ASSOCIATION ON AMERICAN INDIAN AFFAIRS

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

September 29, 2021

Via email only
The Honorable Bryan Newland
Assistant Secretary, Indian Affairs
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The Honorable Shannon Estenoz
Assistant Secretary for Fish and Wildlife and Parks
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Re: Comments regarding the Draft NAGPRA Regulations

Dear Assistant Secretary Newland and Assistant Secretary Estenoz,

We commend the Department of the Interior for its efforts to improve the implementation of the Native American Graves Protection and Repatriation Act, 43 C.F.R. Part 10 (NAGPRA), and for its current active efforts to consult with Native Nations and Native Hawaiian Organizations[1] (NHOs) as part of the process and before a proposed rulemaking. The comprehensive modifications contained in the draft regulations highlight the Department's understanding how the current regulations have been problematic.

We believe the current regulations have failed Native Nations, Native Hawaiian Organizations, as well as agencies and museums, by creating loopholes that cement the institutional racism of our shared past. Our comments are meant to rid the NAGPRA processes of loopholes that are contrary to the human and civil rights purposes of the law to identify items to which no museum or agency has rightful possession, to identify the rightful possessor of those items, and to restore

[1] Our comments use the terms Native Nations or Tribes, and Native Hawaiian Organizations. Any omission or inconsistent language use should be read to include both Tribes and Native Hawaiian Organizations (or NHOs) as defined by the Act.

them, as expeditiously as possible.

We have devoted significant resources to analyzing and evaluating the draft, and to generating these written comments. The Association has provided open meetings and dialogues for Tribal representatives to ask questions, discuss and work through concerns from the current and draft regulations. We have met with attorneys, academics and museum staff and others to make sure that we were providing clear and meaningful comments that would support Tribal efforts. While we understand that we are not a "Tribe" to which the government owes a trust relationship to – and we in no way wish to co-opt this process, the Association feels strongly that our collaborative efforts must be shared with you fully.

Through this process, we have focused on more than responding to the terminology and structure you have proposed. Rather, we are recommending substantive changes and improved terminology, especially in response to your proposal for a "geographical affiliation" process. The reformation needed is so comprehensive, and so different from the current proposal that this single round of consultation is simply insufficient to meaningfully incorporate Tribal and NHO views. Thus, we believe it is necessary for the Department to review comments and work with Tribal experts to provide a second draft of the regulations for consultation, prior to any proposed rulemaking.

We hope that you will accept our comments with a good mind and open heart. Thank you for beginning this consultation.

I. INTRODUCTION

Congress enacted NAGPRA expressly as human and civil rights legislation to benefit Native Nations, and arises directly from Congress' fiduciary responsibility in Indian affairs. With NAGPRA, Congress announced that continued possession of the deceased bodies of our Ancestors and their burial belongings, sacred objects, and objects of cultural patrimony was legally and morally insupportable. NAGPRA goes further, however, to provide remedies, through graves protection and repatriation provisions, to end those wrongs – specifically, through consultation, collaboration and restitution.

The Act expressly mandates that all federal agencies and federally funded museums holding Native American Ancestors and cultural items must expeditiously restore them to their lineal descendants, Native Nations and Native Hawaiian organizations. The **only** exception Congress provided to repatriation was if the institution[2] can prove they have a "right of possession," which is clearly defined by Congress in the Act. Museums and agencies have an absolute obligation to repatriate all cultural items to which they have no right of possession. There is no right of possession without consent of the affiliated Tribe or NHO at the time any such objects were separated from their original home. There are no exceptions, and only a limited provision for delay to complete a scientific study of "major benefit to the United States." Any other delays, excuses, or competing interests are simply not part of the Act and have no place in its implementation.

[2] As used in our comments, the term "institution" is meant to encompass both federal agencies and museums as defined by the Act.

If a museum or agency continues to possess cultural items without a right of possession, then the process is failing. As of this date, museums and agencies possess more than 116,000 (reported) Ancestors and millions of other cultural items. The Act enumerates a simple process: museums and agencies must share information, notify likely affiliated Tribes and NHOs and undertake consultation in a collaborative manner to establish affiliation. Rather than adversarial, the process must rely on consultation that is cooperative. The guiding purpose is to realign proper ownership to those with the "right of possession" as defined by the Act. If that process does not reach the remedy Congress intended, then the Act provides that Tribes or NHOs need only show that their affiliation is more likely than not, through use of any kind of relevant of information as defined by the Act. Again, it is not an adversary process, and it is certainly not a research project – it is a legal administrative process to realign inherent sovereign rights over Ancestors and cultural items by restoring those items to the rightful Tribe(s) or NHO(s).

II. FURTHER TRIBAL CONSULTATION REQUIRED

We request that the Department review Tribal and NHO comments and work with non-federal NAGPRA experts to develop a new set of draft regulations. Then, after release of this second draft, we would request another round of Tribal consultations before any notice of proposed rulemaking moves forward. We strongly believe that together we can create an efficient and effective government-Tribal effort to assist with the development of a new draft. To support this way forward, please see Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" at section 5(d), which states:

> On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use **consensual** mechanisms for developing regulations, including negotiated rulemaking.

The Department has proposed significant, and long overdue changes to the regulations implementing NAGPRA. These draft regulations were based on consultation conducted ten years ago. Since that time, we have further developed our understanding of how institutions have been thwarting NAGPRA and exploiting weaknesses in the current regulations to undermine Congressional requirements of repatriation and graves protection. In addition, new management of the National NAGPRA program has provided access to better technical assistance and compliance data that has advanced repatriation efforts, but also exposed deep flaws in the process. Therefore, new draft regulations must incorporate consensual mechanisms and collaboration between Tribal experts and the Department.

Moreover, California has recently passed progressive legislation the provides greater rights than what NAGPRA provides to Tribes not federally recognized, that are absolutely valuable and must be protected. The Association requests that the DOI consult with California NAGPRA experts to ensure that the greater rights that the state of California is providing are not jeopardized by any language in these national implementing regulations.

Native Nations, NHOs and lineal descendants are the intended beneficiaries of NAGPRA. Within the Act, Congress did not require balancing competing interests to make determinations about repatriation. As these comments reflect, the regulations require more work to better implement the Act, and ensure its remedial purpose for the intended beneficiaries. Therefore, we believe

that the Department should develop a new draft, responsive to the initial round of tribal comments, with the assistance of non-governmental and Tribal experts. Additional consultation on a new draft prior to public rulemaking is absolutely necessary. The government's responsibility for Tribal consultation could not be higher.

III. NATIONAL NAGPRA PROGRAM LOCATION WITHIN THE DOI

We support transferring the National NAGPRA Office from the National Park Service to report directly to the Assistant Secretary for Indian Affairs. While the National Park Service has some expertise in administering Native sites within its jurisdiction, the larger and more direct scope of the NAGPRA responsibility is to Native Nations and their lineal descendants. The Assistant Secretary of Indian Affairs (ASIA) is most closely associated with carrying out the federal trust relationship with Indian Tribes, and most sensitive to the cultural concerns inherent in both repatriation and graves protection.

Additionally, such transfer would invoke Indian hiring preference generally applicable within Indian Affairs, promising to remedy the historic dearth of Native employees in the NAGPRA program.

While beneficial, the move could pose some initial complications. We are not in a position to weigh the administrative hurdles that may be present in such a reorganization. It is our recommendation that if such a transfer is to be made that it must not jettison the progress that has developed in the Program's leadership and its resources. Ms. Melanie O'Brien's leadership has shifted the Program towards real transparency, data collection and sharing that makes it possible, now, to improve NAGPRA implementation and meet the requirements of the government-to-government relationship enumerated in the Act. Rather than halt that progress, we would recommend that any shift to Indian Affairs retain critical staff and institutional knowledge, augmented by strategic hiring to incorporate Native staff as needed. Moreover, the National NAGPRA Program should be positioned in a place where it is protected from changing political climates in order to maintain the consistent implementation of the Act.

IV. COMPREHENSIVE CONCEPTS NOT CURRENTLY ADDRESSED BY THE DRAFT REGULATIONS

In this Section IV, we summarize concepts and major comprehensive changes that are needed in new draft regulations. Section V, below, provides detailed suggestions specific to the language of the draft regulations, however, may not fully address the major comprehensive changes we are requesting here.

1. Redefine "possession or control" in line with the Act.

The Act provides a one-and-only exception to repatriation. If an institution can prove a "right of possession" then repatriation shall not occur:

> "Right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. …. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of

> the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

25 U.S.C. § 3001(13). The Act establishes that agencies and museums shall not have any rightful legal interest to Ancestors and cultural items unless they can prove an authoritative transfer from a Tribe or NHO to the institution. Moreover, an institution may not merely *assert* a "right of possession," but must *prove* it:

> If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this chapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can *overcome such inference and prove* that it has a right of possession to the objects.

25 U.S.C. § 3005(c) (emphasis added). How the institution must overcome the Tribal presumption of proper ownership, overcome Tribal evidence and prove that it has the proper authority to retain an item is absent in the language of the Act.[3] Note, that any standard of proving "right of possession" must include an amount of evidence that "overcomes" or weighs greater than Tribal evidence. As per the language of the Act, this is truly then a greater standard than merely a preponderance of the evidence.

With right of possession so limited, the Act's use of the terms "possession or control" do not and cannot create a legal interest that the Act itself forbids and that the agency or museum has not proven. Though the Act does not define "possession or control," both the current and draft regulations have attempted to do so using the terms "sufficient legal interest," which then directs that repatriation is a transfer of some type of legal interest to Tribes or NHOs, rather than a restoration from agencies and museums that have no such recognized rights. This "sufficient legal interest" verbiage used in the regulations has given agencies and museums justification to assert legal interest in Ancestors and cultural items, thus permitting them to exhibit, research (even with federal monies) and loan Ancestors and cultural items without fulfilling their NAGPRA responsibilities for repatriation and disposition. This scheme violates NAGPRA's clear mandate declaring a duty of repatriation for items from institutions with no right of possession. Under NAGPRA, if agencies and museums cannot demonstrate "right of possession" under specific criteria, the Act acknowledges that lineal descendants, Tribes or NHOs have legal rights to Ancestors and cultural items. Agencies and museums do not have current legal rights in cultural items without this determination – to the contrary, they have legal duties to comply with NAGPRA.

We recommend then that "possession or control" be defined together as a single term or phrase – as they appear in the Act – as a type of <u>naked</u> possession or control and treated like a bailment, albeit one unintended by the rightful owners. In that context, legal rights never transfer but are acknowledged, and the entity with temporary and naked "possession or control"

[3] But see Senate Report 101-473 at pp. 5-6 requiring a preponderance of the evidence.

has a duty to safeguard and restore items to the proper owners. The NAGPRA process, through consultation, affiliation determination, notice, and repatriation would then acknowledge (instead of transferring a legal interest that the agency or museum does not have) the Tribe(s) or NHO(s) who have proper and legal ownership[4] and who must regain their roles and responsibilities to take care of our Ancestors and cultural items.[5]

The draft regulations incorporate a new structure that risks perpetuating an unfounded and assumed "legal interest." The draft further attempts to redefine "possession or control" by introducing "custody" and deleting the term "possession." The draft regulations would require the institution with custody to give notice of items in its custody and then indicate which institution has NAGPRA obligations (control). There is no good reason to separate NAGPRA obligations, which as used in the Act apply absolutely whether an agency or a museum has *either* "possession or control" – because neither has any ownership rights to Ancestors or cultural items. ("Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory…", 25 U.S.C. 3003(a) (emphasis added).) The Act was drafted to create an efficient process of repatriation, so either institution must remain obligated under NAGPRA to right the wrong. We are also concerned that the term "custody" is outside the language of the Act, and its addition might prompt a new path of evasion and delay, perpetuating the problem of figuring out who must comply with NAGPRA's legal obligations.

2. Finding Affiliation.

Under current regulations, the process for determining affiliation has been used by agencies and museums to thwart the requirements of the Act, placing more than 90 percent of Ancestors on the culturally unidentifiable list. Any reform must address this tragic failure of the regulations now in place. The details of these attempts at obfuscation are not hidden; institutions and the Department of the Interior are all aware of these failures:

- Institutions have openly admitted that they have not consulted with Tribes/NHOs, even where there is geographical information available to locate potentially affiliated Tribes/NHOs.
- Institutions have openly refused to affiliate Ancestors and associated funerary objects where multiple Tribes/NHOs are affiliated and have instead placed these Ancestors in CUI inventories.
- Tribes/NHOs have invested their own funding and human resources to develop new archaeological, anthropological and historical research and documentation to overcome the institutions' failures to utilize oral tradition and other lines of evidence as equal lines of evidence.

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

[5] When implementing the Act as it was intended, then an institution has no right – unless they go through the NAGPRA process and prove "right of possession" – to perform scientific studies or other research, display, loan or trade without first going through the NAGPRA process or obtaining the free, prior and informed consent of Tribes and NHOs.

- Though institutions have not performed Tribal consultation and have made determinations that Ancestors are CUI, and even where Tribes have shown a preponderance of the evidence, institutions have forced Tribes to go through the 10.11 disposition process.
- Institutions prefer to go through the 10.11 disposition process in an effort to hold onto associated funerary objects as allowed by the current regulations.
- Institutions – especially research institutions – prefer to maintain Ancestors and cultural items as unidentifiable based on their own internal policies that allow destructive and other forms of research without consent of Tribes or NHOs where Ancestors have not been affiliated.
- These tactics for delaying and denying affiliation determinations has allowed institutions to maintain collections of Ancestors and all cultural items to which they hold no "right of possession;" thus, using Ancestors and cultural items for their academic, economic and other interests at the expense of human and civil rights.

This type of decision-making under the flag of the current regulations flies in the face of the express language of the Act that allows only one exception to repatriation mandating that agencies and museums must prove that they have a right of possession. This failure of the current regulations has created two problems that must be addressed: (1) How to provide an efficient and effective process for cultural affiliation moving forward; and (2) How to establish a corrective process to repatriate Ancestors and funerary objects on the current CUI inventories.

First, the Act has provided the tools to maintain an efficient process to determine cultural affiliation. Cultural affiliation is defined simply in the Act as: "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C. § 3001(2).

Institutions are required to provide inventories and summaries. To find affiliation in an inventory as follows:

> Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, *to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item*.

25 U.S.C. § 3003(a) (emphasis added). This process of bringing together information possessed by the agency or museum, geography and cultural affiliation **"shall"** be performed "in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders." Id. at § 3003(b)(1)(A). This is the process to determine cultural affiliation.[6] It

[6] The regulatory language in the current iteration and the draft have both taken contradictory language from the legislative history to adjust the process actually expressed in the Act. This has caused harm, confusion and expense. For example, the Act clearly only uses a "preponderance of the evidence" when culturally affiliation is not found, though the House and Senate hearing documents seem to use "preponderance of the evidence" for everything. However, the Act only uses the term in limited places. It

describes a collaborative process of sharing information and Tribal consultation to support affiliation and repatriation. This process is similar for developing a summary, which requires finalizing cultural affiliation after Tribal consultation, and is also a collaborative process.

The current and draft regulations, however, have created a complicated morass of procedure and does not describe: Tribal consultation, along with geographical information and information held by the museum or agency is all that is required to make a determination of cultural affiliation pursuant to § 3003(b)(1)(A). This determination is not an academic or scientific research project; it is a prescribed regulatory process to remedy the human and civil rights abuses against Tribes and NHOs through restitution. The connection between the Tribe(s) or NHO(s) need only be reasonably shown, does not require evaluation of all possible forms of evidence, and is not defeated by gaps in the historical record.

It should not be complicated to find affiliation. The process must track the simple structure of the Act. Sections 3003(a) and (b) clearly establish that finding affiliation is not a proffering of evidence to a factfinder, but rather sharing information in an agency or museum's possession in consultation with those with primary expertise in their own cultural heritage, the Tribe(s) or NHO(s), to find a reasonable basis to connect the Tribe(s) or NHO(s) with the Ancestor or cultural items. Thus, the regulations should describe that collaborative process that centers around Tribal consultation, and not a weighing of evidence.[7]

Second, to provide a solution to eliminate the current CUI inventory problems described above and eliminate the current section 10.11, we propose a different framework than the "geographic affiliation" option proposed by the draft regulations. Problematically, the geographic affiliation proposal would require us to rely on agencies and museums to make yet another new determination – a determination that many have been unable or unwilling to make in the first instance. We propose instead that the Secretary and the Review Committee, under its authorities pursuant to § 3006(c)(3), oversee a process by which Tribes and NHOs provide a request for repatriation of their Ancestors and associated funerary objects on the CUI

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is not used in the Act in the initial process for finding affiliation, which requires only reasonable belief and describes a more collaborative process. If Congress meant to include "preponderance of the evidence" it would have included it, as it did in the process when cultural affiliation is not found.

[7] Proof by a preponderance of evidence is only necessary when cultural affiliation cannot be determined by §§ 3003(a) and (b). 25 U.S.C. § 3005(a)(4) provides: "Where cultural affiliation of Native American human remains and funerary objects has *not* been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, *then*, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects *shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence* based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion" (emphasis added). This section describes a different type of process than what is described in §§ 3003(a) and (b) and shifts the burden unilaterally to the Tribe(s) or NHO(s) to prove by a preponderance of the evidence that they are affiliated. This does not describe a collaborative process like §§ 3003(a) and (b). Again, however, where the initial collaborative process did not find affiliation, or perhaps if there is a conflict among Tribes about affiliation, § 3005(a)(4) requires the Tribe(s) to affirmatively show a preponderance of information. But the primary process to determine cultural affiliation is pursuant to §§ 3003(a) and (b) and should be considered a collaborative process.

inventories. This would fall directly under 25 U.S.C. § 3005(a)(4), in which the Tribe(s) or NHO(s) would provide a preponderance of evidence, based on the enumerated categories of information, that shows a connection of shared group identity. The Act does not contemplate this process as an argument between a museum and a Tribe, or as a mutual agreement between a museum and Tribe as the current § 10.11 provides. If the institution has concluded it cannot determine cultural affiliation, then its role must cease. The repatriation obligation, therefore must come from the Secretary, based on recommendations from the Review Committee. The Tribe would simply show a preponderance of evidence and the Ancestors and associated funerary objects would then be expeditiously repatriated.

Though some argue that repatriation is a weighing of interests between science and human rights, that interest is absent from the actual language of the Act, which is singularly aimed at providing restitution. The Act creates an administrative process for repatriation and disposition to provide restitution for harms that have been called out by Congress as genocide and human rights violations. The only exception the Act provides to repatriation is when a museum or agency can prove that they have a "right of possession." Even permitting completion of a scientific study of major benefit to the United States does not prevent repatriation and will only delay it. 25 U.S.C. § 3005(b).

Moreover, we believe allowing Tribes and NHOs to directly request repatriation of Ancestors and associated funerary objects from the CUI lists to the Secretary can direct more NAGPRA grant dollars to Tribes and NHOs to support this process. Under the current regime, many museums have requested NAGPRA dollars intended for the purpose of consultation, finding affiliation and moving forward with repatriation – only to use the funding to place those Ancestors in a CUI inventory, indefinitely evading the appropriate remedy. Were this second phase of affiliation directed to Tribal and NHO efforts to resolve CUI lists, NAGPRA funding could work to carry out that process away from a biased, self-appointed decisionmaker and to bring Tribal and NHO coalitions together to seek individual and joint repatriations.

Museums – even well-funded ones – have admitted that they will not be proactive with their CUI inventories, even with the NAGPRA funding they request, and that instead, they will continue to work to overcomplicate the process, based on the current regulations and criteria outlined there.[8] Thus, it is imperative that the Secretary take over this duty and correct the Ancestors and their belongings that languish under a label called "unidentifiable."
The Act lays out a simple process for cultural affiliation – the current regulations turn that process into an interminable research project that museums and agencies have used to burden Tribes, delay and prevent repatriation, and even continue or, worse, initiate destructive scientific research unjustified by a "right of possession." The draft regulations are better, but still problematic. We ask that you (1) simplify the process of finding cultural affiliation as outlined by the Act that supports repatriation for those Ancestors and cultural items that have not yet been inventoried or placed in summaries as described above; and (2) repatriate the Ancestors and

[8] "But [Phil] Deloria said being proactive is a luxury the Peabody can't afford. 'It's hard to say we're going to dive into our collections and do some kind of proactive work around this—we're basically trying to deal with the requests that come in,' he said. Proactivity 'would mean us needing 20 more people'." Harvard Magazine, Repatriating Native American Remains: Disputes over the disposition of sensitive collections shadow Peabody Museum. by Juliet Isselbacher, August 6, 2021 viewed at https://www.harvardmagazine.com/2021/09/jhj-peobody-museum-native-american-remains.

their burial belonging within the CUI inventories without requiring more museum or agency decision making, delay and expense. We look forward to working with you to develop such a streamlined, more ministerial process.

3. Secretarial Authority to Achieve Compliance.

The regulations must fully acknowledge and empower the authority of the Review Committee and the Secretary to oversee, monitor and achieve compliance with this important human rights legislation. One of the primary complaints against the implementing regulations is that there are "no teeth." We propose avenues pursuant to the language of the Act and other federal law that will underscore the Secretary's role to enforce Review Committee findings when the Review Committee has found an alleged violation of NAGPRA.

The Act gives the Secretary of the Interior authority to:

a. Promulgate regulations that bind museums *as well as federal agencies* in their responsibilities for graves protection and repatriation under NAGPRA (25 U.S.C. 3011);
b. Carry out the special government to government relationship with Indian Tribes and Native Hawaiian organizations for the benefit of Tribes and NHOs (Id. § 3010);
c. Provide grants to Tribes, NHOs and museums to support repatriation and complete inventories (Id. § 3008);
d. Enforce civil penalties against museums and use its subpoena powers in those efforts (Id. § 3007);
e. Establish a Review Committee that will monitor and review the implementation of the inventory and identification process and repatriation activities, specifically nine separate expressed activities. Some of those activities are:
    - ensuring a fair, objective consideration and assessment of all available relevant information and evidence in inventory, summary and repatriation processes;
    - upon the request of any affected party, reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items;
    - facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;
    - compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;
    - consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such Tribes or organizations;
    - consulting with the Secretary in the development of regulations to carry out this chapter;
    - performing such other related functions as the Secretary may assign to the committee; and
    - making recommendations, if appropriate, regarding future care of cultural

items which are to be repatriated. (Id. § 3006)

In the Federal Advisory Committee Act (FACA), Congress declared that "the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved." 5a U.S.C. § 2(b)(6). Thus, if the Review Committee finds, through its oversight, monitoring, assessment, dispute resolution or other activities that cultural affiliation and repatriation should take place, or that there is an alleged violation of NAGPRA, then the Committee must advise the Secretary to take action to make sure the institution complies. Where an alleged violation is against a museum, the Secretary can proceed through the civil penalty process. Where alleged violations are made against federal agencies, then the Secretary must have both duty and ability to seek compliance from the other agency. If the alleged violation is within the Department of the Interior, then an appropriate administrative solution must be found.

The Secretary must be empowered to seek resolution of interagency disputes. NAGPRA expressly delegates NAGPRA authority to the Secretary of the Interior, but outside agencies have been reluctant to comply,[9] and have even asserted the authority to make their own rules contrary to NAGPRA. To further advance the benefits of reforming the NAGPRA process, we recommend the creation of an Executive Order that clarifies the fiduciary duty applicable to all agencies of the United States, as specified in statutory delegation of authority to the Interior Secretary to implement the Act, and the concomitant obligation of all federal agencies to comply with the Secretary's implementing regulations.

4. **Civil Penalties.**

We are grateful that the draft regulations have extended the civil penalties to all violations of the Act. The current regulations restrict the Act's reach by naming only 9 violations. For example, the civil penalty process currently does not have a provision that would penalize a museum who has refused to provide documentation relevant to a holding or collection in the museum's possession, as required by the Act.

We also strongly request that the Secretary utilize this process to its fullest extent possible by obtaining the staff and funding required to rectify civil complaints as efficiently as possible towards compliance.

5. **Graves Protection Provisions Must Be Efficient and Effective and Protect Tribal Sovereignty and Self-Determination**

As drafted, subpart B is very confusing, and creates a drawn-out bureaucratic process that is not easy to follow, imposing a heavy burden for Tribes and NHOs – as well as federal agencies. Regulations should be efficient and should not overly burden or confuse the processes of protection and repatriation.

The graves protection provisions miss important opportunities to include Tribal and NHO consultation for those who have acknowledged aboriginal land connection. By including Tribes

[9] Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act, GAO-10-768. Publicly Released: Jul 28, 2010.

and NHOs who have an acknowledged aboriginal land connection, removed Tribes will also be included where other Tribes now reside on the removed Tribes' acknowledged aboriginal lands. We want to expressly request protection for removed Tribes, such as the Muscogee Nation, who were denied a process to protect their Ancestors and burial belongings located in their acknowledged aboriginal lands when another Tribe pursued economic development projects on those same lands.

Moreover, the subpart does not do enough to recognize Tribes' inherent sovereignty over their cultural heritage, regardless of the status or ownership of lands. Nor does it do enough to prioritize Tribal self-determination and priority of Tribal laws, regulations, procedures and protocols on Tribal lands. NAGPRA should not attempt to diminish or impose upon the sovereignty and self-determination of Tribes to regulate their own lands. Thus, anything in this subpart that imposes an action on Tribal lands must only apply where Tribes have not established their own laws, process, procedures or protocols to protect Ancestors and cultural items – as well as other Sacred Places – within their jurisdictions. Notwithstanding the current land occupants however, current sovereignty should not impede protection for removed Tribes when other Tribes now reside on the acknowledged aboriginal lands of removed Tribes.

Section 10.4 also requires a statement that every effort should be made to preserve Ancestors and cultural items in situ. Disturbance must not be permitted unless the agency obtains the prior consent of Indian Tribes or NHOs. This language carries out the purpose of the Act, as well as other federal law such as the Antiquities Act and others, to protect the integrity of cultural heritage and Sacred Places.

Finally, the timelines proposed in the draft are too long and drawn out. We have more completely detailed these in Section V, below.

6. <u>Provisions that apply to Boarding School cemeteries.</u>

The Act and the current graves protection provisions of the regulations allow the removal of Ancestors and their burial belongings from federal or Tribal lands. This process may also be used to disinter and repatriate children from marked and unmarked burials from past or present Boarding School properties. Revised regulations must clarify and confirm this important right so that other agencies, such as the U.S. Army, will undeniably be required to assist, not just lineal descendants, but also affiliated Tribes or NHOs to disinter their children's graves and bring them home.

Section 10.4 of the draft regulations should include a mandate that this subpart applies to the removal or disinterment of Indian children from marked or unmarked cemeteries that were a part of a federal boarding school policy or program, where a boarding school was provided any amount of federal funding, government certifications or permissions at any period of time, regardless of the current ownership of land. Thus, for this purpose, "federal lands" must be expanded.
This subpart should lay out a simple process that will not impose further harm and provide for the removal of graves by lineal descendants, affiliated Tribes or NHOs and require consultation to determine the best ways to manage the removal and return. Rather than following NAGPRA, the U.S. Army has chosen to use their own internal procedures, applicable to soldiers' graves. Those regulations, adopted without regard to the fiduciary obligations central to NAGPRA and

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

7. **Ensure that Tribes obtain all information from museums and agencies, and sensitive information is protected.**

Comprehensive data sharing is central to facilitating repatriation, but the flow of information can be inadequate. Many Tribes have complained that museums and agencies will not provide all relevant collection documentation as requested. Tribes should not be burdened with compelling production of information. The regulations must clarify that agencies and museums must provide relevant documentation to Tribes and NHOs in a time period that is specific.

Any sensitive information, as understood and defined by the Indian Tribe, NHO or Indian group, must be protected from broader disclosure. Once information is shared, bilaterally, Tribes and NHOs have faced the institutions' refusal to protect sensitive information obtained during consultation from disclosure. The regulations should include language that sensitive cultural and religious information must not be a part of the record of consultation or maintained by the agency or museum without the express written consent of Tribe(s) or NHO(s) involved.

8. **Concerns about rights of Tribes that have not been federally acknowledged.**

The draft regulations properly support the rights of federally recognized Tribes, and allow for joint repatriations with multiple Tribes, which can include non-recognized Tribes. Currently, many Tribal coalitions around Indian Country include Tribes with and without federal acknowledgment working together to do what is best for the Ancestors and other cultural items. Helpfully, by eliminating the 10.11 disposition process, the draft regulations support "Indian groups" to achieve repatriation where no federally recognized Tribe is affiliated. This must apply not only to Ancestors and associated funerary objects, but to all cultural items. This further supports the purpose of the Act to benefit Tribes and Indigenous Peoples based on the wrongful appropriation of our Ancestors' bodies and cultural items needed for our health and welfare. We support this understanding of cultural affiliation as appropriate to the restoration of Ancestors whose history and connections patently predate the artificial distinctions imposed by the much more recent federal categories.

As discussed below, the statutory definition of "Indian Tribe" in the draft regulations restricts the definition provided in the Act. "Indian Tribe" is defined in the Act to include all Tribes "eligible" for federal programs and services; all eligible Tribes may not be on the federal list. Since state

recognized tribes are eligible to participate in certain federal programs and services provided for Indians, the Department should take steps to ensure that all eligible Tribes are included, as per the plain language of the Act.

V. DETAILED COMMENTS AND LANGUAGE REVISIONS

1. Subpart A – General

10.1(a): We support the improved language: "systematic process for the disposition and repatriation…" as it confirms that the singular purpose of the Act and its regulations is to RETURN Ancestors and cultural items through disposition or repatriation. Replacing the old language ("systematic process *for determining the rights* of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated") removes the implication that ignored lineal descendants', Indian Tribes' and Native Hawaiian Organizations' INHERENT rights to their Ancestors and cultural items, which continues to exist and was never taken away.

10.1(b): "Control" should not be used alone and should be replaced with "possession or control" in line with the language of the Act. Please see comments regarding "possession or control" above, and those terms defined below under comments for 10.2.

10.1(c): We are grateful for changes that include the duty of care for the federal government and museums. However, 36 CFR Part 79, which are quoted here, is another set of regulations that require amendment to strengthen this duty in line with the highest fiduciary obligation that a wrongful possessor bears pending return of such objects. We suggest adding the following language to the second sentence of this provision: "These regulations require a museum to safeguard and preserve all cultural items under its **possession or** control." We would also like to add a duty of care specific to museums that is clear and more specific than "safeguard and preserve."

10.1(d): We welcome the mandate for delivering documents but note that sensitive information must be protected. We suggest adding limitations on publicly available information, including safeguarding such material in the hands of museums or federal agencies from public review otherwise available through freedom of information laws. Tribes have frequently asked for protection of sensitive information from public access. If sensitive information cannot be protected upon delivery, we request that the regulations include express language that parties should not deliver sensitive information without the consent of the party from whom that sensitive information originated.

10.1(h): The language provided in the draft regulations is too restrictive and limits a final agency action to only these three actions:

(1) A final determination making the Act or this part inapplicable;
(2) A final denial of a claim for disposition or a request for repatriation; and
(3) A final disposition or repatriation determination.

The Administrative Procedure Act, as well as the timelines provided in the draft regulations, offer other opportunities for an APA action when a federal agency refuses to act. A party can

bring an APA action to remedy unreasonable delay or action unlawfully withheld lawsuit when an agency fails to act—where the remedy sought is action. The timelines provided in the regulations should provide regulatory deadlines for action. The regulations must reflect every opportunity to create deadlines to buttress how Tribes and NHOs can achieve federal agency compliance and successful repatriation and graves protection. As drafted, this provision may limit judicial review, or miss the opportunity to focus that review on stated regulatory infractions.

We also suggest that the Department explore mechanisms for the Secretary to achieve compliance from other federal agencies, encourage action consistent with NAGPRA and Department regulations, and to correct those agencies that fail to act in accordance with the law. An executive order may be best to achieve federal agency success with NAGPRA, especially for agencies, such as the military, outside DOI.

10.2 - Definitions

Thank you for reorganizing the definitions section alphabetically! We request changes, or are providing comments, for the following definitions only:

Acknowledged aboriginal land. Every inch of the United States is acknowledged aboriginal land. Acknowledgment of aboriginal lands is also evidenced inter-Tribally between and among Native Nations. The draft regulations already utilize such intertribal acknowledgment of aboriginal land to determine affiliation (see draft at 10.3(a)). We request that "acknowledged aboriginal land" incorporate a new subsection (6) as follows: "Written recognition between and among Indian Tribes acknowledging aboriginal land of another Indian Tribe utilizing information, such as oral tradition, that supports cultural affiliation (see 10.3(a))."

Subsection (5) of this definition inappropriately introduces a burden of "providing clear and convincing information." That phrase should be deleted. The standard should be the same "reasonable" standard used to determine cultural affiliation – since the purpose of this term is to support affiliation and repatriation or disposition. The revision should not be limited to federal or foreign documentation and should incorporate the other information types expressly the sources already listed in the Act and its regulations, including oral tradition, history, other expert opinion as supporting affiliation and repatriation or disposition.

Consultation. Consultation is currently defined in the draft as a process of exchanging information and open discussions; it has also been defined under other federal law as a mere procedural requirement. Thus, the process for determining affiliation and repatriation is often thwarted because museums and federal agencies view consultation under NAGPRA as a mere procedural box to check off. This generic procedural definition for consultation is insufficient to convey the requirements for Tribal and NHO involvement to achieve repatriation and disposition.

The Department's procedure should enumerate a meaningful process for achieving a determination of cultural affiliation as inherent right of Tribal self-government and self-determination. The central purpose of the process must focus on Tribal inherent rights over our own cultural heritage, and the presumption that the Tribe or NHO is the rightful owner of Ancestors and cultural items.

Given the absolute remedial, restorative purpose of NAGPRA, consultation must be defined

differently from other contexts. Consultation, for NAGPRA purposes, must be defined to include the presumption of Tribal or NHO ownership and rightful caretaking responsibilities for Ancestors and cultural items. Again, the only exception to this is where an agency or museum has a "right of possession."

Control. The proposed "control" definition problematically assumes that the current holder of an Ancestor or cultural item has legitimate legal interest ("sufficient legal interest"). Without a statutorily determined "right of possession," agencies and museums possess no legal interest over Ancestors and cultural items. As such, the Act acknowledges the special government-to-government relationship to provide restitution as a remedy from the taking of Ancestors and cultural items without rightful owners' authorization or consent at the time of alienation. Without such "right of possession," the holder has no more than "naked" possession or control, which cannot imply any legal interest, much less "sufficient legal interest."

Custody. "Custody" is not a term used in the Act. Considering our comments above and our specific revisions below about "possession or control," the term "custody" is not needed to implement the Act and should be eliminated to avoid risk of confusion.

Disposition. We are grateful that this term will no longer be used for culturally unidentifiable Ancestors and burial belongings pursuant to the disposition process under the current 10.11, and now is the term used for the graves protection provisions of NAGPRA.

Federal lands. To carry out the purposes of NAGPRA, the proper definition of Federal lands should be broadened to incorporate the increasingly urgent concerns for repatriation of Native children who did not survive their forced boarding school experience. Many of those graves are unmarked, and only now being searched for and discovered. While a few boarding school sites remain on federal or Tribal lands, other boarding schools and their marked and unmarked cemeteries have been turned over to states, churches or private ownership. Regardless of the current land status surrounding those graves, they contain children whose presence is the direct result of federal educational programs, federal school funding and shameful assimilation policies. The United States cannot evade responsibility by transferring title to land that holds children's graves, or for having provided funding that resulted in those children's deaths. We believe the federal government retains a fiduciary responsibility for the repatriation of those children to their relatives and affiliated Tribal Nations or NHOs. Providing a definition of federal lands that includes marked and unmarked graves of victims of federally owned or funded boarding schools is necessary to pre-empt state laws that may not provide an efficient and appropriate process for repatriation.

Funerary object. We agree that redefining "associated funerary object" to remove the requirement that the Ancestor and their burial belonging both be held by a single federal agency or museum supports the purpose of NAGPRA and better facilitates repatriation where collections have been split between institutions. Thank you!
The Act itself does not invoke November 16, 1990 to define either associated or unassociated funerary objects. Utilizing this date in the regulations to carve out what is an associated or unassociated funerary object unnecessarily restricts repatriation of a funerary object from a split collection. This result would directly conflict the proposed language for associated funerary object: "Objects made exclusively for burial purposes…are always associated funerary objects regardless of the location or existence of any related individual human remains." We

recommend that the Department delete the date of enactment. Ancestors and their objects may have been separated prior to 1990, but that does not change how the Act has defined these terms, which should not be restricted.[10]

In practice, the Act's definition of "unassociated funerary object" is much too restrictive, requiring the object to be identified with a specific burial, specific human remains, or lineal descendent. New regulations should incorporate improved understanding of the scope of burial contexts that Tribes and institutions have achieved through decades of t repatriation efforts. As a result, the class of items today considered to be unassociated funerary objects has grown. But dealers and auction houses often sell **known** funerary objects, evading responsibility by citing NAGPRA's "unassociated funerary object" definition to exploit the inadequacy of the definition and to hide from potential buyers that the item was taken from a grave. Tribes and NHOs – as well as institutions – more often than not know what types of items are included in burials. The fact that there is not a known Ancestor or known lineal descendant should not prevent repatriation of these belongings that were taken without a "right of possession." While the regulations may not be able to correct the statutory definition, the flaw stands directly in opposition to the understanding that such items cannot be rightfully possessed by anyone other than the affiliated Tribe or NHO. The closest interim relief is to use the regulations to broaden the ability to establish associated funerary objects.

Finally, categories of cultural items must be defined as understood by the affiliated Tribe or NHO and not by the museum or federal agency. The Tribe or NHO is the primary expert to determine whether an item falls within a category of "cultural item". The statute provides a remedy for harms borne by Tribes and NHO's, and the classes of harm should accord with their cultural understanding. To do otherwise would be to grant museums and agencies the power to impede restitution and prolong the harm. Moreover, the Tribe or NHO retains inherent authority and jurisdiction over their own cultural heritage – this decision-making has not been and should not be delegated to an institution.

Geographical affiliation or geographically affiliated. First, we do not agree with a new category of affiliation called geographical affiliation, as expressed in our comments above, and do not believe this definition is needed. Moreover, as proposed, the language is critically unclear. We are concerned that this definition does not consider Tribes that have been removed and a different Tribe has adjudicated title to those lands today. In addition, in subsection (1), "at the time of removal" does not clearly indicate whether the phrase refers to the time the cultural item was removed or the time the Tribe was removed. If a Tribe was removed from its homeland before the cultural item was removed, and succeeded by another Tribe, then this vague definition would obscure the identity of the likely culturally affiliated Tribe.

Indian Tribe. We request that you return to the statutory definition of "Indian Tribe" by making the following revision: "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.)), that is eligible for special programs and services provided by the United States Government to Indians because of their

[10] A specific time stamp, under NAGPRA, has less bearing than the fact of the wrong to be addressed, as recognized by the Act's "right of possession" standards, which tracks entitlement back to the initial unauthorized alienation, whenever occurring.

status as Indians~~, as evidenced by its inclusion on the list of recognized Indian Tribes published by the Secretary under 25 U.S.C. 5131~~

The statutory definition specifically includes "any tribe . . . that is eligible for special programs and services," which includes state recognized tribes (e.g., NAHASDA, LIHEAP, Small Business Administration preference for federal contracting). Because state recognized Tribes are "eligible" for federal programs because of their status as Indians, then state recognized Tribes are included in the definition of Indian Tribe and entitled to seek relief under NAGPRA. The proposed amendment is improperly restrictive and should be deleted. Museums and federal agencies should be advised that state recognized Tribes must be included in the NAGPRA process.

Lineal descendant. Please replace the term "admixture" with "comingled."

Native American. We think the proposed definition appropriately broadens the term to include "people" and "culture" indigenous to the United States, beyond the connection to a specific Tribe. We hope this will prevent an institution, court or agency from declaring that an Ancestor is not "Native American" without connection to an "Indian Tribe." However, the Act should also be amended to reflect that "Native American" "means of, or relating to, a tribe, people, or culture that is **or was** indigenous to the United States."

Object of cultural patrimony. This term should include language that clarifies what party has authority to determine what is an object of cultural patrimony: "*as understood and defined by the Indian Tribe, NHO or Indian group*."

Categories of cultural items must be defined as understood by the affiliated Tribe or NHO and not by the museum or federal agency. The Tribe or NHO is the primary expert to determine whether an item falls within a category of "cultural item." Moreover, the Tribe retains inherent authority and jurisdiction over its own cultural heritage – this decision-making should not be delegated to a federal agency or museum.

Possession. Possession is no longer defined in the draft regulations, although the Act itself uses the term, specifically together with "control" as "possession or control." As we note above, a definition of "possession or control" should stress that neither possession nor control imply any legal interest. Rather, naked – unjustified – "possession or control" identifies the party who must carry out NAGPRA obligations as an identified fiduciary responsibility as delegated by statute and regulations, to ensure that the wrongfully detained item is appropriately restored. "Possession and control" should be defined together, to reflect their unity in the Act. If an agency or a museum has either "possession or control," then it is equally obligated to develop inventories or summaries under the law.

"Possession or control" might be better defined as a single term to mean: lacking any legal interest or ownership but identifying the federal agency or museum obligated to provide inventories and summaries of cultural items; a naked possession or control.

Moreover, any cultural items that are a part of an exhibition or curation facility for an agency or museum that are on loan or for storage purposes must be included in the inventories or summaries of the museum or agency with "possession or control." A federal agency or museum

must not exploit a loan or other temporary arrangement to obfuscate or evade the requirements of the Act. All Ancestors and cultural items in the "possession or control" of the agency or museum should be disclosed.

Repatriation or repatriate. This definition should recognize the correct understanding of "control," discussed above. Repatriation is not a transfer of legal interest. Instead, repatriation is recognition and acknowledgment of rightful ownership, and a reunification of rightful possession with the Tribe, NHO or lineal descendant. In other words, the museum or federal agency that cannot prove a "right of possession" must expeditiously recognize Tribal or NHO control and legal interest and facilitate repatriation.

Sacred object. We request the following change and strikeouts to this definition: "Sacred object means an object that is a specific ceremonial object needed by a traditional religious leader for the practice of traditional Native American religion by present-day adherents, *as understood and defined by the Indian Tribe, NHO or Indian group or its traditional religious leadership.* ~~While many items might be imbued with sacredness in the eyes of an individual, this term is specifically limited to objects to be used in the continued observance or renewal of Native American religious ceremonies.~~"

Categories of cultural items should be defined as understood by the affiliated Tribe or NHO and not by the museum or federal agency. The affiliated Tribe or NHO is the primary expert to determine whether an item falls within a category of "cultural item." Moreover, the Tribe retains inherent authority and jurisdiction over its own cultural heritage – this decision-making should not be delegated to a federal agency or museum.

Summary. This definition should be revised as follows: "Summary means a written description of a holding or collection that **may** contain~~s~~ an unassociated funerary object, sacred object, or object of cultural patrimony.

Traditional religious leader. The term should include "*as understood and defined by the Indian Tribe, NHO or Indian group or its traditional religious leadership*." This is not a term that should be interpreted by the federal agency or museum.

10.3 – Cultural Affiliation

We believe the neither the current nor the proposed definition of, and criteria for "cultural affiliation" fully comports with the language of the Act. The regulatory structure, in both iterations, unnecessarily burdens the work of Tribes, NHOs, agencies and museums and overcomplicates the decision-making. Both versions improperly use language from the legislative history, contradictory to express statutory language, to undermine the statutory process set forth in the Act. We propose that a simple reorganization of the information to provide clarity:

> Throughout this part, cultural affiliation is used as a term to define a connection between a cultural item and a present-day Indian Tribe or Native Hawaiian organization. That connection does not require additional scientific or academic research, or scientific certainty, and relies on existing information associated with the holding or collection, including geographic information along with the results of Tribal consultation.

> Cultural affiliation is established in consultation with Tribe(s) or NHO(s) by using information that exists with the holding or collection to reasonably trace a relationship of shared group identity between present-day Indian Tribe(s) or Native Hawaiian organization(s) and an identifiable prehistoric or historic earlier group connected to the cultural item.
>
> The process of determining cultural affiliation is collaborative between an agency or museum and Indian Tribes or NHOs to achieve the goal of repatriation or disposition.

Achieving a finding of cultural affiliation under the law should not burden a Tribe, a museum, or an agency, and it should not be adversarial. There is no need to invest in additional archaeological or anthropological research to find scientific proof of affiliation. Instead, cultural affiliation should be a reasonable determination based on known information about the collection and the results of Tribal consultation (as we have defined above). If a Tribe and an institution mutually wish to perform more comprehensive investigations about Ancestors or cultural items, NAGPRA does not prevent that effort, see 25 U.S.C. § 3009, but it most certainly does not require it.

Because Congress established a simple process to find cultural affiliation, we do not believe a separate geographic category is necessary. However, we do believe a special process is needed to correctly repatriate the Ancestors and associated funerary objects that are on culturally unidentifiable inventories. See additional comments in the appropriate subpart below.

10.3(c). We strongly support this proposal to redefine and acknowledge that multiple Tribes or NHOs can be culturally affiliated. Museums and agencies have exploited the absence of such provision as justification to hold Ancestors and other items as unidentifiable – even though affiliation is established to multiple Tribes or NHOs. While some institutions that have worked well with affiliation to multiple Tribes, other institutions still refuse to do so. This provision will eliminate this egregious practice by some institutions who refuse to implement repatriation established affiliation to multiple Tribes or NHOs. The provision appropriately and clearly distinguishes between joint requests versus competing claims to support those claims where there are no conflicts.

This collaborative work between Tribes and NHOs should redirect NAGPRA grants from interminable museum disputes and consultation grants that do not lead to repatriation – and instead to fund collaborative work among Tribes and NHOs to finalize inventories and effectuate repatriations.

2. Subpart B – Graves Protection Provisions

Change the title of this subpart to: "Graves Protection." This subpart is currently titled "Federal or Tribal Lands after November 16, 1990." The Act and its regulations are unclear about what provisions apply to the "Graves Protection" and the "Repatriation" provisions. We request that the regulations lead the reader directly where they need to go by clarifying the subpart title in plain language. In other words, the "Federal or Tribal Lands after November 16, 1990" title does not make clear that this subpart applies to "cultural items" that are currently in situ on federal or Tribal lands, otherwise known and considered the "Graves Protection" provisions of the Native

American Graves Protection and Repatriation Act. This change of title would support the purpose of the subpart and plain language requirements.

10.4. The language attempting to create a Fifth Amendment taking exception to graves protection on Tribal lands is contrary to the Act and offensive to its human rights goals. "Tribal lands" is defined by the Act as all lands within the exterior boundaries of the reservation. This proposal seems intended to carve out lands that may be private lands within the exterior boundaries of a reservation. But the owner of private land within the boundaries of the reservation cannot be deemed to have a property right in the burial of a Tribal Ancestor or to desecrate Tribal graves. That right remains with the Tribe, which has inherent jurisdiction over its cultural heritage, regardless of where it lies. There is no basis for using these regulations to diminish Tribes' inherent civil regulatory jurisdiction over conduct of non-Indians on fee lands in cases that would threaten Tribal health and welfare, including their human and civil rights to practice their religion and cultures and bury their dead.

10.4(b). Every agency should be required to develop a comprehensive agreement with Tribes and NHOs regarding lands managed by that agency. This is in line with Executive Order 13175 and would establish a consistent management plan and treatment aimed at protecting Ancestors and cultural items, as well as supporting principles acknowledged by Congress in the American Indian Religious Freedoms Act, other federal law as well as international covenants and human rights norms.

10.4(b)(1)(iii) & (b)(2). On Tribal lands, the Tribe must be able to assert and enforce its own laws for protecting areas within its jurisdiction. Any comprehensive agreement regarding Tribal lands must follow Tribal laws, with written consent to any excavation at a minimum.

10.5. "Reasonable effort to protect" must be better defined. Section (b)(3) proposes: "to secure and protect the cultural items, including, as appropriate, stabilizing and covering the cultural items if they are in situ." Please incorporate a specific standard or best practice that increases the due diligence that is required to protect. These changes should be made where applicable throughout the graves protection provisions.

10.5(b)(4). Written documentation should be sent immediately and not later than 24 hours. Written communications can occur by text or email to timely alert a federal or Tribal official and initiate the appropriate response.

10.5(c). This provision would allow up to 8 days to pass (not including weekends or holidays, extending the range up to 14 days) before the agency must ensure that a reasonable effort has been made to secure and protect cultural items and confirm ground disturbing activity has stopped. A lot of damage can occur in one week and even more in two. We strongly recommend that this provision allow no more than two days. Additionally, we suggest shortening the time in (b)(4) to send written documentation – especially since written documentation can be sent immediately by text or email.

10.5(d) & (e). "Potential need for excavation" is not defined. Both (d) and (e) allow a federal official on federal lands to unilaterally determine that excavation is needed, allowing activity to resume without first consulting with a Tribe or NHO. Delaying the participation of Tribe(s) or NHO(s) until after a federal decision is in place can irreparably harm their inherent rights over

their cultural heritage.

10.5(e). This proposal would limit Tribal consultation under 10.6(b) or Tribal processes under 10.6(a) to only 30 days. This constrains the ability for the parties to develop a timeline for consultation, among other elements required under 10.6. Without sufficient time, Tribes will not have time for substantive consultation and to determine when excavation can resume. See comments above regarding consultation.

10.6(a). This proposal does not address Tribal concerns where one federally recognized Tribe resides on acknowledged aboriginal lands of another Tribe. Any Tribes or NHOs affected by excavations or discoveries on acknowledged aboriginal lands, regardless of that Tribe's present location, should be included in the consultation for discoveries and excavations on those lands.

10.6(b)(1)(i)(D). On federal lands, consultation parties should include all Tribes and NHOs who have an acknowledged aboriginal land connection (which includes intertribal acknowledgment), as well as "cultural relationship."

10.6(b)(1)(iii). We are concerned with the 30-day timeline mentioned in 10.5(e). Particularly, if a Tribe or NHO does not receive the notice and therefore cannot submit a written request to consult, whether that would end the requirement to continue to keep that Tribe or NHO in the written notification and consultation processes. The process should ensure that Tribes can be included in consultation as long as possible and not be cut out of the process, unless the Tribe or NHO affirmatively consents to being removed.

Moreover, it is not clear why a Tribe or NHO that has been invited to consult must submit a written request to consult thereafter. Again, this language is confusing and seems to create a procedure for no reason – especially if the goal is to ensure that all Tribes or NHOs continue to receive notices for consultation and other information. If a Tribe or NHO does not submit a written request to consult after being invited to consult, it should not be removed from future consultation or notices.

10.6(b)(3). The provisions that apply to federal and Tribal lands in Hawaii should not state "federal and Tribal lands" and should always state "federal and Tribal lands in Hawaii" to avoid confusion.

10.7. Two years is too long. Sections 10.4, 10.5 and 10.6 lay out consultation processes that should be completed sooner. Moreover, if a federal agency is ultimately unable to reasonably determine the lineal descendant, Tribe or NHO for disposition, the Ancestors or cultural items should not be considered unclaimed, unless no Tribe or NHO (including non-recognized Indian groups) has claimed connection to the site.

10.7(c). This section fails to protect Tribes who have been removed from their original homelands and other Tribes currently reside on those Tribal lands. An additional provision should be included that provides a process by which a removed Tribe can petition the Department to stay the disposition and provide a determination on cultural affiliation.

10.7(d). When an agency fails to make a disposition determination it should not report the Ancestors or cultural items as "unclaimed" unless there is actually no Tribe or NHO that will

accept the disposition.

10.7(d)(5). It is insufficient to state merely that sensitive information will be protected from disclosure to the extent consistent with applicable law. We do not think that applicable laws have been sufficient, as agencies have refused to use FOIA to protect sensitive religious and cultural information. We request a provision that expressly prevents the agency from entering into its records any information that is identified by the Tribe or NHO as sensitive.

10.7(e). "Unclaimed" should be limited to the absence of a claim, not government uncertainty. This provision should be revised to read "If no lineal descendant, Tribe or NHO has claimed disposition, then the federal agency or DHHL must report the cultural item as unclaimed." Again, the agency is *required* to determine a lineal descendant, Tribe or NHO. The regulations provide a process for Tribes or NHOs to jointly make a claim, and there is also a process for an Indian group to make a claim. If there is a conflict among Tribes, the procedures provide a remedy. This process should ensure that "unclaimed" is limited to the absence of a claim.

In no event is federal action to unilaterally reinter cultural items preferable to transfer to an Indian group. Such transfer to an Indian group, should be prioritized over an agency reinterring cultural items unilaterally.

10.7(e)(2)(i)(B). Though the graves protection provisions provide disposition for "cultural items," this part allows an Indian group to make a claim only for Ancestors and their burial belongings. The process should permit claims for all types of cultural items enumerated in the Act by any Indian group that has a connection to those items, where a lineal descendant, Tribe or NHO has not claimed such a connection.

3. Subpart C – Repatriation Provisions

This subpart is currently titled "Museum or Federal Agency Holdings or Collections." We suggest simply replacing that title with "Repatriation" to better identify its content and purpose. Repatriation is the goal, and museums and agencies are merely the institutions charged with carrying out that goal. Changing the title would also shift the focus from museum and agency interests back to the interests of Tribes and NHOs. This change of title would support a plain language understanding of the regulations.

Inventories are intended to locate and track items eligible for repatriation. Such inventories should not be limited to current holdings, but should also include information held by the institution about items that may have been transferred, stolen, sold or removed. Thus, inventories and summaries would require agencies and museums to provide documentation on any cultural items that have been transferred, traded, sold, or were lost or stolen, during any period of time, and all information about the transfer including trade or transfer to international institutions. Though NAGPRA may not provide a clear remedy for cultural items removed from an agency or museum before November 16, 1990, this information should be provided to Tribes and NHOs as part of the inventory and summary processes. The information would support law enforcement efforts against trafficking in which other federal, state or Tribal laws may apply. We understand that there are institutions that have not disclosed this information to Tribes and NHOs, which may affect Tribal and NHO rights to cultural heritage. Tribes and NHOs must be provided information to enhance their ability to seek relief from subsequent holders.

10.8 General

As defined in the Act, an agency or a museum with either "possession or control" of a holding or collection is obligated to implement the repatriation provisions of the Act. Please see our comments in Part IV above. The terms and provisions that create a new process for "control" or "custody" should be deleted consistently throughout. Thus, if a federal agency will not undertake NAGPRA responsibilities, the museum that is curating the cultural items is also obligated to do so. This eliminates evasion of responsibility to ensure completion of the inventory and summary processes. We suggest this as partial remedy for the problem of dilatory federal agency consultation and cooperation, as documented eleven years ago in the General Accountability Office report.[11] Were the joint and several repatriation obligation of "possession or control" explicit in the regulations, museums and agencies would more likely reach agreements to cooperate to complete these tasks.

Finally, as discussed above, "possession or control" must be defined as a "naked" possession or control, similar to a bailment where the museum or agency are under an obligation to protect those items until the owner is determined and rightful possession restored. Pursuant to NAGPRA, the museum or agency must provide information on all its holdings and collections including loans and other arrangements. The only exception to repatriation for any cultural items in a museum or federal agency's holdings or collections would be where the museum or agency can prove a "right of possession."

10.8(d). In line with comments above in Part IV, and with respect to subpart D regarding Review Committee responsibilities, a party should be able to bring a request to the Review Committee to facilitate the identity or cultural affiliation of cultural items, or the return of such items, or to facilitate the resolution of any disputes among Tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums. "Informal conflict resolution" is not a term utilized in the Act. Instead, the Review Committee has the authority to make findings that are unilaterally brought by one party, or to resolve disputes among multiple parties.

10.9 Summaries

We are pleased to see clear timelines included in the process. These timelines are necessary as a marker of compliance.

The number of items in the holdings and collections of museums and agencies has made the summary process onerous. But even so, the regulations must focus on the fact that these items, as defined, likely were taken without the right of possession. The process requires efficient regulations that do not overly burden Tribes and NHOs. All concerned must understand and treat consultation as a collaborative process in which Tribes and NHOs are the experts of their own cultural heritage.

In line with this understanding, museums and federal agencies may not possess the information to determine whether an object is a cultural item covered by NAGPRA. The Act does not confer that decision upon the museum or agency. Instead, it states that the museum or agency shall provide a written summary based on available information, and that process is to be followed by

[11] Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act, GAO-10-768. Publicly Released: Jul 28, 2010.

consultation. 25 U.S.C. §§ 3004(a) & (b). In general, such summaries should be transparent and inclusive about the scope of Native American collections and holdings and include accession information, as museums and agencies may not have information necessary to determine the category of a cultural item. Summaries must include all items that constitute cultural items *as that category is understood and defined by the Indian Tribe, NHO or Indian group*." Tribes and NHOs are the primary experts of their own cultural heritage.

Moreover, section 10.10 regarding inventories provides a process whereby "Indian groups" may request repatriation of Ancestors and their burial belongings where a lineal descendant, Tribe or NHO has not been affiliated. Section 10.9 regarding summaries does not provide a duplicate process to allow "Indian groups" to obtain sacred objects, objects of cultural patrimony and unassociated funerary objects – which are sensitive items defined as requiring the voluntary consent of an authorized individual or group to transfer the right of possession. If a museum or agency does not have the "right of possession" and there is an Indian group that does, the remedy of repatriation must be provided for these cultural items. To do otherwise would be unconscionable.

(a)(1). The summary provided to the National NAGPRA Program should provide the full scope of the museum or agency's Native American holdings or collections, as the museum or agency may not have enough information or expertise to appropriately categorize cultural items; Tribes and NHOs are the experts of their own cultural heritage. This summary should be considered an initial summary, pending consultation necessary to develop a final summary of appropriately categorized cultural items, including cultural affiliation.

(b)(1)(iii). We believe a "geographically affiliated Indian Tribe or NHO is not appropriate as stated previously.

(b)(3). The process of requiring a written request for consultation after an invitation to consult is confusing. We are concerned that this requirement may, by inference, allow the museum or agency to stop reaching out to a Tribe or NHO if the Tribe or NHO does not submit a written request for consultation in response to an invitation to consult. A Tribe or NHO should always be allowed into the consultation.

(d)(3)(i). Again, the definitions of these cultural items should be defined as the Tribe or NHO defines or understands these items as they are the experts of their own cultural heritage.

(e). The proposal is for an unnecessary and improper adversarial process to find flaws in a Tribe or NHO's request for repatriation – mobilizing all the information in the agency or museum's possession in a unilateral fact-finding endeavor. Instead, earlier in the process, that same information should be included in consultation to advance a collaborative effort between Tribes or NHOs and institutions to determine appropriate cultural affiliation and the categorization of the cultural items, a process designed to lead to repatriation. The goal of all consultation and collaboration must be to support a determination that leads to repatriation, especially considering that cultural items (as they are defined) were removed without a right of possession.

(e)(3). This provision should spell out what the museum or agency must prove and the standard required to prove it. To overcome the presumption of a duty to repatriate, the museum or agency must prove – by a preponderance of evidence – that they had the right of possession,

which was given through the original acquisition by a person or group with the authority to alienate the cultural item. This section should emphasize the evidentiary standard, that it is borne entirely by the institution to the types of evidence acceptable in establishing a prima facie case. Additionally, the section should discuss the process by which the Tribe or NHO might contest the assertion, including types of evidence, and the clarification that the Tribe or NHO *does not bear a primary burden of proof.* Finally, the regulations should provide a process by which the Review Committee or the Secretary makes a final decision whether the "right of possession" has been proven to justify a repatriation exception.

(f)(2). There should be a timeline for the National NAGPRA Program to approve publication or return the submission of the federal register notice.

(g). The repatriation statement shall acknowledge ownership to the Tribe(s) or NHO(s). The repatriation statement cannot convey "control," or any legal interest as defined in the draft regulations because the museum or agency has merely a naked possession or control, one which wrongfully separates the item from its rightful home. The acknowledgement should be one that emphasizes return to proper ownership, and unification of uninterruptible Tribal interests.

(g)(2)(ii). Thank you for including language requiring the protection from disclosure of sensitive information, as identified by the requestor. The invitation to protect sensitive information from disclosure should begin with the first steps of the NAGPRA process, with repeated opportunities for the requestor to renew and supplement protected material requests.

(i). Stay of repatriation. Thank you for providing an alternative to litigation to resolve a dispute. A stay of repatriation can provide time and opportunity to reach an agreement between Tribes or NHOs. Such stays must be time limited, except by consent of all parties, to avoid indefinite delay.

(i)(3). Any scientific study must be limited to a scientific study that had been undertaken and not completed by November 16, 1990. The plain language of the Act and repeated in this section confirms this: "indispensable for *completion* of a specific scientific study, the outcome of which would be of major benefit to the people of the United States." Thus, the study must have been ongoing and had not been completed on November 16, 1990. This cannot be a new study, as the museum or agency does not have a right of possession. However, this would not prevent a Tribe or NHO to provide consent for scientific study.

10.10 Inventories

As discussed in Part IV above, determinations of cultural affiliation must be the product of robust consultation in a collaborative process. The language of this section should reflect that type of effort, versus an adversary process.

(a)(1). It is not clear whether the "estimated age of the human remains" means the Ancestor's age at the time of death, or the period of time in the past when the Ancestor was buried.

(b)(3). Similar to previous comments in the graves protection provisions and summaries, the process of requiring a written request for consultation after an invitation to consult is confusing. We are concerned that this requirement may, by inference, allow the museum or agency to stop

reaching out to a Tribe or NHO that does not submit a written request for consultation in response to an invitation to consult. A Tribe or NHO should always be allowed into the consultation. What if the Tribe or NHO does not receive the request for consultation?

(c)(2)(v). Should be revised as follows: "The appropriate care and handling required by the Indian Tribe or NHO of human remains and associated funerary objects. Sensitive information about the care and handling to support repatriation should not be included in the repatriation statement without consent of the Tribe or NHO."

(e). We see no justification to permit a museum or agency up to six months to provide notice that it has completed an inventory and determination of cultural affiliation. Once that task is completed, any additional time unnecessarily defers repatriation. We suggest a shorter time frame for such notice, no longer than 60 days.

(e)(2)(vi). This language should be replaced with language from the Act: "When cultural affiliation has been found, a statement that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group, has been found."

(e)(3). There should be a timeline for the National NAGPRA Program to approve publication or return the submission of the federal register notice.

(g). The proposal would establish an unnecessary and improperly adversarial process to find flaws in a Tribe or NHO's request for repatriation – mobilizing all the information in the agency or museum's possession in a unilateral fact-finding endeavor. Instead, earlier in the process, that same information should be included in consultation to advance a collaborative effort between Tribes or NHOs and institutions to determine appropriate cultural affiliation and the categorization of the cultural items, a process designed to lead to repatriation. The goal of all consultation and collaboration must be to support a determination that leads to repatriation, especially considering that cultural items (as they are defined) were removed without a right of possession.

(h). The repatriation statement must acknowledge ownership to the Tribe(s) or NHO(s). The repatriation statement cannot convey "control," or any legal interest as defined in the draft regulations because the museum or agency has merely a naked possession or control, one which wrongfully separates the item from its rightful home. The acknowledgement should be one that emphasizes return to proper ownership, and unification of uninterruptible Tribal interests.

(j)(3). Any scientific study must be limited to a scientific study that had been undertaken and not completed by November 16, 1990. The plain language of the Act and repeated in this section confirms this: "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States." Thus, the study must have been ongoing and had not been completed on November 16, 1990. This cannot be a new study, as the museum or agency does not have a right of possession. However, this would not prevent a Tribe or NHO to provide consent for scientific study.

(k). The transfer of Ancestors and their burial belongings to a Tribe, NHO or Indian group must

be prioritized over allowing the agency or museum to reinter the Ancestors and burial belongings.

(k)(2)(ii). There is no timeline for the National NAGPRA Program to approve publication or return the submission of the federal register notice.

10.11 Civil Penalties

(b). We request a reasonable timeline within which the National NAGPRA Program, DOI and/or the Secretary shall act on an allegation, take steps to investigate and resolve the complaint, including a duty to inform the complainant when an investigation is commenced, interim findings and any enforcement action, if any.

(c)(2). The inclusion of "archeological, historical, or commercial value of the cultural items involved" in the Act has been offensive to Tribes as it places value on western colonized perceptions of the Ancestors and cultural items at issue and ignores the value of the items as the Tribe understands their value. We request that the regulations prioritize the factors used to increase the base penalty such that the damages suffered by the Tribe or NHO is primary and the western notion of monetary value is minimized.

(c)(3). We are grateful for the inclusion of subsection (ii), "The museum agrees to mitigate the violation in the form of an actual or an in-kind payment to an aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization."

4. **Subpart D – Review Committee**

10.12(a). Please amend this provision as follows: "Any recommendation, finding, report, or other action of the Review Committee is advisory to the Secretary and Congress ~~only and not binding on any person~~. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by the Secretary, and in actions brought by any persons alleging a violation of the Act. Review Committee dispute resolution findings can be binding upon the parties' agreement."

10.12(b). Thank you for the changes to clarify the requirement of membership in national museum or scientific organizations and not of a "lesser geographical scope."

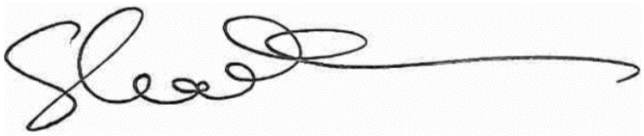
10.12(c). This provision should be titled "Monitoring and oversight authorities" and include the ability to perform all activities that Congress envisioned for the Review Committee that support the repatriation goals of NAGPRA:

- Ensure a fair, objective consideration and assessment of all available relevant information and evidence in inventory, summary and repatriation processes;
- Upon the request of any affected party, review and make findings related to the identity or cultural affiliation of cultural items, or the return of such items to encourage the repatriation goals of the Act (this may be the unilateral request of any affected party and is not conflict resolution);
- Facilitate the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable

(this is dispute resolution among multiple parties);
- Where the Review Committee finds that, through a request of an affected party or dispute resolution that a violation of NAGPRA may have occurred or is occurring, the Review Committee must advise the Secretary that a civil penalty may be advisable.

Thank you for this opportunity to provide comments. If you have any questions or concerns, do not hesitate to reach out to me at shannon@Indian-affairs.org or 240-314-7155.

Yakoke,



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