



INDIANA UNIVERSITY

RESEARCH

June 20, 2023

The Honorable Brian Schatz, Chairman
The Honorable Lisa Murkowski, Vice Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Chairman Schatz and Vice Chairman Murkowski:

Thank you for your letter of April 20, 2023, to President Pamela S. Whitten seeking information regarding Indiana University's implementation of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). President Whitten has asked that I, as Vice President for Research and the person responsible for oversight of our NAGPRA activities, respond on her behalf. We are grateful for the opportunity to address your questions and provide information on our compliance activities, as well as our broader efforts to foster strong relationships with Native American partners. We sincerely hope our response below will enlighten your committee on how Indiana University has worked to meet and exceed its obligations under the law.

In 2013, the Office of the Native American Graves Protection and Repatriation Act was founded at Indiana University. One of our primary tasks was to start developing relationships with federally recognized tribal nations through consultation. Relationships are not built overnight. It takes a long-term commitment to establish relationships that are built on transparency, trust, and mutual respect. The recent National NAGPRA Review Committee meeting held in Bloomington, Indiana was co-hosted by Indiana University and the Miami Tribe of Oklahoma. The Miami Tribe of Oklahoma has interest in most of the collections held at Indiana University and the decision to co-host reflects one of the strong relationships Indiana University has developed through consultation.

Aside from the return of collections, consultation is perhaps the most important aspect of NAGPRA. Meaningful consultation is a cyclical, collaborative, and ongoing. Tribes do not all approach consultation in the same manner. At National NAGPRA Review Committee meetings, both the Department of the Interior and Review Committee members stress that consultation is paramount to NAGPRA work. It is recommended that consultations be in-person as much as possible to help foster mutual trust and respect through individual contact. We are proud of our consultation efforts and the relationships we have built. As publicly stated by the Miami Tribe of Oklahoma's Cultural Resource Officer and NAGPRA Committee Chair Julie Olds on June 8th at the National NAGPRA Review Committee Meeting, "Respectful consultation, with patience and sharing of knowledge, we believe, has been the

catalyst to much needed change within institutions where non-compliance had been the prevailing culture. Our relationship with Indiana University is exemplary to this process.”

At the direction of our tribal partners, we have spent the last eight years moving forward with the repatriation of specific collections of ancestral remains. Consultation on summary collections continues alongside this work but has taken second priority. For example, at a 2016 consultation meeting including representatives from 15 tribal nations, it was requested that Indiana University focus most of its efforts on completing the Angel Mounds repatriation project before moving onto other repatriations. The Angel Mounds collection is Indiana University’s largest archaeological collection and the NAGPRA component consisted of over 700 individuals and 15,000 associated funerary objects. This collection was repatriated and reburied at the Angel Mounds National Historic Landmark at the direction of our tribal partners in 2021. At that time, it was the largest NAGPRA reburial in Midwestern history.

Once Indiana University has received input from our tribal partners on which specific collections/archaeological sites they wish us to focus, the information reported in our 1995 inventories is reassessed. Our tribal partners have requested that we thoroughly reassess the documentation previously done on collections to ensure entire collections are accounted for. While Indiana University is committed to repatriating as expeditiously as possible, we are also mindful of the desires of our tribal partners. As Miami Tribe of Oklahoma’s legal counsel Joseph Halloran stated in the January 13, 2023, public comment session aimed at discussing the newly proposed NAGPRA regulations, “We don’t want speed, we want justice.”

To reassess collections in an efficient and timely manner, we augmented our staff in 2021. Six full-time individuals are now dedicated to compliance work at Indiana University, one of the largest NAGPRA teams in the country.

A reassessment of the documentation includes identifying which skeletal elements are present to determine minimum number of individuals, identifying all human remains mistakenly included within faunal collections, reuniting funerary objects with the ancestors, and ensuring that all funerary objects are accounted for *prior* to repatriation. Additionally, in many instances, collections at Indiana University are split with other institutions. In some, the ancestral remains are at one location and the funerary objects are at another (with each institution retaining legal control); in others, an archaeological site may have been excavated by different universities over the years, such that remains and objects from a single site are held by several universities. By not taking the time to ensure the collections are properly documented and all the ancestors and funerary objects are accounted for, tribes may have to rebury more than once, particularly if universities are not working together on a joint repatriation and a single, coordinated reburial.

We now turn to your specific questions.

- 1. Please describe in detail how your institution determines if there is “a relationship of shared group identity that may be reasonably traced” when your institution is determining the cultural affiliation of NAGPRA-eligible items or ancestral remains, and explain how your institution interprets and applies the terms “totality of the circumstances” and “preponderance of the evidence” when making such determinations.**

While the Inventory information is reassessed, cultural affiliation is determined through consultation with potentially affiliated tribal partners. Consultation is reciprocal, so collection information (provenance, archaeological cultural phase, time period, geographic location, etc.) is provided by Indiana University staff and coupled with information received in turn from tribal partners. The information shared by tribal partners may include oral histories, traditional knowledge, and/or historical documents the tribe(s) is willing to provide. Consensus regarding the final determination is achieved by discussing the totality of available evidence in consultation with our tribal partners. Depending on the number of tribal nations participating in these meetings, consensus may be achieved more or less quickly depending on the priorities of the various stakeholders (e.g., as tribal partners sometimes request that museum staff collect additional information, as tribal partners sometimes request in-person site or museum visits be incorporated into the consultation process, as competing claims among participant nations must be resolved, etc.).

In determining affiliation, all possible lines of evidence set out in the law do not need to be present; rather, the determination is made based only on the available evidence—that is, the totality of the circumstances. The term “totality of the circumstances” is interpreted as the total sum of evidence available. The totality of circumstances can be constituted by just one line of evidence or several depending on the case. In the context of all available information, a collection is determined to be affiliated or not based on the preponderance of evidence. The term “preponderance of evidence” is interpreted as an evidentiary standard in which something is more likely than not, using the sum of evidence available in favor of affiliation, but not necessarily based on conventional understandings of scientific certainty.

- 2. Please describe the process your institution undertakes to determine—**
 - a. When there is sufficient evidence to proceed with repatriation; and**
 - b. When a cultural item or ancestral remain is culturally unidentifiable.**

All NAGPRA collections of Native American ancestral remains and associated funerary objects under Indiana University’s control will be repatriated; however, the decision to proceed with repatriation in each individual case is dictated less by the need for additional evidence and more by the timelines and priorities set by our tribal partners.

Collections of human remains or artifacts that are culturally unidentifiable are usually those for which available documentation lists only a vague geographic location (e.g., where only vague descriptions like Southwest, Eastern Woodlands, Oklahoma, etc. are available)

or those for which there is only limited provenience and/or site history. Further, without a clear understanding of site chronology, it is sometimes not possible to identify which communities may have direct affiliation with ancestral remains or artifacts from a particular region, as different communities may have occupied the same place at different points in their history. In Indiana, various tribes passed through different parts of the state at different times. This complication is further exacerbated by the consequences of the removal period, as tribal nations now typically live far from their aboriginal homelands. This is true for most Midwestern and some Southeastern states, Indiana included. Despite these complications, there should be very few times when a collection is culturally unidentifiable after consultation with tribal partners. Even in cases where institutional documentation does not provide a clear path to affiliation, information that arises during consultation often does, and the culturally unidentifiable designation is not assigned without the input of our tribal partners.

In any event, cultural unidentifiability is not a barrier to repatriation given the changes to the law in 2010. When the culturally unidentifiable designation is applied to ancestral remains and objects, the law mandates the return of those remains and objects following a priority order beginning with 1) the community from whose current tribal lands they were originally removed, followed by 2) the community from whose aboriginal lands they were originally removed, and finally 3) any federally recognized tribe that requests them. Even in the relatively rare instances where ancestral remains and artifacts possessed by Indiana University are designated as culturally unidentifiable, these remains and objects will ultimately be repatriated in accordance with the law.

3. Please describe the processes and methods your institution uses to gather and utilize Native traditional knowledge when determining the cultural affiliation of NAGPRA-eligible items or ancestral remains.

Through consultation and cooperation with tribal partners, native traditional knowledge is discussed. When a tribe or tribes are willing to share traditional knowledge pertinent to affiliation, that knowledge, oral history, or information is used as a line of evidence.

4. Please provide examples of when your institution has used only Native traditional knowledge to culturally affiliate NAGPRA-eligible items or ancestral remains.

For Indiana University's repatriations thus far, oral history has never been the sole evidence for determining affiliation, as there has always been additional information that could be used. For example, Angel Mounds is a multicomponent site with occupancy spanning 500 years as multiple tribes moved throughout the area. During consultation, oral history was a deciding factor in establishing multiple cultural affiliations at the site, but the final designations also incorporated archaeological and historical evidence.

5. Please describe each allegation filed with the National NAGPRA Program regarding your institution's failure to comply with NAGPRA, including a summary of the circumstances and outcomes of the allegation(s).

In 2016, the Indiana University NAGPRA Office received its one and only notice of an alleged failure to comply. This allegation claimed that Indiana University had failed to complete an Inventory. Specifically, the individual who levied the allegation noted that the 2012 job listing for the NAGPRA Project Manager position included a figure of 7,500 sets of human remains in Indiana University's possession, while Indiana University had originally reported possessing only 5,200 sets of remains that fell under NAGPRA. The figure in the job listing included *all* human remains on campus—including those that have no relationship to past or present Native American populations (e.g., medical cadavers, anatomical specimens, forensic cases, etc.). It was suggested that all 7,500 sets of remains were eligible for repatriation under NAGPRA, implying a discrepancy between the advertised counts and the numbers originally reported to National NAGPRA. In reality, no such discrepancy existed. On October 17, 2016, the Department of the Interior officially determined that the allegation of a failure to comply was unsubstantiated.

6. Please describe the process your institution undertakes to complete summaries and inventories pursuant to 43 C.F.R. § 10.8 and 43 C.F.R. § 10.9, including the average length of time for completion and the average length of time to send the required Notice of Intent to Repatriate to the Manager of the National NAGPRA program.

- a. For each summary prepared by your institution, please explain whether the determination listed in the summary as sacred, possibly sacred, patrimonial or unassociated funerary objects was made by i) museum staff or ii) in consultation with tribal representatives or iii) some combination of (i) and (ii).**

To complete Indiana University's summaries by 1993, museum staff compiled a list of all Native American artifacts within its repositories. The decision to include all Native American objects on these initial summaries was made as museum staff did not possess the knowledge necessary to classify any given object as sacred or possessing the historical, traditional, or ceremonial importance that would render an object of cultural patrimony. The classification of an object as an unassociated funerary object likewise requires knowledge of traditional and/or ceremonial importance that should not be assessed without the input of tribal partners. Rather than guessing at potential significance of any given object, these summaries simply listed every single object, with the expectation that such classifications would follow from consultation.

After completion of these initial summaries, letters were mailed out to tribal nations affiliated or potentially affiliated with the items in order to initiate consultation, although few of these early communications led to real consultation. After that time, consultation efforts waned until 2013 when the Indiana University NAGPRA Office was established, at which point consultation efforts reinitiated in earnest. The determination of each item is

not made in the summary until after consultation with tribal representatives is complete. It is difficult to estimate the average length of time to send a Notice of Intent to Repatriate, as it depends on the number of items under review, the number of tribes being consulted, and how quickly the tribes wish to move forward with repatriation. Indiana University has not sent a Notice of Intent to Repatriate, as we have been advised by our tribal partners to prioritize the repatriation of the ancestral remains and funerary objects.

- b. For each inventory prepared by your institution, please explain whether the determination of human remains or associated funerary objects as either culturally affiliated or unaffiliated was made by i) museum staff or ii) in consultation with tribal representatives or iii) some combination of (i) and (ii).**

To complete Indiana University's inventories by 1995, museum staff compiled a list of all Native American ancestral remains and associated funerary objects within its repositories. Between 1995 and 2013, only a few of the collections were determined to be culturally affiliated. In these cases, determinations of affiliation were based on collection records, in which ancestral remains were listed explicitly as originating from a specific tribal nation. In almost all other cases, collections were designated as culturally unidentifiable. These determinations—all of which were made prior to 2010—typically did not utilize geographic and/or chronological associations to assess affiliation, and the initial classifications of culturally unidentifiable precluded meaningful consultation.

In the context of the 2010 regulatory changes regarding the disposition of culturally unidentifiable human remains, under which the Indiana University NAGPRA Office has operated since its inception in 2013, determinations of affiliation are now made only after full consultation with tribal representatives and utilizing all available evidence—including evidence supplied by tribal partners during consultation. Further, it has been the experience of those in the Indiana University NAGPRA Office that collections previously determined to be culturally unidentifiable can often be culturally affiliated when meaningful, careful consultation is undertaken. A Notice of Inventory Completion, rather than a Notice of Intent to Repatriate, is filed with the National NAGPRA Program after consultation is complete and tribes agree to moving forward with submitting a notice.

Between 2014 and 2021, Indiana University repatriated the remains of nearly 1,000 individuals and over 15,000 associated funerary objects. We have also completed the redocumentation, as per tribal request, on nearly 1,400 individuals in the collections, which are currently under consultation and will be published in notices once consultation has been completed. Through expanded staff, streamlined documentation (done through consultation with tribal partners), and growing cooperation between Midwestern institutions, the progress of the Indiana University NAGPRA Office continues to accelerate.

7. Please describe the process your institution undertakes to determine if cultural items or ancestral remains are not culturally affiliated, including the length of time, on average, it takes to notify the Manager of the National NAGPRA program.

Meaningful measures regarding average length of time are challenging to provide, complicated, and case specific. Nevertheless, as previously discussed, determinations of cultural affiliation (or lack thereof) are made through consultation. Decisions made during consultation involve consensus building between tribal nations and institutions with the perspectives and preferences of the former privileged over those of the latter. The speed of consultation is determined by the tribes and is subject to shifts in priority, resources, and staffing on their part. At times, an ongoing collaboration may slow as a tribe speeds up work with another museum on similar repatriation projects. After a collection is determined to be unaffiliated through consultation, then a Notice of Inventory Completion is submitted, and transfer of control may proceed to tribal nations that are recognized as aboriginal to the area from which the collection came. In accordance with the law, these aboriginal tribes are those which are recognized through a final judgment of the Indian Claims Commission, an Act of Congress, an Executive Order, or a treaty 10.11(c)(1)(ii).

8. Please explain any discrepancies between your institution's estimate of the number of cultural items and culturally unidentifiable remains in your institution's possession or control, and the number reported by the National NAGPRA Program.

Numbers reported in the 1990s to the National NAGPRA program often relied on old catalog cards or what was written on the outside of boxes. In retrospect, these notations were rarely accurate representations of a collection's actual size or contents. Discrepancies between previously reported numbers and the estimates that result from collection reassessment arise from finding the difference between work done under a time crunch, using incomplete information with inadequate staffing for the task, and more recent, careful, systematic work done by staffers to the degree of detail dictated by tribal stakeholders. As described above, Indiana University's tribal partners want to ensure that all ancestors and funerary objects are accounted for *prior* to the publication of a Notice of Inventory Completion. This is one reason why Indiana University has hired additional staff to assist with this more intensive documentation.

9. Please provide an inventory of any human remains that are in your possession, but controlled by another agency or institution. Please also note what effort, if any, has been taken to ensure the possession of these items comply with NAGPRA.

Illinois State Museum (Minimum Number of Individuals: 96)

Representatives from Indiana University NAGPRA and the Illinois State Museum (ISM) have discussed the return of their collections. Currently ISM is going through its archives to

search for loan and/or transfer paperwork to make sure the list Indiana University NAGPRA has is complete. Plans to transfer ISM collections housed at Indiana University are ongoing and will likely be delayed until a final reburial decision is made by our tribal partners to avoid unnecessary movement of the ancestral remains.

Gilcrease Institute (Minimum Number of Individuals: 80)

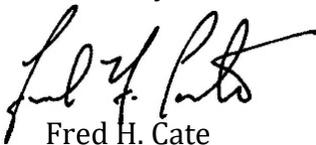
Indiana University NAGPRA is currently working under a contract from the Gilcrease Institute to document the ancestors in preparation for further consultation and repatriation. Contract work to finish this documentation will be complete by December 2023. Plans to physically transfer the collection back to the Gilcrease will be delayed until final reburial plans are decided through consultation to avoid unnecessary movement of the ancestral remains.

Indiana University has been and remains dedicated to the successful execution of NAGPRA legislation and does so in full collaboration with—and at the direction of—our tribal partners. We support tribes' sovereign rights to dictate consultation and repatriation timelines so tribal communities do not incur additional burdens—be they administrative, economic, or spiritual—as part of the process.

Repatriation indicates a transfer of legal control, not necessarily a physical return. Filing a notice with the National NAGPRA program does not mean that repatriation is at an end. Indiana University continues to work with our tribal partners after paperwork has been filed, particularly with regard to the physical transfer of collections and any potential reburials so that the ancestral remains and cultural items are treated with dignity and respect. We will take direction from our tribal partners towards both the repatriation and physical return of *all* NAGPRA collections.

President Whitten, our NAGPRA office, and the entire university leadership thank you for the opportunity to provide what we hope is valuable information to your committee in its efforts to oversee compliance with this important and complex law. Indiana University is committed to a program of respectful and timely repatriation, achieved via ongoing consultation and collaboration with our tribal partners. We welcome any additional questions from, or dialogue with, the committee toward our joint aim of successful implementation and completion of the NAGPRA mission.

Sincerely,



Fred H. Cate

Vice President for Research

Distinguished Professor and C. Ben Dutton Professor of Law

Cc: The Hon. Catherine Cortez Masto
The Hon. Martin Heinrich
The Hon. Mazie Hirono
The Hon. Ben Ray Lujan
The Hon. Patty Murray
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The Hon. Kyrsten Sinema
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