Forest Service) are also responsible for implementing NAGPRA. The Department of Justice is responsible for enforcement of NAGPRA’s criminal provision, and the Secretary of the Interior has



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authority to assess civil penalties against a museum for failure to comply with NAGPRA.<sup>14</sup>

In addition, Executive Order 13175, issued in November 2000, calls for federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.<sup>15</sup> To implement Executive Order 13175, some agencies have developed agency-specific policies and procedures for tribal consultation.<sup>16</sup> More recently, in a January 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, the President directed every executive department and agency to develop a detailed plan of actions to implement the policies and directives of Executive Order 13175, after consulting with tribal nations and tribal officials.<sup>17</sup> Since then, 80 agencies and offices have hosted tribal consultation sessions to discuss their consultation policies and practices and they issued action plans to improve these efforts, including the Office of Management and Budget, which had not previously consulted with tribes on its activities.

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<sup>14</sup>For example, the Department of Justice may prosecute someone for knowingly transporting a sacred object that was obtained from tribal lands in violation of NAGPRA and the Secretary of the Interior may assess a penalty against a museum for failure to develop an inventory of the human remains and associated funerary objects in its possession or control.

<sup>15</sup>Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, § 5(a), 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000). The order defines “policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

<sup>16</sup>We have not reviewed whether agencies’ tribal consultation policies apply to their efforts to implement NAGPRA.

<sup>17</sup>Presidential Memorandum, *Tribal Consultation and Strengthening Nation-to-Nation Relationships*, 86 Fed. Reg. 7491 (Jan. 29, 2021). Agencies also obtained feedback from tribes on federal consultation efforts in response to a 2009 presidential memorandum. *Presidential Memorandum on Tribal Consultation*, 2009 Daily Comp. Pres. Docs. 887 (Nov. 5, 2009).

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## Federal Agencies Have Made Progress Implementing NAGPRA

In July 2010, we reported on the status of NAGPRA implementation, including federal agencies' compliance with NAGPRA's requirements for their historical collections; actions taken by the National NAGPRA Program to fulfill its responsibilities under the law; and federal agencies' reporting of their repatriation of Native American human remains and objects.<sup>18</sup> At that time, we found that (1) federal agencies had not yet fully complied with all of the requirements of NAGPRA; (2) the National NAGPRA Program had taken several actions to implement the act's requirements, but in some cases, had not effectively carried out its responsibilities; and (3) the key agencies had repatriated many NAGPRA items, but repatriation activity had generally not been tracked or reported government-wide.

That report included 14 recommendations aimed at improving NAGPRA implementation, clarifying which entities are eligible under NAGPRA, and providing policymakers with information to assess the overall effectiveness of the act and to provide Indian tribes and Native Hawaiian organizations readily accessible information on items that are available for repatriation, all of which have been implemented. One of these recommendations was that the agencies report their repatriation data to the National NAGPRA Program on a regular basis, and that the National NAGPRA Program make that information readily available to Indian tribes and Native Hawaiian organizations, as well as publish the information in its annual report to Congress.

As a result of the agencies' and the National NAGPRA Program's implementation of this recommendation, annual data on the status of federal agencies' repatriation progress are readily available. For example, according to data from National NAGPRA Program's fiscal year 2020 report, from fiscal year 1990 through fiscal year 2020, 91.5 percent of culturally affiliated human remains have completed the NAGPRA process and over 1.7 million associated funerary objects have been transferred with human remains. In addition, \$52 million in NAGPRA grants have been awarded, including \$1.9 million in fiscal year 2020, which was a \$250,000 increase from fiscal year 2019 grants awarded.<sup>19</sup>

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<sup>18</sup>[GAO-10-768](#).

<sup>19</sup>NAGPRA authorizes the Secretary of the Interior to award two types of grants: (1) grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting them in the repatriation of Native American cultural items and (2) grants to museums for the purpose of assisting the museums in developing inventories and summaries of Native American cultural items in their possession or control. 25 U.S.C. § 3008.

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According to the National NAGPRA Program’s fiscal year 2020 report, however, more work is needed, particularly with respect to the human remains of more than 116,000 Native American individuals still in collections, of which 95 percent have not been culturally affiliated with any present-day Indian tribe or Native Hawaiian organization. The report notes that cultural affiliation studies and in-depth consultations could resolve the rights to many of these individuals. In addition, since fiscal year 1990, the program has collected \$59,111 in civil penalties for failures to comply with NAGPRA.

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## Challenges Remain with NAGPRA

Although there has been progress in the implementation of NAGPRA since its enactment 30 years ago, concerns expressed by tribes and tribal organizations and our past work indicate that several challenges remain. These issues include challenges with consulting with tribes and tribal organizations, better protecting cultural items, and addressing challenges in the limited scope of the law and enforcement.

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## Challenges with Implementing Consultation Requirements under NAGPRA

Tribes and tribal organizations have expressed concerns about how some federal agencies are implementing consultation requirements under NAGPRA. In August 2021, Interior held consultation sessions with tribes, tribal organizations, and Native Hawaiian organizations to obtain their input on its draft proposed revisions to the NAGPRA regulations. Interior noted in its August 2021 consultation report that the draft proposed revised regulations are designed to, among other things, streamline and improve its regulatory process for repatriating cultural items to Native Americans and Native Hawaiian organizations. Interior also noted in the consultation report that it plans to review the comments it received.

In written comments on Interior’s draft proposal, in September 2021, the Association on American Indian Affairs said a single round of consultation is insufficient to meaningfully incorporate tribal and Native Hawaiian organization views because the reformation needed is so comprehensive and so different from the draft proposed revisions. In August 2021, several tribes also provided comments to Interior on how its draft proposed regulations could facilitate meaningful consultations and lead to respectful repatriation. For example,

- One tribal official commented that the current definition of consultation in Interior’s draft proposed regulations is insufficient and prefers the definitions of consultation used in the regulations to implement section

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106 of the National Historic Preservation Act because it includes seeking, discussing, and coming to an agreement.<sup>20</sup>

- A leader of a Native Hawaiian organization said that the revisions to the regulations should recognize that Native Hawaiians are the experts of their lands.

NAGPRA regulations also prohibit intentional excavation of Native American cultural items from federal lands without, among other things, consultation with the appropriate Indian tribe or Native Hawaiian organization. In addition, NAGPRA regulations require consultation with Indian tribes or Native Hawaiian organizations when Native American cultural items are inadvertently discovered on federal lands.<sup>21</sup> According to the National Congress of American Indians, federal consultation with tribes can help to minimize potential negative effects of federal infrastructure projects on tribes' natural resources and cultural items, which may include cultural items subject to NAGPRA. In 2020, we reported that effective consultation is a key tenet of the government-to-government relationship the United States has with Indian tribes, which is based on tribal sovereignty.<sup>22</sup> We also noted that failure to consult, or to consult effectively, sows mistrust; risks exposing the United States to

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<sup>20</sup>The regulations implementing section 106 of the National Historic Preservation Act define consultation to mean the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. 36 C.F.R. § 800.16(f). Under section 106 of the National Historic Preservation Act and its implementing regulations, federal agencies are to take into account the effects of their undertakings on historic properties through consultation between agency officials, Indian tribes, and others. Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966) (codified as amended at 54 U.S.C. § 306108); 36 C.F.R. pt. 800.

<sup>21</sup>Specifically, federal land management agencies are required to consult with (1) Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; (2) Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the Native American cultural items; and (3) Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the cultural items. 43 C.F.R. § 10.4(d)(1)(iv). Agencies must initiate this consultation as soon as possible but no later than 3 working days after receipt of written confirmation of the inadvertent discovery of the items by the person who made the discovery. If the inadvertent discovery occurred in connection with an on-going activity on federal or tribal lands, the person who makes the discovery must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the Native American cultural items inadvertently discovered. 43 C.F.R. § 10.4(c).

<sup>22</sup>[GAO-20-466T](#).

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costly litigation; and may result in irrevocable damage to Native American cultural items.

In a 2019 report and 2020 testimony about federal agencies' consultations with Indian tribes for federal infrastructure projects and sacred objects, we reported that several key factors hamper effective tribal consultations.<sup>23</sup> These key factors included agencies initiating consultation late in project development stages and not respecting tribal sovereignty or the government-to-government relationship between federally recognized tribes and the federal government. In addition, we also reported that federal agencies faced challenges in obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities. To address these issues, in March 2019, we made one matter for congressional consideration and 22 recommendations including that federal agencies take steps to improve their tribal consultation process. As of January 2022, we had closed 11 of the 22 recommendations as implemented and 11 remain open.

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## Challenges with Better Protecting Cultural Items

Some Native American cultural items have a direct cultural link to modern-day Native American communities who live or whose ancestors lived on the lands. While cultural and religious practices vary, tribes may consider some items at these sites to be sacred or have other profound significance. They consider the theft or damage of these items to be detrimental to the preservation of their culture and traditions.

NAGPRA prohibits the theft and damage of Native American cultural items, such as sacred objects, on federal and tribal lands. Federal agencies also help protect these items by attempting to prevent theft and damage and by investigating such crimes. In 2021, we reported that seven federal agencies have taken a variety of approaches to help prevent and detect the theft and damage of Native American cultural items on federal and tribal lands that may contain such items.<sup>24</sup> These agencies' approaches included conducting public awareness programs, installing physical protection measures and monitoring sites with electronic surveillance equipment (see figure 1).

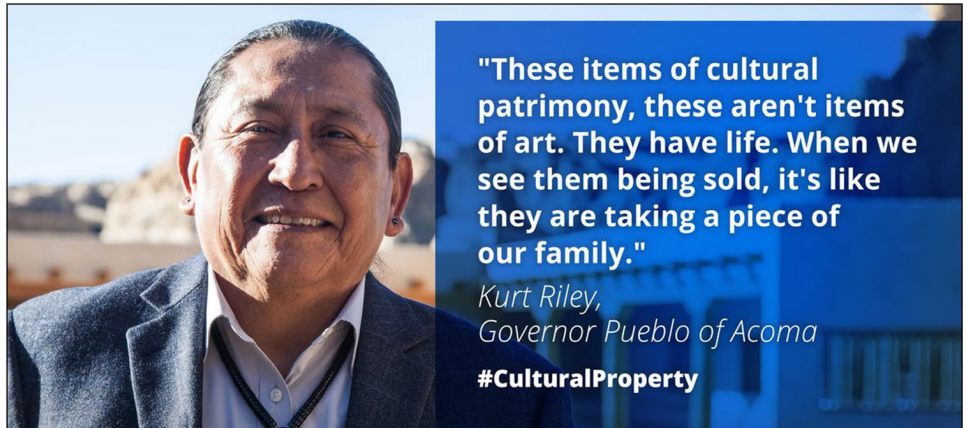
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<sup>23</sup>[GAO-19-22](#) and [GAO-20-466T](#).

<sup>24</sup>[GAO-21-110](#).

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**Figure 1: Image from a Department of State Social Media Campaign Aimed at Raising Awareness about Protecting Native American Cultural Items**



Source: Department of State. | GAO-22-105685

However, resource constraints and limitations with data to support decision-making hamper some federal agencies' efforts to prevent, investigate, and prosecute incidents of theft and damage to Native American cultural items. In March 2021, we made seven recommendations that each agency take steps to identify and obtain information to enhance their ability to analyze and respond to risks to Native American cultural items. As of January 2022, these seven recommendations remained open.

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## Challenges with NAGPRA's Scope and Enforcement

Limitations in the prohibitions on theft and trafficking of Native American cultural items pose another challenge to protecting Native American cultural items. We reported in 2018 that although several federal laws address the theft and trafficking of Native American cultural items, these laws are limited in scope and only apply to the theft or trafficking of certain items.<sup>25</sup> In August 2018, we made 12 recommendations, three to each of the four agencies, including a recommendation that the agencies assess the U.S. legal framework governing the export, theft, and trafficking of Native American cultural items. The agencies generally agreed with our recommendations.<sup>26</sup> As of January 2022, we had closed two of the 12 recommendations as implemented and 10 remain open.

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<sup>25</sup>GAO-18-537.

<sup>26</sup>The Department of Justice disagreed with the recommendation to assess the U.S. legal framework. We believe this recommendation is still valid, as discussed in the report.

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For example, the criminal prohibition in NAGPRA applies only to Native American cultural items obtained in violation of the act. This criminal prohibition would apply to a person selling a sacred object that was obtained from federal land after NAGPRA's enactment without meeting the requirements for intentional excavation but would not apply to a person selling sacred objects they excavated from their privately owned land, even if that land is located within a tribe's ancestral homelands.

Moreover, in situations where the theft or trafficking of an item falls within the scope of NAGPRA, agency and tribal officials said it can be challenging to provide sufficient evidence to prove the violation in court. For example, to prove a NAGPRA violation, there must be evidence that the item in question was removed from federal or tribal land and was taken after NAGPRA was enacted. Further, as we reported in 2021,<sup>27</sup> according to an FBI official, it can be less burdensome to prove a violation of the Bald and Golden Eagle Protection Act, than to prove a violation of NAGPRA when a Native American cultural item includes bald eagle feathers.<sup>28</sup>

In a recent consultation with Interior on draft proposed revisions of NAGPRA regulations, one tribal official noted that the NAGPRA regulations do not require a permit for intentional excavation of private lands within the boundaries of an Indian reservation even though those are tribal lands subject to NAGPRA. Another tribal official noted that it does not apply when private collectors hold objects that would be subject to repatriation under NAGPRA if they were held by museums or federal agencies.

In conclusion, during the 30 years since the passage of NAGPRA, federal agencies have made some progress in addressing the act's requirements, including repatriating over 1.7 million associated funerary objects with human remains, according to the National NAGPRA Program's fiscal year 2020 annual report. However, as we have previously reported and as tribes and tribal organizations have noted, agencies continue to face challenges in implementing and enforcing NAGPRA.

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<sup>27</sup>GAO-21-110.

<sup>28</sup>16 U.S.C. § 668(a). The Bald and Golden Eagle Protection Act prohibits, among other things, possession of eagle feathers unless allowed by permit.

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Such challenges point to the value of further examining how NAGPRA is being implemented, including efforts to consult with tribes and Native Hawaiian organizations, better protect cultural items, and address challenges with the law's scope and enforcement. Overall, NAGPRA was a significant step forward in recognizing the dignity of Native American people and supporting tribes' political sovereignty. However, while agencies have made progress in repatriating remains to culturally affiliated tribes, human remains of more than 116,000 individuals are still in federal possession and have not yet been culturally linked to a present day tribe or Native Hawaiian organization. By implementing open recommendations from our prior work, federal agencies will continue to make progress in their efforts to improve tribal consultations and protect Native American cultural items.

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Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

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## GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Anna Maria Ortiz, Director, Natural Resources and Environment at (202) 512-3841 or [ortiza@gao.gov](mailto:ortiza@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

GAO staff who made key contributions to this testimony include Tammy Conquest (Assistant Director), Travis Cady, John Delicath, Brooke Linsenhardt, Jamie Meuwissen, Caroline Prado, and Jeanette Soares.



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## **Abbreviations**

NAGPRA	Native American Graves Protection and Repatriation Act
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