



**ACET**  
Alliance of Colonial Era Tribes

AND



January 31, 2023

Deb Haaland, citizen of the Pueblo of Laguna  
Secretary of the Interior  
U.S. Department of the Interior

**Re: Written Comments on NAGPRA Proposed Rulemaking,  
National Park Service, RIN#1024-AE19**

Dear Secretary Haaland,

We appreciate the opportunity to comment on the proposed revisions to regulations implementing the Native American Graves Protection and Repatriation Act (25 U.S.C. Chapter 32) ("NAGPRA"). The Association on American Indian Affairs (the Association)<sup>1</sup> has separately filed comprehensive comments on the proposed rulemaking and joins in this filing with the Alliance of Colonial Era Tribes (ACET)<sup>2</sup> to focus on the proper interpretation of the federal government's responsibility to Tribes it serves through a range of federal Indian programs, without reference to their inclusion on the List maintained by the Interior Secretary. By incorporation, ACET, in turn, concurs with the additional comments submitted by the Association in this proceeding.

Our comments detail objections to the proposed amended definition of "Indian Tribe" at § 10.2. The proposal to limit eligibility to Tribes on the Secretary's List threatens to codify the unlawful practice of excluding Tribes, Bands and other Communities that are eligible for benefits from the United States because of their status as Indians. That proposal is contrary to the Act and embodies an unfortunate practice that violates clear judicial construction of the statutory provision governing NAGPRA eligibility.

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<sup>1</sup> The Association is the oldest non-profit serving Indian Country. Since 1922, the Association has been a leading organization protecting Sacred Places and cultural and religious practices, including advocating for the AIRFA, the NMAI Act and the establishment and effective implementation of NAGPRA.

<sup>2</sup> The Alliance of Colonial Era Tribes (ACET) is an inter-Tribal league of sovereign American Indian Nations, both federal and state recognized, of the eastern and southern seaboard of the continental United States, who can each trace their history from the colonial era.

The proposal to amend the definition of “Indian Tribe” would violate NAGPRA’s statutory definition by wrongfully adding a requirement of inclusion in the List maintained by the Secretary of the Interior of Tribes only acknowledged by the Secretary for Bureau of Indian Affairs programs. Not only would the proposed language violate the plain language of the statute, as construed by federal courts, it would perpetuate the uncertainty and confusion that has, for years, wrongfully excluded eligible Tribes from the consultation, disposition and repatriation processes. There is no lawful basis to prevent them from protecting their Ancestors from the harms the Act was intended to remedy. As set forth below, we ask that the Department withdraw the unnecessary language associated with the Secretary’s List, and to establish a process to facilitate public certification of Tribes eligible to participate in NAGPRA.

## **A. INTRODUCTION**

On September 30, 2021, the Association and ACET jointly urged the removal of a provision that would prevent Tribes . . . “recognized as eligible for the special programs and services provided to the United States to Indians because of their status as Indians” from protecting the remains of their Ancestors if those Tribes were not now recognized by the Secretary of the Interior.<sup>3</sup> Our 2021 submission stressed legal and moral imperatives of carrying out the remedial purpose of the statute, which would be materially impaired by artificially limiting the protected class, or by superimposing modern distinctions of formalized political relationships in an effort to limit the timeless human rights interests Congress intended for NAGPRA.

In NAGPRA, the United States Congress enacted legislation designed to provide a remedy for disturbance of burials of Native Americans, a wrong causing continuing injury and anguish to those Ancestors and their present-day Tribes. The Act is designed to protect human remains and cultural items found in federal or Tribal lands, or held by federal entities (except the Smithsonian) and museums, as defined by the Act. The global intent is to return Ancestors to their Peoples, and to protect burials as closely as possible to the condition and customs of the Peoples concerned. The remedies are not immediate or self-executing, requiring extensive efforts by Tribes to break the chains of wrongful possession and control. NAGPRA beneficiaries, and their standing, are as defined by Congress.

In implementing NAGPRA, the Interior Department does not have unfettered discretion. It must respect and carry out the language of the statute. In NAGPRA, Congress recognized that the United States had been complicit in denying Indigenous Peoples the fundamental right of protecting and caring for their grave sites. Present day Tribes seek to protect Ancestors whose burial places were subject to desecration because of their status as Indians. Those Ancestors deserve the protection that Congress promised. Congress assured Tribes that, so long as they are eligible to receive services from the federal government, because of their status as Indians, NAGPRA protections and remedies would attach. These regulations may not take away those protections, nor relegate them to what might remain after all others have had an opportunity to be heard.

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<sup>3</sup> We are incorporating the September 30, 2021 comments, attached as Attachment 1, to be included in the record of this rulemaking.

The proposed amended definition of “Indian Tribe” violates important principles of law and the express intent of NAGPRA, as set forth below. It should be withdrawn for the following reasons:

- 1) The amendment would impermissibly slash the scope of eligibility established by Congress to provide the broadest possible remedy for long standing and inexcusable violations of human rights;
- 2) The amendment would impermissibly impose limitations that nullify the recognition afforded Tribes through recognized eligibility for special programs and services provided by various agencies of the United States because of their status as Indians;
- 3) The amendment would flatly contradict the ruling of the only federal court to construe the statutory language;
- 4) The amendment would unnecessarily reinstate a regulatory proposal previously withdrawn in light of controlling precedent; and
- 5) The amendment would impermissibly codify unlawful practice of depriving rights of Tribes clearly within the scope of statutory protection, extending and perpetuating bad faith and racism that continue to damage sacred relationships.

Congress intended to provide a broad remedy. It did so through a broad definition that may not be administratively diminished. The proposed regulation to include the Secretary’s List was unacceptable thirty years ago and remains unacceptable now. It must be withdrawn.

#### **B. THE STATUTORY LANGUAGE REQUIRES INCLUSION OF ALL TRIBES ELIGIBLE FOR FEDERAL PROGRAMS AND SERVICES BECAUSE OF THEIR STATUS AS INDIANS**

Congress expressly extended the remedial benefits of NAGPRA to:

any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village . . . 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) (emphasis added).

The plain language of the statute requires that the term “recognized,” as used here, takes a meaning different from the political status inherent in a Tribe being “recognized” by the Interior Secretary, as evidenced by inclusion on the Secretary’s List of recognized Tribes.<sup>4</sup> NAGPRA’s use of “recognized” is broader, including not only Tribes on the Interior Secretary’s List, but also those eligible for any federal programs and services provided by the United States “because of their status as Indians.” The Supreme Court recently reached the same conclusion in *Yellen v. Confederated Tribes of the Chehalis Reservation*:

Nor is the mere inclusion of the word “recognized” enough to give the recognized-as-eligible clause a term-of-art meaning. True, the word “recognized” often refers to a tribe with which the United States has a

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<sup>4</sup> Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, most recently published at 88 FR 2112 (January 12, 2023) (the “List”).

government-to government relationship. [...] That does not mean, however, that the word “recognized” always connotes political recognition.

[...]

In ISDA, the required recognition is of an entity’s eligibility for federal Indian Programs and services, not a government-to-government relationship with the United States.<sup>5</sup>

The Indian Self-Determination and Educational Assistance Act is the source of the language adapted for the NAGPRA definition.

The definition of “Indian Tribe” proposed in section 10.2, which would add Interior Secretary’s recognition to legislative criteria, improperly attempts to substitute the Secretary’s criteria for those established by Congress. The Interior Department cannot by regulation arbitrarily shrink the rights unambiguously expressed in the Act. “If the intent of Congress is clear, that is the end of the matter . . . the agency must give effect to the unambiguously expressed intent of Congress.”<sup>6</sup>

The NAGPRA definition, as interpreted by federal courts, requires no additional guides to construction, and may not be diminished to simplify the agency’s task. While Congress has used similar language in a number of statutes, the specific meaning of the NAGPRA definition has been long settled, as a matter of law, though its proper application has long been obstructed by agency misunderstanding and misapplication.

Only one federal case squarely addresses the NAGPRA statutory provision governing eligibility of Indian Tribes not recognized by the Secretary of the Interior. The case *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D.Vt. 1992), *aff’d.*, 900 F.2d 729 (2d Cir. 1993) (*per curiam*), specifically rejected the argument that NAGPRA standing required that a Tribe be on the Secretary’s List:

[T]he fact that [the Abenaki Nation] receives federal funds and assistance from the United States because of its members status as Indians includes it within the class protected by NAGPRA.

805 F. Supp. at 251. The Second Circuit adopted the District Court’s reasoning without change. 900 F. 2d 729 (2d Cir. 1993) (*per curiam*).

### **C. INTERIOR PREVIOUSLY, AND CORRECTLY, ABANDONED EFFORTS TO RESTRICT THE STATUTORY DEFINITION**

Nearly 30 years ago, the Interior Department proposed, then withdrew, regulatory language that would have restricted NAGPRA eligibility to Secretarially recognized Tribes - similar to the current proposal. In its 1993 rulemaking, Interior proposed that the definition “refer to those Indian Tribes and Native Alaskan entities on the current list of recognized Indian tribes

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<sup>5</sup> 141 U.S. at 2445 (footnote omitted). “ISDA” refers to the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 5301, *et seq.*, also referred to as “ISDEAA”.

<sup>6</sup> *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

as published by the Bureau of Indian Affairs.”<sup>7</sup> The proposal would have advised Tribes that were not on the list to contact the Bureau of Indian Affairs to determine qualifications, substantially directing them to undertake Interior Department’s federal acknowledgment process set forth at 25 C.F.R. Part 83, 58 Fed. Reg. at 31125, a process that takes decades.

Then, as now, commenters objected to the attempt to administratively amend NAGPRA’s applicability. Comments filed jointly on behalf of the Association, the Native American Rights Fund and Morningstar Institute (inter alia), objected to narrowing the scope of the definition:

The statutory definition, 25 U.S.C. 3001(7), refers to services provided by the United States to Indians by reason of their status, not merely to services provided by the Department of the Interior. In the Guidelines which you previously issued, you recognized that in addition to the list of federally-recognized tribes maintained by the Bureau of Indian Affairs, “other Federal agencies also offer benefits specifically to Indians.” Yet, in this draft, you have now effectively limited the definition to those tribes which are served by the Bureau of Indian Affairs. A recent Federal District Court case has in fact interpreted the NAGPRA more broadly, in accordance with your original approach in the guidelines. Abenaki Nation of Mississquoi, et al. v. Hughes, et al., 20 Indian Law Reporter 3001 (Fed.Dist.Ct., Vt. 1992). The new language should be deleted and replaced with language which achieves the same purpose as that required by NAGPRA and suggested in your original guidelines.

1993 AAIA, NARF Joint Comments to proposed NAGPRA regulations, Attachment 2, at 2, (emphasis in original).

In the end, Interior avoided this error. The preamble to the final rule stated:

Four commenters found this interpretation unduly narrow and recommended interpreting the statutory definition to apply to Indian tribes that are recognized as eligible for benefits for the special programs and services provided by “any” agency of the United States to Indians because of their status as Indians. The Review Committee concurred with this recommendation. Based on the above recommendations, *the definition of Indian tribe included in the regulations was amended by deleting all text describing the process for obtaining recognition from the BIA. In place of this text, the final regulations include a statement identifying the Secretary as responsible for creating and distributing a list of Indian tribes for the purpose of carrying out the Act.* This list is currently available from the Departmental Consulting Archeologist and will be updated periodically.<sup>8</sup>

The list referred to here would be separate and distinct from the Secretary’s List, but the solution was never implemented. Specifically, we propose a more effective mechanism for certifying Tribes eligible under NAGPRA, as follows:

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<sup>7</sup> NAGPRA Regulations, Proposed Rule, 58 FR 31122 (May 28, 1993).

<sup>8</sup> NAGPRA Regulations, 60 FR 62134, 62136 (December 4, 1995) (emphasis added).

Develop a Registry of NAGPRA Eligible Tribes. The Secretary (or as delegated to the National NAGPRA Program) would maintain a registry of Tribes eligible for NAGPRA participation. The registry would be built through self-certification by eligible Tribes. Eligibility would be conclusively established by presence on the Secretary's list OR by evidence of federal program participation, or notice of eligibility for such participation. NAGPRA requires only eligibility, not actual receipt of services, so current participation should not be required.

Once the self-certification is complete, then the Tribe is entered into the registry. National NAGPRA would publish the registry to provide notice to all federal agencies and museums of the requirement to consult with the identified Tribe for the purposes of NAGPRA, and respond to inquiries. All Tribes included in the registry would be eligible for participation in all NAGPRA functions, i.e., receive all notices, participate in consultation, eligible for repatriation or disposition.

**D. INTERIOR CANNOT SUBSTITUTE ITS FEDERAL ENTITY LIST TO EXCLUDE ENTITIES THAT ARE ELIGIBLE TO RECEIVE FEDERAL SERVICES BECAUSE OF THEIR STATUS AS INDIANS.**

The Interior List does not define "Indian Tribe" for all federal purposes, but only as directed by Congress in the Federally Recognized Indian Tribe List Act of 1994 (the "List Act"), to regularize administrative treatment of federally acknowledged Tribes. The Secretary's duties were defined in relationship to all Tribes the Secretary acknowledges to exist as an Indian Tribe, and do not address any other sources of federal recognition. 25 U.S.C. §§ 5130(2).<sup>9</sup> The same Act clarifies that the Secretary may neither terminate the status nor administratively diminish the privileges and immunities of federally recognized Indian Tribes without the consent of Congress.<sup>10</sup>

List Act eligibility, based on the Secretary's recognition, is much more limited than NAGPRA eligibility, which includes those "recognized as eligible for the special programs and services provided by the United States . . . because of their status as Indians" (emphasis added). The Interior Secretary heads only one of the agencies providing such services. Other federal Indian programs, provided without requiring List Act inclusion, include:

- NAHASDA (Native American Housing and Self Determination Act);
- LIHEAP (Low Income Heat & Energy Assistance Program);
- WOIA (Workforce Opportunity and Investment Act);
- COVID Relief - Consolidated Appropriations Act, Dec. 2020, rental programs - specifically related to NAHASDA participation;
- Small Business Act (minority contracting) - extending preference in federal contracting to state Tribes. The Small Business Administration has created Hubzones

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<sup>9</sup> Section 109 of the List Act. Congress required the annual List publication as a ministerial directive. The Secretary's obligation - as to the Department's own list - is to provide certainty, prompted by previous errors. In another portion of the Act, Congress reaffirmed the federal status of the Central Council of Tlingit and Haida Indian Tribes of Alaska, mistakenly omitted from the Secretary's 1993 List of federally recognized Tribes. 25 U.S.C § 1212(2).

<sup>10</sup> *Id.* at § 1212(3)-(4) (emphasis added) (section (202)((3)-(4) of the List Act).

for contracting preference, further recognizing status of state recognized Tribes based on federal census data;

- Indian Arts and Crafts Act ;
- Federal Boarding School Program, which included children from Tribes that did not then have federal recognition (as some still do not). Those children, by reason of their identity as members of Indian Tribes were subject to the brutal educational programs authorized by the federal government. Those who died or were buried at such schools there should be returned to their people, regardless of current status of their affiliated Tribe.

Because these programs are made available to non-Secretary List Tribes specifically because of their status as Indians, without regard to Secretary acknowledgement, all such Tribes fall within NAGPRA's definition of "Indian Tribe."

Under NAGPRA's statutory definition, Tribes eligible for such programs are indeed "recognized" by the federal agencies providing services. The Secretary of Interior may not promulgate regulations to exclude them from NAGPRA coverage. To do so would "administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress" in violation of 25 U.S.C. § 1212(4).

## **E. NOTHING IN THE LAW SUPPORTS LIMITING THE NAGPRA DEFINITION**

### **1. Chehalis provides no guidance for interpreting the NAGPRA definition**

The National Park Service (NPS) in its response to Tribal consultation<sup>11</sup> wrongly asserts that the Department is bound by the United States Supreme Court's recent decision in *Yellen v. Confederated Tribes of the Chehalis Reservation*,<sup>12</sup> construing the CARES Act application of the ISDA definition. This position has multiple flaws.

First, the definitions construed serve different purposes. The definitions are not the same, and the Court's construction is not relevant to NAGPRA. The *Chehalis* Court had to determine whether Alaska Native Corporations (ANCs) were covered, through language that Congress incorporated into the CARES Act - in whole - from the ISDA, which included ANCs as covered entities. That central question is entirely absent from the NAGPRA definition. As noted in the NPS comments, Congress expressly removed ANCs from the NAGPRA definition. NPS Response at 15-16. In any event, construction of the CARES Act is not binding precedent for the construction of NAGPRA.

Next, the *Chehalis* Court expressly rejected the plaintiff Tribes' position that eligibility - through the ISDA language - required List Act Inclusion. *Chehalis*, 141 S.Ct. at 2444-45.<sup>13</sup> Thus, even if *Chehalis* were applicable to understanding similar language in the NAGPRA definition, it would not support requiring application of the List Act.

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<sup>11</sup> Response to Tribal Consultation on revisions to 43 CFR Part 10 Native American Graves Protection and Repatriation Act Regulations, Prepared December 2021, Updated August 2022 ("NPS Response"), accessed at <https://www.nps.gov/subjects/nagpra/upload/Response-to-Comments-on-Consultation-Draft.pdf>.

<sup>12</sup> 141 S.Ct. 2434 (2021) ("*Chehalis*")

<sup>13</sup> See discussion at pages 3-4 above.

In confirming ANC participation in the CARES Act (via the ISDA definition) the *Chehalis* Court further included evidence of ANC participation in other federal programs, including NAHASDA,<sup>14</sup> as indicative of requisite recognition. *Chehalis*, 141 S.Ct. at 2447. That same program is among those available to Tribes not on the Secretary's List.<sup>15</sup>

The *Chehalis* Court was construing a different statute, and its applicability to different entities, for a completely different purpose – a purpose that was economic only, rather than one of human and civil rights, and deep spiritual significance. *Chehalis* has no bearing on NAGPRA.

Finally, NPS supports its position with a fundamentally flawed statement that “[b]ecause Congress also used the same language ‘eligible for the special programs and services’ in both NAGPRA and the List Act, the list of federally recognized Tribes is the list of Indian Tribes for the purposes of NAGPRA.” NPS Response at 15-16. The conclusion makes no sense. The definitions in NAGPRA and the List Act are materially different: Unlike NAGPRA, the List Act revolves entirely around Tribes recognized by the Secretary of the Interior. The List Act refers only to the Interior's acknowledgment, and pertains to services provided by the Bureau of Indian Affairs.<sup>16</sup> It does not and cannot interfere with programs and services available through other agencies of the United States.

## **2. Incorrect application of the law has repeatedly impeded NAGPRA relief for eligible Tribes.**

The erroneous presumption, that the Secretary's List governs eligibility, is so entrenched that an otherwise authoritative treatise on NAGPRA legislative history sought to instill this flawed implementation as genuine – purporting to rely on cases whose conclusory statements are neither correct, case dispositive, nor connected to the statutory language. The book states, misleadingly: “Since promulgation of the regulations, courts have consistently denied standing to claim items under NAGPRA to nonfederally recognized Indian groups.”<sup>17</sup> The book cites three cases for this proposition. One does not concern NAGPRA at all.<sup>18</sup> Of the other two, one lacks a NAGPRA cause of action,<sup>19</sup> and the other was dismissed for sovereign immunity.<sup>20</sup>

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<sup>14</sup> Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101 *et seq.*

<sup>15</sup> See bullet list on pages 6-7 above.

<sup>16</sup> Compare, NAGPRA definition:

“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 [43 U.S.C. 1601 *et seq.*]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

with List Act Definition:

For the purposes of this title:

2) The term “Indian tribe” means the any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

This List Act definition of “Indian Tribe” is limited, by its terms, to the List Act itself.

<sup>17</sup> C. Timothy McKeown, *In the Smaller Scope of Conscience: The Struggle for National Repatriation Legislation, 1986-1990*, at 189, and note 123 (U. Arizona Press 2014).

<sup>18</sup> *Muwekma v. Babbitt*, 133 F. Supp.2d 42, 44 (2001) (no NAGPRA holding in case to expedite recognition petition; plaintiff asserts Secretary's listing as prerequisite to NAGPRA).

<sup>19</sup> *Romero v. Becket*, 256 F.3d 349, 354 (5th Cir. July 16, 2001) (NAGPRA inapplicable on state land, standing determination irrelevant).

<sup>20</sup> *Maynor v. United States*, Civil No. 03 CV 1559 (D.D.C. July 8, 2005) (state and federal sovereign immunity defeat court's jurisdiction; any other ruling invalid as dicta, standing irrelevant).



Notably, the book does not acknowledge the 1992 *Abenaki* case, discussed above, that decisively ruled against the stated proposition for the 1995 regulations. Instead, the book selectively quotes from the preamble to the 1995 regulations: "'The statutory definition of Indian tribe,' explains the preamble, 'precludes extending applicability of the Act to Indian tribes that have been terminated, that are current applicants for recognition, or have only State or local jurisdiction legal status'."<sup>21</sup>

But considering the 1993 comments drawing attention to the *Abenaki* ruling discussed above, the preamble actually reflects the Interior's decision to withdraw the List Act language that would have conditioned eligibility on Interior Secretary's acknowledgment. Instead, "recognition" for NAGPRA purposes is determined and expressed by Congress in the Act. The statement from the book is not true. It ignores case precedent that bound the Secretary in the 1995 rulemaking, and continues to bind the Secretary today.

### **3. NAGPRA precedes the List Act and so cannot be said to rely on it**

NAGPRA was enacted in 1990, four years before the List Act. Congress could not have intended, at the time, to mandate application of a List not then in existence.

#### **F. TO DENY REPATRIATION OF ANCESTORS' REMAINS VIOLATES THE MOST BASIC PRINCIPLES OF HUMAN DIGNITY.**

The Department of the Interior bears a Sacred duty to implement legislation intended to relieve the continuing harm borne by those whose Ancestors' final resting places have been desecrated and plundered. In doing so, it must respect the guidance of the UN Declaration on the Rights of Indigenous peoples (UNDRIP), which rejects artificial distinctions as excuses for deprivation of the fundamental rights of Indigenous Peoples. UNDRIP, Article 12 provides:

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

The United States has expressed its support for the principles of UNDRIP.<sup>22</sup> Through NAGPRA, Congress has expressed its determination to provide a remedy for those harmed, as well as on behalf of all those entities recognized as eligible for federal programs and services because of their status as Indians. Interior may not now limit those statutory remedies and must take steps to ensure that they are extended as required by law.

Moreover, fulfilling Congress' intent as established by the definition of "Indian Tribe" will support and advance racial equity in agency actions and programs, in accordance with the Executive Order 13985.

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<sup>21</sup> McKeown at 189 and note 122.

<sup>22</sup> *Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. Dept. of State (Jan. 12, 2011), available at <https://2009-2017.state.gov/s/srgia/154553.htm>.

## **G. CONCLUSION**

To date, the only judicial interpretation of the NAGPRA statutory eligibility of Tribes not yet recognized by the Secretary of the Interior remains the 1992 *Abenaki* case, as affirmed by the United States Court of Appeals for the Second Circuit. In addition, nearly 30 years ago, the Interior Department properly determined that it could not add unauthorized restrictions to NAGPRA participation by Indian entities served by other federal agencies, when those entities sought to protect their Ancestors from continuing harm. The Department should, once again, follow the law, and remove the requirement of inclusion on the Secretary's list of federally recognized Tribes.

The United States gains nothing by denying a basic right to Tribes it serves in other contexts. Restoring the statutory definition of "Indian Tribe" would cost nothing - but would dramatically enhance the ability of Indigenous Peoples to participate in the recovery and protection of Ancestors who were laid to rest before the existence of a federal government, much less federal recognition.

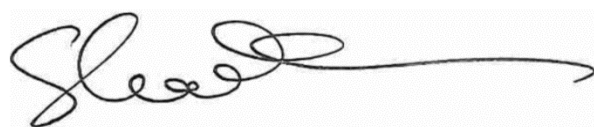
The regulations should be revised to clarify that museums and federal agencies holding materials related to Native American burials, sacred objects, and objects of cultural patrimony have full repatriation, disposition, and consultation obligations to any Indian Tribe or NHO "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The Secretary should implement Congress' express directive that NAGPRA be available to all Tribes eligible for programs and services of the United States because of their status as Tribes. The Secretary must develop a process, similar to the one described above, to remove the confusion that continues to impair NAGPRA rights. To proceed otherwise, by imposing administrative limitations on a statutory right, would not only violate Section 202(4) of the List Act, but would also perpetuate a future of dishonor.

We respectfully request deletion of the List Act requirement in the proposed rulemaking. In addition, we suggest establishing, through consultation with all affected Tribes, a process for creating a registry to ensure that all Tribes recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians are treated as an Indian Tribe for purposes of NAGPRA.

Sincerely,



Rev. John R. Norwood, Ph.D, Nanticoke-Lenape  
General Secretary  
Alliance of Colonial Era Tribes



Shannon O'Loughlin, Choctaw  
CEO & Attorney  
Association on American Indian Affairs

# ATTACHMENT 1



**ACET**  
Alliance of Colonial Era Tribes



September 30, 2021

*Via email only*

The Honorable Bryan Newland  
Assistant Secretary, Indian Affairs  
bryan\_newland@ios.doi.gov

The Honorable Shannon Estenoz  
Assistant Secretary for Fish and Wildlife and Parks  
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Ms. Melanie O'Brien, Program Manager  
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Re: Comments regarding the Draft NAGPRA Regulations

Dear Assistant Secretary Newland and Assistant Secretary Estenoz,

Thank you for initiating Tribal consultation on the important matter of reevaluating and reforming the regulations implementing the Native American Graves Protection and Repatriation Act (25 U.S.C. Chapter 32) (“NAGPRA”). The Association on American Indian Affairs (the Association) has separately filed comments on the draft regulations, but joins in this filing with the Alliance of Colonial Era Tribes (ACET)<sup>1</sup> to focus on the proper interpretation of the federal government’s responsibility to state recognized Tribes. By incorporation, ACET concurs with the separate comments submitted by the Association. Together, the Association and ACET urge the Department to issue regulations that are in line with the Act, whose plain language, properly read, includes state recognized Tribes. Present NAGPRA procedures and consultation wrongfully exclude and ignore state recognized Tribes.

State recognized Tribes fall within the statutory definition of “Indian Tribe.” NAGPRA’s definition of “Indian Tribe” includes those entities “recognized as *eligible* for the special programs and services provided by the United States to Indians because of their status as

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<sup>1</sup> The Alliance of Colonial Era Tribes (ACET) is an intertribal league of sovereign American Indian Nations, both federal and state recognized, of the eastern and southern seaboard of the continental United States, who can each trace their history from the colonial era.

Indians.” 25 U.S.C. § 3001(7) (emphasis added). The current draft regulations add limiting language to the Act’s definition: “as evidenced by its inclusion on the list of recognized Indian Tribes published by the Secretary under 25 U.S.C. § 5131.” However, there are state recognized Tribes eligible for certain programs and services provided by the United States to Indians, that are not included on this list. The regulations cannot shrink the rights unambiguously expressed in the Act. “If the intent of Congress is clear, that is the end of the matter ... the agency must give effect to the unambiguously expressed intent of Congress.”<sup>2</sup>

State recognized Tribes are expressly *eligible* for some, if not all, special programs and services provided by the United States to Indians, even if they are not currently receiving those services. These federal programs and services available to state Tribes include, but are not limited to:

- NAHASDA (Native American Housing and Self Determination Act);
- LIHEAP (Low Income Heat & Energy Assistance Program);
- WOIA (Workforce Opportunity and Investment Act);
- COVID Relief - Consolidated Appropriations Act, Dec. 2020, rental programs – specifically related to NAHASDA participation;
- Small Business Act (minority contracting) – extending preference in federal contracting to state Tribes. The Small Business Administration has created Hubzones for contracting preference, further recognizing status of state recognized Tribes based on federal census data;
- Indian Arts and Crafts Act
- Federal Boarding School Program, which included children from Tribes that did not then have federal recognition (as some still do not). Those children, by reason of their identity as members of Indian Tribes were subject to the brutal educational programs authorized by the federal government. Those who died or were buried at such schools there should be returned to their people, regardless of current status.

Because these programs are made available to state recognized Tribes specifically because of their status as Indians, without regard to federal recognition, all state recognized Tribes fall within NAGPRA’s definition of “Indian Tribe.”

The draft regulations should be revised to clarify inclusion of state recognized Tribes for full remedial processes under NAGPRA. NAGPRA is a sweeping implementation of the federal trust responsibility to Indian Tribes – providing not just rights but remedies to protect the burials of their Ancestors, and to their communities, Ancestors, their burial belongings, sacred objects and objects of cultural patrimony. Nearly all of the Ancestors in question were born, lived, and passed on before the concept of federal acknowledgment existed. Cultural items, too, were created and taken before the current system of federal acknowledgment. The statute aims to restore the break in relationship between Ancestors and cultural items unjustifiably taken from

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<sup>2</sup> *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

their resting places and their descendants. NAGPRA, properly implemented, aims to reconnect generations of Indigenous communities, starting from Ancestral relations and reaching generations of descendants who have come into existence in a changed world.

NAGPRA's enactment acknowledges and carries out the "Special relationship between Federal Government and Indian tribes and Native Hawaiian organizations." 25 U.S.C. § 3010 (section title). Its remedial purpose is thwarted when the Department does not implement the broad and inclusive definition of "Indian Tribe" by excluding state recognized Tribes. The Act commits to restore Ancestors to their proper place, among their descendants, and necessarily includes all Indigenous Ancestors, burial items, and cultural patrimony reasonably associated with any Tribe, people, or culture Indigenous to the United States.

NAGPRA acknowledges the federal fiduciary obligation to remedy previous neglect and affirmative mistreatment of the burials of Indigenous Ancestors and the dispossession of culture. The duty to repatriate is an express delegation of the federal trust obligation to remedy the accumulated harms represented by thousands of Ancestors, waiting for many decades to go home. In this context, federal recognition status loses meaning, and time periods transform. Communities have been disrupted for centuries, and the healing must begin as soon as possible. The federal trust responsibility transcends the artificial regulatory distinction that would divide a Native American burial from Native American descendants. Disregarding the definition that includes state recognized Tribes in NAGPRA is not only contrary to law, it is an improper evasion of a solemn trust.

The federal trust relationship is distinct from acknowledgment status. Just as federal acknowledgment does not create a Tribe, neither does it create a federal relationship, but rather confirms that one has always been in existence, albeit not "recognized" by the federal government. The federal trust responsibility to Indian Tribes cannot lightly be avoided, and the federal government cannot rely on its own current ignorance of a Tribe to disclaim that responsibility. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the United States Court of Appeals for the First Circuit held that the United States has, at least, an inchoate trust responsibility to unrecognized Tribes. 528 F. 2d 370, 373 (1<sup>st</sup> Cir. 1975). The remedy at stake here should not wait for federal acknowledgment of the present descendants.<sup>3</sup> Nor does NAGPRA require that delay.

Tribes may wait for decades for a determination of their federal status. The Ancestor should not be trapped in that process, which has no bearing on an identity that predates federal acknowledgment. If any Tribe can demonstrate close cultural affiliation to an Ancestor or to a cultural item covered by the Act, then the right of repatriation is unquestionable – as measured against a museum or agency that has no right of possession. NAGPRA creates an absolute remedy of repatriation, and imposes that obligation on any and all museums having no right of possession. Ancestors belong with their descendants; further delays compound the harm.

When state recognized Tribes have improperly been denied direct access to NAGPRA,

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<sup>3</sup> The District Court had required federal action to preserve the Tribe's rights. See *Passamaquoddy*, 528 F.2d at 373.

Ancestors languish on shelves for additional generations. A state Tribe without access to federally recognized partners in a consortium is denied opportunity to demonstrate incontestable cultural affiliation. For example, the Secretary issued a Final Determination for the Shinnecock Nation in 2010, after a 32-year process. Before federal acknowledgment, the Nation, continuously recognized by New York for centuries, actively sought to repatriate remains and cultural items from various covered museums, but because current regulations fail to clarify that state recognized Tribes are Tribes “eligible for federal programs and services,” Shinnecock was ignored until after the Nation’s federal status was determined. Since then, the Nation has welcomed home several hundred Ancestors, with more repatriation pending. The first rounds of repatriation returned hundreds of Ancestors who had been pillaged from known traditional burial grounds during golf course construction, including Shinnecock Hills Golf Course (on historic tribal lands barely a mile from the Shinnecock reservation). Most of the remains not thrown away were removed to the American Museum of Natural History in New York City, and to the Southhold Indian Museum, a private facility across the Peconic Bay from Shinnecock. For all those years, the Shinnecock people lived with the pain of the desecrated burials and the continuing – nearby – separation from their relatives. The Nation’s cultural affiliation was never in doubt, the identity of the Ancestors was never in doubt, nor was there any valid right of possession in any other than the rightful descendants. Federal recognition had no bearing on the express definition of “Indian Tribe” under the statute, or underlying moral principles.

The federal trustee’s delay in resolving Tribal acknowledgment should not obstruct the moral imperative to end the harm caused by historical grave robbing. In 2011, the United States announced its support for the Declaration on the Rights of Indigenous Peoples (“UNDRIP”):

Most importantly, [UNDRIP] expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.<sup>4</sup>

It would be inconsistent with UNDRIP to deny state Tribes the repatriation and disposition rights that UNDRIP Article 12 holds applicable to all Indigenous Peoples, regardless of governmental status:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; *and the right to the repatriation of their human remains.*
2. *States shall seek to enable the access and/or repatriation of ceremonial objects and human remains* in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

(Emphasis added.)

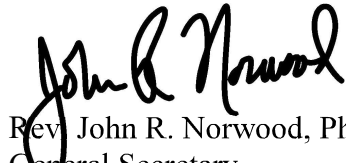
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<sup>4</sup> *Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. Dept. of State (Jan. 12. 2011), available at <https://2009-2017.state.gov/s/srgia/154553.htm>

The United States gains nothing by denying state recognized Tribes the ability to retrieve their relatives and cultural items from exile. Permitting institutions to continue such wrongful holding perpetuates centuries of erasure and abuse. The regulations should be revised to clarify that museums and federal agencies holding materials related to Native American burials, sacred objects, and objects of cultural patrimony have full repatriation, disposition, and consultation obligations to any Indian Tribe or NHO, including state recognized Tribes “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” Their inclusion need not alter the Department’s other duties pursuant to 25 U.S.C. § 5130, to maintain a separate list of federally acknowledged Tribes. The regulation can expressly limit its application to preclude any inference that the Secretary has conferred broader federal acknowledgment

We ask, therefore, that the Department’s implementing regulations delete limiting language currently in the draft regulations and expressly include state recognized Tribes within the definition of “Indian Tribe” for the purpose of 25 U.S.C. § 3001(7). We look forward to discussing this with you in the continuing consultation process.

Sincerely,



Rev. John R. Norwood, Ph.D, Nanticoke-Lenape  
General Secretary  
Alliance of Colonial Era Tribes



Shannon O'Loughlin, Choctaw  
CEO & Attorney  
Association on American Indian Affairs

# ATTACHMENT 2

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July 26, 1993

Dr. Francis T. McManamon  
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P. O. Box 37127  
Washington, D. C. 20013-7127

Re: Native American Graves Protection and Repatriation Act  
Regulations, Notice of Proposed Rulemaking - Comments  
Docket No. 1024-AC07

Dear Frank:

Please accept the following joint comments on the draft regulations on behalf of the American Indian Ritual Object Repatriation Foundation, Association on American Indian Affairs, Cultural Committee of the Sisseton-Wahpeton Tribe, the Morning Star Institute, Native American Rights Fund and the Pawnee Indian Tribe of Oklahoma. These organizations and tribes have a number of serious problems with these regulations in terms of their compliance with the statute. Some of the more important objections involve:

1. The prohibition of repatriation until after inventories have been completed and the failure to recognize an independent right to repatriation;
2. The narrowing of the definition of "Tribal lands"; and
3. The process in the regulations which limits the ability of Indian tribes and Native Hawaiian organization to assert their ownership and control interest in imbedded materials on a timely basis.

Our detailed comments on these issues and others follow:



## Section 10.2 Definitions

1. The statutory definition, 25 U.S.C. 3001(7), refers to services provided by the United States to Indians by reason of their status, not merely to services provided by the Department of the Interior. In the Guidelines which you previously issued, you recognized that in addition to the list of federally-recognized tribes maintained by the Bureau of Indian Affairs, "other Federal agencies also offer benefits specifically to Indians." Yet, in this draft you have now effectively limited the definition to those tribes which are served by the Bureau of Indian Affairs. A recent Federal District Court case has in fact interpreted the NAGPRA more broadly, in accordance with your original approach in the guidelines. Abenaki Nation of Mississquoi, et al. v. Hughes, et al., 20 Indian Law Reporter 3001 (Fed.Dist.Ct., Vt. 1992). The new language should be deleted and replaced with language which achieves the same purpose as that required by NAGPRA and suggested in your original guidelines.

2. The definition of "traditional religious leader" appears to have left out the words "means an individual" before the word "who"

3. The definitions in subsection 10.2(b) clearly reflect a considerable effort to integrate statutory language and legislative history. We urge that the definitions be retained unchanged in the final draft of the regulations, except for a technical change to "human remains" as follows: the word "there" should be the word "they".

4. The definition of "tribal lands" in section 10.2(d)(2) is directly at odds with the statute. The statutory definition includes "all lands within the exterior boundaries of any Indian reservation." There is no exclusion for privately owned lands. Congress' unambiguous decision to include all lands within a reservation's boundaries as tribal land for the purposes of this statute should not (and cannot) be undone through the regulatory process. Where a statute is unambiguous on its face, that language must ordinarily be considered to be conclusive. See, e.g., United States v. Turkette, 101 S.Ct. 2524 (1981). Moreover, your assertion that legislative history supports your proposed regulation is somewhat bewildering. The only reference in the legislative history to this definition is in the House Interior and Insular Affairs Committee Report, wherein it was specifically noted, at 15, that the "term 'tribal land' is for purposes of this Act only and may be inapplicable in other circumstances" -- the inference being that this definition is somewhat broader than the definitions used in some other contexts.

In fact, landowners do not "own" human remains and funerary objects imbedded in the ground. Under the common law, the landowner holds remains and objects in trust for the next of kin. See Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History", 24

Ariz.St.L.J. 35, 47-48 (1992). For many tribes, including the Pawnee, tribal grave sites are located on land within reservation boundaries which is no longer owned by the tribe (through no fault of the tribe itself). Excluding grave sites on those lands from the tribal consent provision would have a substantial adverse impact upon those tribes. Indeed, the United States Supreme Court has on numerous occasions recognized inherent tribal jurisdiction over non-Indians where the conduct involved "threatens or has some direct effect upon the...health and welfare of the tribe", see, e.g., South Dakota v. Bourland, 61 U.S.L.W. 4632, 4637 (1993), and has suggested that protecting areas on the reservation which are of critical cultural and spiritual value to the tribe is directly related to the health and welfare of the tribe. Brendale v. Conferderated Yakima Indian Nation, 492 U.S. 408, 454 (1989). Moreover, whether or not inherent tribal sovereignty provides tribes with the right to exercise authority over grave sites, clearly Congress has the right to recognize such authority. See, e.g., United States v. Mazurie, 419 U.S. 544, 556-558 (1975). Given this legal and factual underpinning, Congress concluded that private lands within reservation boundaries ought to be included in the category of tribal lands in the context of NAGPRA, even if this might not be the case in some other contexts.

5. The control and possession definitions (sections 10.2(e)(5) and (6)), are simply inappropriate. Specifically, to link possession with a cognizable legal interest of the sort described could create a rather large loophole by which significant numbers of items possessed and displayed by museums on a long-term basis could not be said to be "possessed" by them within the meaning of that term in the regulations. The definitions essentially change the statutory standard from "possess or control" to "have a legal interest in". As noted by the Society of American Archaeology in its comments, it is questionable under the common law whether museums "have a legal interest in" human remains sufficient to do anything with them. The terms "possession" and "control" should be given their ordinary and customary meaning in the regulations. The takings exception recognized in 25 U.S.C. 3001(13) is the protective device for ensuring that the temporary possession of items by museums does not result in an illegal transfer. The "possession" and to a lesser extent "control" definitions cannot be used to achieve this purpose and would contravene the statutory scheme.

#### Section 10.3 - Intentional Excavations

By itself, there is nothing objectionable about these provisions. However, when read in concert with other sections of the regulations, such as sections 10.5 and 10.6, the process created is problematic. We will address those issues in comments to those sections which create the problem.

## Section 10.4 - Inadvertent Discoveries

1. Section 10.4(c)(3) provides for notice to Indian tribes which aboriginally occupied the land in question, if known. The NAGPRA contains no such limitation and this should be deleted. Claims based upon aboriginal land were limited by 25 U.S.C. 3002(a)(2)(C) to those claims confirmed by the Indian Claims Commission or United States Court of Claims, as opposed to generalized proofs concerning aboriginal possession, specifically to make it easier for archeologists and others who might have cause to excavate a site to know exactly which tribes would have an interest in any given site based upon aboriginal land title. Indeed, there are maps of the United States which show exactly which land areas have been the subject of successful court actions based upon aboriginal title and these maps have been provided to the Office of the Department Consulting Archeologist. Thus, those engaged in projects on Federal land ought to be required to know which tribes should receive notice based upon aboriginal title and to provide those tribes with notice.

2. Section 10.4(e) allows for the resumption of activities in less than 30 days after the inadvertent discovery of human remains or cultural items where an agreement is signed. The statute does not provide for this. We have no problem with including such a provision, however, if it were to provide for the resumption of activity only in the case where agreement is reached as to how to avoid disturbance of the site altogether through the development of an alternative plan for the project.

## Section 10.5 - Consultation

1. Tribal access to information in section 10.5(c) is limited. For example, for tribes to be able to adequately consult, it is essential that, at a minimum, they specifically receive information about the proposed activity, the nature of the items that appear to be involved and the general location of the items.

2. The written plan of action developed by the federal agency official pursuant to section 10.5(e) should specifically include a determination as to whether the items should be unearthed in the first instance, especially where a tribe, lineal descendant or traditional religious leader specifically requests that a site not be disturbed.

Moreover, it must be required in this regulation that the plan developed take fully into account the determinations of an Indian tribe or a lineal descendant where, in the words of Senator McCain, the ownership/control interest is "known or readily ascertainable". See 136 Fed.Reg. S17176 (daily ed. October 26, 1990). The regulations should provide that in cases of intentional excavation not incidental to developmental activity, the tribal determination should be dispositive where ownership or control is known or

readily ascertainable. In the context of inadvertent discovery, where excavation may be indicated by reason of a construction project of some sort, Congress contemplated that "under this section, Indian tribes and Native Hawaiian organizations would be afforded 30 days in which to make a determination as to the appropriate disposition for these human remains and objects." See Senate Report No. 473, 101st Cong., 2d Sess. at 10; 136 Fed.Reg. S17176 (daily ed. October 26, 1990) (statement of Senator McCain). Thus, while the statute authorizes more of a balancing of interests in terms of excavation itself when inadvertent discovery is involved, an Indian tribe whose interest is known or readily ascertainable was recognized by Congress as having the right to make determinations as to disposition during the 30 day period.

It should be emphasized that where cultural affiliation is not clear or readily ascertainable, the statute recognizes an ownership or control interest in a tribe with an adjudicated aboriginal claim to land where the grave site is located. In the absence of a tribe with a clear interest based upon cultural affiliation, the aboriginal tribe would appropriately have the right to make the aforesaid determination -- although where there is a significant chance that some other tribe may ultimately have a superior claim, perhaps the regulations might make some accommodation for this possibility and prevent the aboriginal tribe from taking any action which would irreparably destroy the interests of another tribe who might have a superior interest (which is exceedingly unlikely with or without such a regulatory restriction).

This understanding that tribes would be exercising authority during the 30-day period after inadvertent discovery is not reflected in these regulations at all. Indeed, just the opposite is reflected. The regulations would limit tribal ability to assert ownership or control for a substantial period of time. The written plan assumes the right of an excavator to perform various analyses in regard to the items unearthed during an indeterminate period before the remains or objects are "disposed of in accordance with their ownership". Sections 10.5(e)(4), (5) and (9). Moreover, while sections 10.3(b)(3) and 10.5(e)(9) recognize that items must be disposed of consistent with tribal ownership interest, they do not make reference to any requirement that the treatment of the items be consistent with that interest. In addition, section 10.6(c) builds a delay into the process of recognizing ownership or control which exceeds 30 days. Thus, even where it may be fairly clear which tribe(s) has ownership or control over items, the current regulations do not recognize any right of a tribe, aside from notice and consultation, which arises from this ownership or control interest until long after decisions are made about excavation and excavation occurs.

These provisions reflect a clear bias toward excavation, analysis and recordation of imbedded materials, which may or may not be the appropriate course in any given instance, especially

since common law disfavors exhumation of the dead and NAGPRA was meant in part to bring the treatment of Indian graves in line with the treatment of the grave sites of others.

In addition, these provisions in toto suggest an exceedingly narrow view of what an ownership/control interest in imbedded items encompasses -- a narrow interpretation which was not contemplated by Congress.

### Section 10.6 - Ownership

This section generally tracks the statutory requirements, although its application is problematic because of the procedures created by this bill, as discussed above. We have two recommendations:

1. It should be made clear that Section 10.6(c) does not preclude Indian tribes whose ownership or control over certain remains or objects is known or readily ascertainable from exercising decision-making authority in terms of the treatment or disposition of imbedded items during the period of time prior to final publication. (See comments to section 10.5(e) above) Moreover, this section should include a requirement that publication occur within 7 days after the determination of which tribe has ownership and control rights. This recommendation is made for the same reasons specified above -- to ensure that full tribal ownership or control interest can be asserted at the earliest possible point in time.

2. This section should specify that, unless it can be readily ascertained that it is probable that some other tribe will have a superior claim to the remains and objects in question, an Indian tribe whose claim is based upon aboriginal land title should be considered the tribe with the ownership and control interest during the period immediately after discovery (see comments to section 10.5(e) above). Any uncertainty about cultural affiliation must not be used to delay the exercise of decision-making authority over these objects by an Indian tribe with a claim based upon aboriginal land title.

### Section 10.8 - Summaries

1. Section 10.8(d)(1)(ii) provides that consultation should occur with "traditional religious leaders identified by Indian tribes". In many cases, this is appropriate. However, in some tribes, there is a schism between the tribal government and traditional religious leaders. This was one reason, though certainly not the only reason, why the statute specifically refers to such leaders separately from tribes. Museums and federal agencies should specifically be required to consult with all traditional religious leaders known to them who meet the definition provided in the regulations.

2. Although the requirement that consultations begin no later than the completion of the summary in section 10.8(2) is consistent with the statute, it would be consistent with congressional intent to encourage museums to consult at the earliest possible date, since Congress clearly intended to facilitate maximum cooperation through the enactment of NAGPRA.

3. Section 10.8(d)(4) requires museums and federal agencies to request certain information from tribes, including kinds of cultural items considered to be sacred or objects of cultural patrimony, and names and appropriate methods of contacting traditional religious leaders. In some tribes, it may be difficult, inappropriate or sacrilegious to provide this information in this manner. In some cases, for example, the only appropriate way to identify objects might be through actual visual observation of specific objects. We believe that this section should be restructured to focus upon requirement (iv). The most productive and appropriate procedure would be to contact the tribe to determine how the consultation should occur, given the extreme sensitivity in regard to these matters. The consultation could include the other current elements of this section if the tribe concluded that this was appropriate.

4. Section 10.8(e) requires Federal Register notice before unassociated funerary objects, sacred objects and cultural patrimony can be repatriated. This introduces an unnecessary bureaucratic delay in the repatriation of cultural items which did not exist prior to the enactment of NAGPRA and does not exist currently. In those cases where museums or agencies and tribes agree on repatriation, it can currently occur immediately (and sometimes does). It certainly was not the intent of Congress to delay repatriation when it enacted NAGPRA. See 25 U.S.C. 3009. Moreover, such a publication requirement is not necessary to protect museums from liability. 25 U.S.C. 3005(f) protects against such liability. In addition, the requirement of an object-by-object list to be disclosed publically, including sacred objects, may violate the precepts of some tribal religions. Finally, such a provision is not likely to be of much benefit to competing claimants. Unless tribes are scrupulously monitoring the Federal Register and are prepared to react immediately (often not the case in this sensitive area), the notice is of little value. To the extent the intent of this section is to protect competing claimants, a requirement that a federal agency or museum directly notify any Indian tribe which the museum or agency has a specific reason to believe may have an interest in the materials ought to be more than adequate for the purposes of due process. Such a notice should be sent out immediately upon receipt of the repatriation request so as to not delay repatriation unnecessarily.

#### Section 10.9 - Inventories

1. Section 10.9(b)(1)(ii) again provides that consultation

should occur with "traditional religious leaders identified by Indian tribes". As discussed previously, we believe that museums and federal agencies should be specifically required to consult with all traditional religious leaders known to them who meet the definition provided in the regulations.

2. The consultation provision in section 10.9(b)(2) permits too much of a delay in the commencement of that process. There is no reason to delay the commencement of consultation until efforts to determine cultural affiliation occur. Tribes and traditional leaders can be helpful in many respects in addition to aiding in the determination of cultural affiliation. For example, the identification of certain associated funerary objects might be enhanced by their involvement. Since a major purpose of the legislation was to encourage cooperation and the statute as drafted provides you with considerable discretion in regard to promulgating rules pertaining to consultation in the inventory process, the regulations should require that consultation commence at the earliest possible moment in that process.

3. Section 10.9(b)(4) is similar to section 10.8(d)(4) and the same comments apply. The nature of consultation must be tribally driven, if it is to be sensitive and successful.

4. We are concerned that the documentation specified in section 10.9(c) not be so onerous as to delay completion of the inventories. If museums object to certain requirements specified as too burdensome, we would recommend that they be deleted, so long as they do not compromise the ability of tribes to utilize the inventory to identify specific remains and objects in which they may have an interest.

5. Section 10.9(d) could be interpreted in a manner not totally consistent with the requirements of 25 U.S.C. 3003(d)(2)(C). That section requires that the inventory not only identify those remains and objects identified as culturally affiliated and those that are not, but also that the inventory identify those which "are not clearly identifiable as culturally affiliated, but which, given the totality of the circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization." It might be clearer if the regulations were to require that inventories clearly identify this third category of remains and objects separately, rather than merging the category into the list of culturally affiliated items.

6. Section 10.9(e)(5) should specifically recognize the right of Indian tribes to receive all of the information specified in section 10.9(c).

7. Section 10.9(e)(6) should reference only those remains or

objects "that cannot be identified as affiliated with a particular Indian tribe or tribes". It may be that in some cases, remains or objects will be identified as belonging a group of tribes without a determination being made as to which particular tribe is affiliated. In such cases, tribes might collectively choose to pursue those objects and the regulations should reflect this possibility.

8. Section 10.9(f) should be strengthened by making clear that federal funding is not a prerequisite for completion of an inventory.

### Section 10.10 - Repatriation

This section is woefully out of compliance with the statutory requirements in several critical respects:

1. Section 10.10(a)(1)(ii) provides that one criteria that must be met before an unassociated funerary object, sacred object or object of cultural patrimony is repatriated is that the cultural affiliation of the object is "established...through the summary, consultation and notification process." This ignores the sections of the bill which allow for repatriation claims to be made outside of that process and the section which does not require a showing of cultural affiliation in the case of sacred objects and objects of cultural patrimony. Failure to specifically recognize these sections could give rise to voluminous litigation, contrary to the explicit provisions of the Act and the purpose of the Act to facilitate cooperation. 25 U.S.C. 3005(a)(4) provides that unassociated funerary objects shall be returned when an Indian tribe or Native Hawaiian organization can show by a preponderance of the evidence that it is culturally affiliated (assuming that the scientific study, right of possession and conflicting claims exceptions do not apply). 25 U.S.C. 3005(a)(5) provides that sacred objects and cultural patrimony must be returned upon a showing that the lineal descendant, Indian tribe or Native Hawaiian organization or a member of the tribe or organization (where there is no lineal descendant) previously owned or controlled the object (provided the above exceptions do not apply). Currently the regulations only incorporate 25 U.S.C. 3005(a)(1) and (2) which are separate subsections which deal with repatriation through the summary and inventory processes. 25 U.S.C. 3005(a)(4) and (5) were specifically added to the bill by the House of Representatives to make clear that rights of repatriation could be established independently of those processes and this must be reflected in this section of the regulations.

2. Section 10.10(a)(1)(iii) should read "tribe or tribes" to reflect the fact that tribes may bring joint claims for certain items.

3. The requirement in Section 10.10(a)(3) that repatriation



occur within 90 days of receipt of a request is acceptable, but we have the same objections to the Federal Register requirement as specified in our comment to Section 10.8(e).

4. Section 10.10(b)(1)(ii) requires that cultural affiliation be reasonably traced "through the inventory and consultation process". As stated in the comment to section 10.10(a)(1)(ii) above, NAGPRA did not intend this process to be the sole means for materials to be repatriated. Where an Indian tribe or Native Hawaiian organization can independently show cultural affiliation pursuant to 25 U.S.C. 3005(a)(4), repatriation is required, unless the scientific study or conflicting claims exceptions applies. It is essential that this be recognized in the regulations. Moreover, this section should refer to "Indian Tribe or tribes" to reflect the fact that tribes may bring joint claims for certain items.

5. Section 10.10(b)(2) precludes repatriation until 30 days after publication of inventory completion in the Federal Register. This restriction is so utterly contrary to the intent of the Act and even the practice of most museums since the Act has passed, that it is astounding to us that such a restriction could be proposed. As noted above, there is an independent right to repatriation aside and apart from repatriation rights established pursuant to the inventory. Moreover, 25 U.S.C. 3009(1)(A) specifically states that "Nothing in this Act shall be construed to limit the authority of any Federal agency or museum to return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations and individuals." Yet, this is exactly what this regulation would do.<sup>1</sup> In view of the fact that inventories need not be completed until November 16, 1995 (25 U.S.C. 3003(b)(1)(B)) and extensions can be granted for good cause (25 U.S.C. 3003(c)), this section would prevent any repatriation of human remains and associated funerary objects for years. It is hard to imagine a provision less consistent with the intent of Congress. There are no due process concerns that could possibly justify such a restriction. A simple notice procedure where there is direct knowledge of a possible competing claimant ought to be more than enough to satisfy due process as specified above.

5. By omitting an explicit statutory requirement, the so-called "taking" exception to repatriation in section 10.10(c)(3) could lead to unduly restrictive repatriation procedures contrary to the statute. The statute expressly provides for otherwise applicable law on "right of possession" to apply only where an

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<sup>1</sup> The Senate Committee Report on NAGPRA (Senate Report 473, 101st Cong., 2d. Sess.) at 12, specifically contemplated that notice of culturally affiliated objects would be provided throughout the summary and inventory processes. Obviously, this is additional evidence that Congress did not intend to halt repatriation until after inventories were completed.

application of that definition would result in a taking "as determined by the United States Claims Court pursuant to 28 U.S.C. 1491." (emphasis added). When this compromise was inserted at the Justice Department's insistence, the understanding was that such an exception to the application of the "right of possession" definition would occur only as a result of a litigated determination that a taking would result. Thus, a museum or federal agency cannot decide on its own not to repatriate where a taking issue may be present; rather the party that believes that its property would be the subject of an unconstitutional taking must successfully litigate that question in court in order for this exception to attach.

6. Section 10.10(d) ought to read "Indian Tribe or tribes" to reflect the fact that tribes may bring joint claims for certain items.

7. It would be useful to include a provision in this section specifying the types of evidence available to demonstrate prior ownership or control and right of possession similar to the standard laid out in section 10.14(d). Congress clearly intended that determinations under this Act should be based upon all available evidence -- with a decision-making body obviously having the right to weigh the probity of different types of evidence introduced before it. By confirming this in the regulations, future legal disputes can be minimized -- which ought to be a major purpose of these regulations given Congress' preference for cooperation rather than confrontation.

8. We are concerned that the documentation specified in section 10.10(e) not be so onerous as to delay repatriation. This section should be modified to make this clear.

#### Section 10.14 - Lineal Descent and Cultural Affiliation

1. All references in section 10.14(c) should read "Tribe or tribes" to reflect the fact that tribes may bring joint claims for certain items.

2. Section 10.14(c)(2) contains standards for identifying an identifiable earlier group which are vague and could be too limiting. We believe that rather than stating that "Evidence to support this requirement must...", the section should read "Evidence to support this requirement may include, but not be limited to, evidence that..." Without this change, each repatriation request and determination will require massive documentation which was not the intent of Congress. This will frustrate repatriation and lead to confrontation, not cooperation, again contrary to the purpose of the NAGPRA.

3. Section 10.14(c)(3) appears to establish an additional requirement not contemplated by Congress, namely that a present day

Indian tribe be identified from prehistoric to historic times to the present as descending from the earlier group. In the original Senate version of the NAGPRA, the bill required that "continuity" be shown. The definition currently in the NAGPRA, which does not include the "continuity" language, was adopted after negotiation by interested parties, at the insistence of the Native American participants. This change was made to avoid the types of problems which have been experienced in the Federal Acknowledgment Process whereby small gaps in documentation have been grounds to deny recognition. House Report No. 877, 101st Cong., 2d. Sess. at 14, explained the "cultural affiliation" requirement as follows:

[The requirement] is intended to ensure that the claimant has a reasonable connection with the materials...[I]t may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

This language should be incorporated into the regulations. As they now read, they could easily be interpreted as more restrictive than was intended by Congress.

4. Sections 10.14(d) and (e) should both refer to "Tribe or tribes" to reflect the fact that tribes may bring joint claims for certain items.

#### Section 10.15 - Repatriation Limitations and Remedies

1. The sentence in section 10.15(a) which begins "If there is more than one claimant" ought to end with the phrase "unless the claimants agree upon the disposition".

2. Section 10.15(c) provides that administrative remedies are not exhausted until a written claim for repatriation has been denied by the responsible museum or federal agency. We have no problem with this in general, except that there must be a time limit placed upon the museum or agency decision-making process. Otherwise, the right to legal recourse could be thwarted simply by a museum or federal agency not making a decision. As other sections of the regulations require repatriation within 90 days of a request, a 90-day limitation upon museums and agencies would make sense here as well.

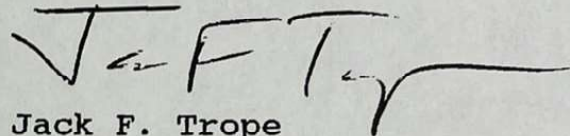
In drafting these regulations, we urge you to keep in mind that the NAGPRA is, first and foremost, human rights legislation based upon the principle of the right of Native peoples to group self-determination. It must be interpreted to advance the goals of

...ess to facilitate the rights of Native peoples to repatriate  
...r remains and cultural items, while at the same time promoting  
...operation between museums, agencies, Indians, Alaska Natives and  
Native Hawaiians. Unnecessary bureaucratic requirements which  
undercut key statutory provisions must be eliminated from this  
draft to ensure that the regulations implement both the letter and  
spirit of the NAGPRA as intended by Congress when it enacted this  
remedial legislation.

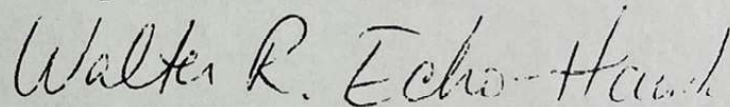
We have tried to comment on these regulations as  
comprehensively as possible. Please understand, however, that  
there may be comments from others (or future issues that arise)  
that reveal other problems with the regulations, and that we do not  
intend these comments to be viewed as exhaustive.

Thank you for the opportunity to submit these comments.

Sincerely,



Jack F. Trope  
Attorney for the American  
Indian Ritual Object  
Repatriation Foundation,  
Association on American Indian  
Affairs and the Cultural  
Committee of the Sisseton-  
Wahpeton Sioux Tribe



Walter R. Echo-Hawk  
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American Rights Fund, the  
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Pawnee Indian Tribe of Oklahoma

cc: NAGPRA Review Committee