



ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Protecting Sovereignty • Preserving Culture
Educating Youth • Building Capacity

January 31, 2023

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

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

Dear Secretary Haaland,

We hope you are well and healthy. Thank you for the opportunity to provide the Association's experience and expertise in helping to shape the NAGPRA regulations. While we are grateful to see major changes, there remains too much buy-in for certain concepts that have not worked, burden Native Nations and Native Hawaiian Organizations, and even contradict the language of the Act.

This is not a typical rulemaking. The Department of the Interior is seeking to correct longstanding problems with the implementation of the Native American Graves Protection and Repatriation Act, an important human and civil rights statute with the primary purpose to benefit Native Nations, Native Hawaiian Organizations and relatives of individuals whose bodies, burial belongings and sensitive cultural items have been on exhibit, in boxes, bags, and basements, researched and exploited.

This rulemaking has the potential to heal - or further harm - the human and civil rights of Indigenous Peoples from Turtle Island. These regulations also have the power to alter how Indigenous Peoples in this country are represented and viewed by the public because it will shift how museums and the government interact with us, as well as how museums and the government provide public education about us. It is in this spirit that we submit these written comments to the Department of the Interior.

There are so many positive changes in the current rulemaking - we acknowledge that there are many more than we specifically mention. We appreciate the difficult work and coordination of the Department to make vast and meaningful changes to shift the burden of NAGPRA compliance to where it belongs - with the federal agencies and museums. However, there remain substantial issues that are confusing and will continue to burden Native Nations

and Native Hawaiian Organizations (NHOs) unnecessarily if they are not amended before the final rulemaking. To that effort, the Association on American Indian Affairs is ready to answer any questions or discuss our comments if they are not clear. We all need to get this right!

To develop these comments, the Association has been working with our Tribal Partners Working Group, as well as other Native and non-Native experts in the field, over the past year and a half, so that we can best support an efficient NAGPRA practice that focuses on the remedies Congress provided to protect graves and to repatriate.

Below, we highlight what we believe to be strong and workable changes made by the proposed rulemaking that we support in Part I; and provide revised alternatives where there remain concerns in Parts II, III and in the attached addendum that includes redline revisions of section 10.3 and Subpart C regarding repatriation. We know you understand expressing these comments in writing and with sufficient detail is very difficult. If you have any questions regarding these comments, we are committed to work with you to ensure that our comments are clear and understood.

I. Important and Positive Changes We Support

Deference. Including deference in 10.1(a) is a positive change to improved implementation and we hope this will decrease the burden on Native Nations.¹ However, as we have experienced from the current regulations, having a strong introductory section and supporting language in a federal register notice has not moved museums and federal agencies in the actual decision-making processes. This is likely because the individuals who are using the law are not lawyers. Therefore, we request express inclusion of “deference” in these decision-making steps to improve disposition and repatriation processes and ensure that museums (who often do not use lawyers) and federal agencies understand that deference is required throughout these processes. We have pointed out where the inclusion of “deference” is needed in the detailed comment section below and in the attached redline revisions.

Including “Customs and Traditions”. We support this new language that defers to how Native Nations: “based on customs, traditions, or Native American traditional knowledge” in the definitions for “cultural items”, “funerary objects”, “sacred objects” and “objects of cultural patrimony” as necessary changes to effectuate congressional intent.

Consultation. This is the first time “consultation” has been defined for the NAGPRA process. We concur with the included language regarding consensus and incorporating traditional knowledge. Yet, considering our comments regarding the need for “deference” language throughout the regulatory process, the consultation definition must also include it to better inform how a museum or federal agency must work with Native Nations and consider the totality of information.

The language used in the proposed rulemaking, “to the maximum extent possible,” is a unilateral standard that will be used as the institution understands the information - versus how the Native Nation understands the information. The Department has clearly indicated

¹ We are using the term “Native Nations” as short hand to include the terms “Indian Tribe” and “Native Hawaiian Organizations” collectively in the remainder of this document.

that the Act and its regulations must utilize the Indian law canons of construction - which compels interpretation, particularly in this vitally critical context of consultation, as understood by Native Nations for whom this remedial statute was enacted. Therefore, "to the maximum extent possible" must be replaced by a requirement that the consultation process defer to the Native Nation(s), their customs and traditions, and their understanding of the complex, culturally based questions at the heart of the consultation. This change - from "maximum extent possible" to "deference" - will support and advance racial equity in agency actions and programs, in accordance with the Executive Order 13985. Please see our change in Part III, below.

Civil Penalties. The civil penalty provisions have been improved by removing the previous limit on NAGPRA violations to nine enumerated violations. The civil penalty provisions have been further improved through the inclusion of subpart (c)(2)(i) that allows penalty amounts to be increased based on the "ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization"; and subpart (c)(3)(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."

Removal of CUI and 10.11. We are grateful for the removal of "culturally unidentifiable" inventories and the disposition process currently enumerated at 10.11. In the past, institutions have used the culturally unidentifiable classification to avoid the responsibility of consultation and relinquishing their holdings to rightful Native Nation hands. We will be looking forward to understanding how the National NAGPRA Program will revise its public information regarding "unaffiliated" Ancestors and funerary objects in the "CUI" inventories available on its website.

II. Continued Problematic Concepts and Provisions

Affiliation. We continue to have great concern regarding the inclusion of the new type of affiliation called "geographic" affiliation. Native Nations have expressed that this inclusion will not simplify the process but instead bring new complications and loopholes, ruining the opportunity to truly develop an efficient and less burdensome NAGPRA practice. As expressly provided by the Act, "cultural affiliation" need only include one type of information, along with consultation, that reasonably points to a shared relationship. That evidence can be geographic information. The Act thus *incorporates* geography as a starting point to identify consulting parties, but does not support elevation of geographic information as a separate basis for determination of affiliation.

By defining affiliation into two separate processes, we all risk: (1) litigation, as it is contrary to the express language of the Act; (2) creating a bifurcation in which Native Nations seek cultural affiliation (which the proposed regulations deem to be more significant than geographic affiliation) but institutions² will refuse to defer to those Native Nations' assertions - similar to the problems we have today with "culturally unidentifiable"; and (3) creating additional confusion and complications that museums can exploit. The simple solution is to have one affiliation process, which need only include one line of information (which can be geography) to show that a shared relationship is reasonable.

² "Institutions" is shorthand in these comments for "museums" and "federal agencies."

Please see our detailed narrative below and requested changes to 10.3 and Subpart C in the attached redline.

Reasonableness versus Preponderance of Evidence. The proposed rulemaking continues to confuse the use of a “reasonableness” standard with a “preponderance of the evidence.” The new regulations must mirror rather than contradict the language of the Act. If the Act is ambiguous, only then would legislative intent need to be evaluated. The Act is clear on when the “reasonable basis” standard is used in the repatriation process, and when “preponderance of the evidence” is used. See the use of “reasonable basis” standard at 25 U.S.C. 3001(2), 3002(a)(2)(C), 3003(d)(2)(C); versus the use of a “preponderance of the evidence” in very specific circumstances for determining “unassociated funerary objects” at 25 U.S.C. 3001(3)(B), when cultural affiliation “cannot be reasonably ascertained” at 3002(a)(2)(C)(2), and where cultural affiliation has not been established, then the Native Nation has the burden of showing “cultural affiliation by a preponderance of the evidence” at 3005(a)(4).

Thus, the Act itself clearly separates the use of these two different terms, with “reasonableness” clearly being a part of the consultation processes and building consensus towards disposition or repatriation; and “preponderance of the evidence” being used only when there is conflict or controversy. The “preponderance” standard in the statute is also the only thing that shifts the burden away from the museum or federal agency onto the Native Nation. Thus, “preponderance of the evidence” is reserved for the circumstance in which Native Nations have conflicting claims that could not be resolved through “reasonableness” and consultation. Museums have, and we expect that they will continue to use the “preponderance” language to improperly shift the burden away from themselves and onto the Native Nation, absolving themselves of working towards consensus through consultation and “reasonableness.”

Moreover, the plain language meaning, as well as the legal meaning, of both terms are different and are utilized differently by factfinders. The reasonableness standard is a test that asks whether the decisions made were legitimate and designed to remedy a certain issue under the circumstances at the time. Courts using this standard look at both the ultimate decision, and the process by which a party went about making that decision. It is defined in any dictionary as “not extreme” and “in accordance with reason.” “Preponderance of the evidence”, however, is much different and is an evidentiary standard required by the party who is bringing the conflict or controversy, and is borne by the party with the conflict to support their position. If you are a Native Nation, would you rather have a discussion to find what is “reasonable” based on consultation and consensus, or would you prefer to have to prove a preponderance of the evidence? They are clearly two different types of decision-making. We believe these two terms have been conflated over the decades through unchecked practices and should not continue.

Finally, the legislative history only confuses these standards. (It is important to note that the language of the final Act was different than what was in front of Congress during the congressional hearings. There were at least 7 versions of the Act.) If Congress meant to use a “preponderance of the evidence” in consultation for the primary means of deciding on cultural affiliation, it would have included that term in that part of the Act – but it did not. Instead, it chose to describe that process as finding a “reasonable connection.” Therefore,

these standards are not “similar standards” as has been repeatedly used by the Department.³ See 87 FR 63216 (Oct. 18, 2022).⁴

We strongly believe that the regulations should not move forward if they continue this line of reasoning, as it is no different than what is on the books now and will continue to place a heavy burden on Native Nations, at the outset of consultation, to prove a “preponderance of the evidence”. *Please see our requested changes to 10.3 and Subpart C of the repatriation provisions in the attached redline.*

“Possession or Control” and Custody.

The Department clearly made the point in the proposed rulemaking that “possession or control” does not connote legal title or ownership of Native American collections to the institution. However, adding the new term “custody” creates more confusion and restricts the scope of what the Act provides.

First, we do agree that “possession or control” should be defined as a phrase, which – as expressly provided in the Act – requires, either a federal agency or a museum that has *either* “possession or control”... “shall compile an inventory” and “shall provide a written summary”. 25 U.S.C. 3003(a) and 3004(a). It does not matter which the museum or federal agency has – possession or control. Whatever it is, they must compile the information. “What does the institution have possession or control of” is a separate question than whether the institution has authority to repatriate the item; the rulemaking conflates and confuses this.

Second, we do not support a process in which the museum can make a unilateral “legal determination” about whether it has “possession or control” at the outset. Instead, we support a process of transparency to understand the entirety of museum and federal agency collections. *As you will see from the detailed comments below and attached redline revisions*, possession may be singularly defined as “custody.” However, depending on the regulatory structure, separate definitions for “possession” and “control” may not be necessary.

During the January 6, 2023 NAGPRA Review Committee, member E. Halealoha Ayau stated that the framework that includes this new term “custody” is problematic and in fact not substantively different from the current regulations, because the current regulations have allowed institutions to “pre-screen” what information they provide to Native Nations. We believe that simple adjustments can provide clarity for Native Nations and the Department about what institutions really have in their collections; moreover, these changes should lessen the amount of corrections for “lost” or newly discovered items.

³ See September 29, 2021 Comments provided by the Association on American Indian Affairs in footnotes 6 and 7. We incorporate those comments here.

⁴ “In response to consultation with Indian Tribes and NHOs, the Department emphasizes that ‘a preponderance of the evidence’ is a similar standard to a ‘reasonableness’ requirement, both of which are common legal concepts. In both standards, a ‘more likely than not’ assessment is required, such that the reasonableness requirement for tracing cultural affiliation is satisfied by a preponderance of the evidence establishing cultural affiliation. Congressional report language states cultural affiliation ‘shall be established by a simple preponderance of the evidence,’ and that phrase is used in the proposed revisions.”

We have provided a solution in the narrative details below and the attached redline revisions for section 10.3 and Subsection C.

Purpose and Duty of Care. Though 10.1 is improved by the addition of deference to “customs and traditions”, the purpose could be improved by recognizing that NAGPRA provides no exceptions to disposition or repatriation unless (1) A Native Nation does not wish to have Ancestors and cultural items returned; (2) An institution is unable to repatriate an unassociated funerary object, object of cultural patrimony or sacred object because it is under the control of an entity or person that is not a federal agency or museum; or (3) The institution can prove a “right of possession” as defined under the Act.

There should be no access to or research on Ancestors or cultural items without the consent of potentially affiliated Native Nations. Otherwise, the institution is allowed to continue to profit off Native American collections that are not rightfully theirs. Thus, the duty of care should be the same as if you are caring for another’s property. The duty of care, as currently expressed in the proposed rulemaking at 10.1(d), must not rely on the institution’s determination of “maximum extent possible,” but instead prioritize the Native Nation’s understanding of duty of care; in other words, the institution must “defer” to the Native Nation. Any action taken by the institution regarding its Native American collections, such as publicly exhibiting, researching, loaning, or transferring its collections or holdings, must first require consultation and deference to the Native Nation.

Boarding School Returns. Considering the failure of some federal agencies, especially the Office of Army Cemeteries and the Carlisle Indian Industrial Boarding School, to comply with NAGPRA for the return of our children to lineal descendants or affiliated Native Nations, it is absolutely necessary to provide clear guidance that marked and unmarked gravesites that were a part of a non-Native internment – such as a boarding school cemetery – located on federal or Tribal lands, are protected under NAGPRA. The Act clearly provides a definition of “burial site” that includes “any natural or prepared physical location” where Native American relatives are buried; and provides a process that allows for the intentional removal of those gravesites. 25 U.S.C. § 3001(1) and § 3002(c).

The explanatory language provided in the proposed rulemaking is extremely helpful concerning Boarding School cemeteries, or other “modern” cemeteries, located on federal or Tribal lands. However, we do not believe this is enough to clarify the compliance required, considering that this requirement has been ignored by the Army and perhaps other federal agencies. Instead, we are asking for express language to be included in section 10.4 of the regulation, such as this: “Marked and unmarked burial sites that were a part of a non-Native internment, such as a boarding school cemetery, located on federal or Tribal lands, are included in this part.”

In addition, the process of disinterring and bringing children home from boarding school cemeteries is overly complicated under this rulemaking. We strongly recommend a separate provision within the disposition process that applies to gravesites created by non-Native institutions (such as boarding schools) that would allow for a simpler form of return, since a disinterment would be requested when the lineal descendant or affiliated Tribe or NHO is known before the excavation. We suggest language of deference, as supported in the

rulemaking, that would allow for the Native Nation to control the process and disinter their known relatives for the return journey home.

Furthermore, section 10.6 regarding excavation requires the “appropriate official” to evaluate the potential need for an excavation. There is no further clarity on what are the reasonable steps the official must make for this evaluation, leaving the decision as to whether or not there will be an excavation in federal agency hands when federal lands are involved. This does not agree with the “deference” language that Interior is promulgating elsewhere in the regulations.

Moreover, if the excavation is a disinterment of a child from a boarding school cemetery, then this provision leaves it up to the “appropriate official” - such as the head of the Office of Army Cemeteries - to make this determination without consultation with affiliated Tribes or NHOs, or lineal descendants.

Section 10.7 regarding disposition also creates more burden on the process of disposition, especially for disposition of children from boarding school cemeteries. Not only is a Plan of Action required that would address affiliation, but the federal agency in this step will also make a separate determination of cultural affiliation. For known Ancestors, this section creates a potential loophole that can delay and possibly ignore the return of known Ancestors. Again, this section should also use “deference” to Native Nations and NHOs to ensure that disposition will occur to the child’s descendants, Native Nation or NHO.

It is important to note that the priority of disposition in 10.7(a) will allow for boarding school repatriations, first by known lineal descendants, and next with the Indian Tribe or Native Hawaiian organization with the closest cultural affiliation (because the “Tribal lands” question may not be reasonable to determine affiliation in the case of children who have been relocated from their homelands). Information from institution or federal agency documentation will (hopefully) provide names or Tribal affiliation of children for these dispositions. Thus, the excavation is of a known Ancestor.

Protecting Sensitive Information. Express language that requires the institution to notify the potentially affiliated Native Nations that they will not require a Native Nation to disclose sensitive information without prior consent, and that they will protect any sensitive information that may be disclosed during consultation, is necessary to implement NAGPRA. In addition, ARPA permitting allows for FOIA exceptions to be used to protect sensitive information. Declaring that only certain types of public lands require an ARPA permit, would therefore limit the application of FOIA for the disposition processes. *Please see our detailed narrative comments below.*

Timelines Burdening Native Nation Capacity Remain Unfunded. When museums and federal agencies begin this new work under the repatriation provisions, Native Nations will be inundated at the same time with requests for consultation, as well as scouring federal register notices to make sure they can assert their rights to their Ancestors and cultural items. We strongly suggest that the Department and the National NAGPRA Program consult with Native Nations to develop information for museums and federal agencies to utilize when determining what Native Nations to contact for consultation purposes. Museums and federal

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029
(240) 314-7155 general@Indian-Affairs.org

agencies must have access to correct information at the outset of disposition and repatriation to connect geography with potentially affiliated Native Nations.

In addition, Native Nations will need to build human resource capacity to support consultation efforts with museums and federal agencies. 25 U.S.C. 3008 allows for grants to be made to Native Nations and museums to carry out this work. (There is nothing in the current rulemaking that further enumerates the grant process or opportunities.) The National NAGPRA Program must prioritize Native Nation grants to respond to consultation requests and allow for the resources needed to bring home Ancestors and cultural items.

Repatriation Processes Do Not Include Notice of When Actual Physical Repatriation Occurs. Improvement has been made to the repatriation provisions to require museums and federal agencies to provide a “repatriation statement” acknowledging the transfer of authority to the Native Nation. However, this is not actual repatriation – the physical transfer – and there is no final or concluding action necessary to document and report to the National NAGPRA Program that physical repatriation has actually occurred. *Please see our detailed narrative comments below, as well as the attached redline revisions.*

“Indian Tribe”. Simply, the language in the Act defining “Indian Tribe” is broader than the Secretary’s inclusion of Interior’s list of Tribes, which is limited to Tribes eligible for funding and services only from the Bureau of Indian Affairs. Either carrying over the Act’s definition of “Indian Tribe” (or not including a definition in the regulations in the alternative so that the Act’s definition will be used) is all that is needed in the regulations. In other words, we are requesting that the Department maintain the congressional definition (which may change over time depending on actions of many executive agencies and judicial decisions) over the Department’s definition used under its more limited authority. We are concerned with future administrations that may attempt to administratively terminate Native Nations included as part of the Interior’s Federally Recognized Indian Tribe List Act of 1994, among other concerns. We hereby incorporate our separate comments that we submitted jointly with the Alliance of Colonial Era Tribes to provide additional legal reasoning about this issue.

Civil Penalties: Anonymity and “Must”.

Changes are necessary in the regulations to protect a person’s anonymity when making a complaint, for example, in the case of an employee of a museum, and to allow more flexibility by the person making an allegation if the person is unable to provide all of the information that “must” be provided in an allegation. *Please see our more detailed comments below.*

III. Detailed Narrative Comments

Subpart A - General

10.1 Introduction

(a) Purpose.

We support the added language that museums and federal agencies “must defer” to the customs of Tribes. However, clarity and consistency throughout the regulations must be added to the proposed rule. Below are our recommendations:

- “Deference to customs and traditions” language should be defined in the regulatory text according to the Indian Law Canons of Construction, i.e., “as understood by” Native Nations.
 - We recommend: *“deference means that the museum or federal agency must give preference to the customs and traditions as the Tribe(s) understand them.”*
 - Many Nations have shared stories that institutions often claim they understand Native customs and traditions better than the Native Nation itself. If the application of deference is not clear, then the addition of “deference” will have no meaning; or will leave another loophole that institutions can exploit. Supporting a clear definition here will advance racial equity in agency actions and programs, in accordance with the Executive Order 13985.
 - 87 FR 63210 expressly states that the Indian law canons of construction apply, and the Act and its regulations are to be construed liberally in favor of Native Nations, with any ambiguity interpreted to benefit the same.
 - Include “defer to customs and traditions” in the definition of “consultation” and in language for the disposition and repatriation decision-making processes. Having one statement in the purpose section will be ignored by laypersons that are the museum and agency decision-makers; thus, to be clear to those that utilize the disposition and repatriation provisions, the language of deference should be duplicated throughout the regulations.
- The second sentence states that the Act “recognized” the rights of Tribes. The Act is a living piece of legislation that is used to currently recognize the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations. *Thus, the language should be changed from “recognized” to “recognizes” to confirm the current and continuing recognition of the rights protected by the Act.*

(b) Duty of Care. As stated in the previous section, “maximum extent feasible” must be deleted and replaced with “deference.” In addition, the duty of care as drafted fails to acknowledge the fact that a museum or federal agency does not have rightful ownership of human remains and cultural items. Therefore, the duty of care must defer to the reasonable requests of the Native Nation:

Duty of care. Prior to disposition or repatriation, these regulations require a museum or Federal agency to care for, safeguard, and preserve all human remains or cultural items in its ~~custody or in its~~ possession or control. Upon request of a lineal descendant, Indian Tribe, or Native Hawaiian organization, a museum or Federal agency must *defer to the customs and traditions of Indian Tribes and Native Hawaiian organizations as follows: the maximum extent possible:*

- (1) Consult, collaborate, and obtain consent on the appropriate treatment, care, or handling of human remains or cultural items;
- (2) Incorporate and accommodate customs, traditions, and Native American traditional knowledge in practices or treatments of human remains or cultural items; and
- (3) Limit *exhibition*, access to and research on human remains or cultural items, *as requested by potentially affiliated Indian Tribes and Native Hawaiian organizations.*

10.2 Definitions

Affiliation – This term should be deleted, and its definition be used to define “cultural affiliation.”

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 general@Indian-Affairs.org

Consultation - "Incorporating" should be replaced with "deference to"; "to the maximum extent possible" should be replaced with "as the Indian Tribe or Native Hawaiian organization understands them."

Consultation means a process to seek consensus through the exchange of information, open discussion, and joint deliberations and by ~~incorporating~~ ~~deferring to~~ identifications, recommendations, and Native American traditional knowledge, ~~as the Indian Tribe or Native Hawaiian organization understands them to the maximum extent possible.~~

Custody - The use of the term and its definition should be deleted regarding repatriation processes.

Indian Tribe - The term must mirror the language of the Act, or in the alternative, deleted from the definitions section of the rulemaking so that the definition defers to the Act's specific language.

Possession or control. We recommend the following revisions as per our comments:

Possession or control means having an ~~sufficient~~ interest in an object or item, ~~such that the museum or federal agency has been providing care, to independently~~ direction, management, oversight, or restrictions regarding the use of the ~~human remains or cultural item~~ ~~object or item~~. A museum or Federal agency may have possession or control regardless of whether the object or item is in its physical ~~possession custody. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.~~ Possession or control may be held jointly, such as in a curatorial arrangement between a federal agency and museum. Thus, they should be jointly responsible as per that agreement.

Possession or control thereby is a type of "custody" in which the institution has a "duty of care" over. A museum, since it is in receipt of federal funds, should therefore be required to disclose a full list of its Native American collections for the purposes of transparency and consultation - as well as protecting its collections from theft, among other things. Thus, it is in the museums' best interests to make public its Native American collections.

The question of whether an item is held by a person or an entity that is not a museum or federal agency should not yet be the question at this stage of the process. Instead, an institution at this stage should merely provide transparency of what is in its possession or control, regardless of where it is located or what its status may be. The issue does not become "jurisdictional" as the Department states at 87 FR 63214, unless a Native Nation is seeking return of an item that is on "loan" from a non-museum person or entity. *Please refer to the attached redlined revisions of Subpart C.*

We hope the Department is well aware that museums have been using the confusion of "possession or control" in the current regulations to not give complete information about the entirety of their collections. For example, the Field Museum has admitted that it has not provided information to Native Nations about items in its possession or control that are on loan to other institutions. The Metropolitan Museum of Art is currently holding onto

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 general@Indian-Affairs.org

information about loans that have come out of loan status and other information about agreements with private parties for perpetual loans to prevent NAGPRA's application. Museums must provide transparency regarding their collections; the Act, as well as Executive Order 13985, support this transparency.

Repatriation - This term is helpful, but for the fact that it does not include the actual physical transfer of Ancestors and cultural items.

Repatriation means a museum or Federal agency acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items in a holding or collection, **and then physically transfers the human remains or cultural items as the lineal descendant, Indian Tribe, or Native Hawaiian organization requires.**

Right of possession - This term should not include "possession or control" as it is unnecessary to the meaning and may be confusing. The term should further include important language that is expressed in the proposed rulemaking at 84 FR 63215.

Right of possession means **possession or control the human remains or cultural items were** obtained with the voluntary consent of a person or group that had authority of alienation. **Right of possession does not include, for example, consent given under duress or as a result of bribery, blackmail, fraud, misrepresentation or duplicity on the part of the recipient.** Right of possession is given through the original acquisition of:

- (1) An unassociated funerary object, a sacred object, or an object of cultural patrimony from an Indian Tribe or Native Hawaiian organization with the voluntary **and fully free, prior and informed** consent of a person or group with authority to alienate the object; or
- (2) Human remains and associated funerary objects which were exhumed, removed, or otherwise obtained with **fully free, prior and informed** knowledge and consent of the next of kin or, when no next of kin is ascertainable, the official governing body of the appropriate Indian Tribe or Native Hawaiian organization.

10.3 Cultural and Geographical Affiliation

We do not agree with the Department in its rulemaking that creating two classes of affiliation will improve the organizational structure of the regulations and align with the requirements of the Act. See 87 FR 63216. First, form over function (organizational structure over how the thing will work) should not be a priority to create this new classification. Second, considering that "geographic affiliation" is not a part of the Act (it is merely part of the initial identification process to begin consultation) and thus it is unclear how then it would better align with the requirements of the Act.

Cultural affiliation can be determined with minimal information and merely one line of information such as geography, plus consultation. Splitting this into two separate processes gives more opportunity for confusion and complication where it is unnecessary, and potentially creating additional loopholes that may be exploited by institutions.

Providing for these two different types of affiliation is also duplicative, as "cultural affiliation" may include geography. Determining "cultural affiliation" under the Act requires the institution to identify geography so that it can identify potentially affiliated Native Nations and

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029
(240) 314-7155 general@Indian-Affairs.org

consult with them. Geography and consultation is enough to make a reasonable connection of shared group identity, or “cultural affiliation,” under the Act.

Please review the attached redlined revisions to 10.3 and Subpart C, which further details how the process could be simpler and less confusing through the reliance on “cultural affiliation” based on consultation, reasonableness, and working towards consensus.

Subpart B - Protection of Human Remains or Cultural Items on Federal or Tribal Lands

Boarding School Burial Sites. Please review our comments above at pages 6-7.

10.4 General

(b) Within this subsection, “consulting party” and “requesting party” are used to mean the same thing – the Native Nation that is being consulted with. Whether the Nation is being asked to consult, or is requesting to consult, the use of these two different terms seems to create a difference where none substantively exists. Federal agencies must consult with all consulting parties. For clarity and consistency purposes, the rulemaking should use one term – preferably “consulting party.” These two terms are only used in subsection 10.4(b).

This subsection (b) expressly eliminates deference to “customs and traditions” and is contrary to Executive Order 13985. The plan of action provides that: “Determining the likelihood of discovery or excavation must be based upon previous studies, discoveries, or excavations in the general proximity of the planned activity. Information from and the expertise of Native American cultural practitioners, while not required, may assist in determining the likelihood of discovery or excavation.” (Emphasis added.) If consultation is imperative in developing a plan of action, then certainly involving potentially affiliated Native Nations to determine the likelihood of discovery should be just as significant. These provisions should be amended as follows:

Determining the likelihood of discovery or excavation must be based upon previous studies, discoveries, or excavations in the general proximity of the planned activity, **as well as deference to Information from and the expertise of Native American cultural practitioners, while not required, may assist in determining the likelihood of discovery or excavation.**

10.5 Discovery

(e) This subsection requires that the appropriate official – including a Native Nation on Tribal lands – must certify that an activity may resume no later than 35 days after receiving written documentation of a discovery. Though the language used is permissive (activity may resume), there should also be an express option that the activity may not resume, or that additional time is needed before an activity can resume. Weather and cultural sensitivity, among other things, may prevent an activity from resuming. Ideally, activity may resume within 35 days, but on determination of the appropriate official, activity may be halted, especially on Tribal lands within the United States where Tribes may have other requirements, including Tribal laws, that limit whether activity can resume. These limitations may be tied to cultural or religious practices. And as previously stated, deference should be given to Native Nations.

10.6 Excavation

This section requires the “appropriate official” to evaluate the potential need for an

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 general@Indian-Affairs.org

excavation. There is no further clarity on what are the reasonable steps the official must take for this evaluation. This leaves the decision as to whether or not there is an excavation in federal agency hands when federal lands are involved. This is contrary to the “deference” language that Interior is promulgating elsewhere in the regulations.

Moreover, if the excavation is a disinterment of a child from a boarding school cemetery, then this provision leaves it up to the “appropriate official” - such as the head of the Office of Army Cemeteries - to make this determination without consultation with affiliated Tribes or NHOs, or lineal descendants.

10.7 Disposition

Though there is a Plan of Action, and possibly a comprehensive agreement, this section creates a loophole that can delay and possibly ignore the return of Ancestors and cultural items to Tribes and NHOs. It is likely that through consultation and development of a Plan of Action or a comprehensive agreement, that the parties may decide - through consultation, consensus and deference - cultural affiliation. Thus, the need for the appropriate official to make a unilateral determination here, without consultation, consensus and deference, seems to be conflict with the purpose of the Act and Interior’s statements that NAGPRA should be understood as Native Nations understand it.

Subpart C - Repatriation of Human Remains or Cultural Items by Museums or federal agencies

Please see the attached redlined document for specific revisions related to these comments.

10.8 General

(a) A museum must be transparent concerning all Ancestors and cultural items it has “possession or control” over. This provision begins the process mandating that a museum make a “legal determination” on a case-by-case basis before it ever begins to disclose information.

This will start the repatriation process in a precarious position - Native Nations must rely on the museum’s level of transparency, which has not, after more than 32 years, been a successful strategy. During the January 6, 2023 NAGPRA Review Committee, member E. Halealoha Ayau stated that this is problematic because the current regulations have allowed institutions to “pre-screen” what information they provide to Native Nations. Thus, the initial step for an institution should be merely producing information about what it has “possession or control” of, as we have redefined “possession or control” in the definitions section above. Of course, unless Interior wishes to continue to burden Native Nations and limit transparency.

In addition, the language describing “custody” is confusing. A solution is to simply require transparency. In the alternative, though we do not prefer it, a museum should disclose everything in its “custody” and that it has a duty of care for. However, the list of what could be “custody” such as “a loan, lease, license, bailment, or other similar arrangement” leaves a loophole in which private persons and entities, as well as museums, can continue to profit off cultural items simply by creating a loan in perpetuity, or other similar arrangement to defeat NAGPRA’s human and civil rights. This is being done by several institutions, such as the Metropolitan Museum of Art.

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029

(240) 314-7155 general@Indian-Affairs.org

(b) There is no clarity why a federal agency must determine when a holding or collection came into its possession or control, and what a federal agency (and Native Nations) are supposed to do with this information. It seems that this information may be important to a cultural affiliation determination but is not relevant at this stage to dismiss whether the holding or collection is repatriatable. Perhaps more clarity is required here so that Native Nations understand why this information is important and what purpose it will be used for. If this information is not vital to the repatriation process, it is more than likely that gathering this information may indefinitely slow down federal agency consultation with Native Nations - which is already at an egregiously slow pace.

The bottom line is that this provenance information does not apply to progress consultation and the repatriation process. If Ancestors or cultural items are in the agency's "possession or control" then it has an obligation to comply with NAGPRA. This information does not change that and must not be used to limit consultation and repatriation.

Please see the attached redlined document for specific revisions related to these comments.

10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

Please see the attached redlined document for specific revisions related to these comments.

Note that in this section regarding summaries, there is no reference to "geographic affiliation." If the Department does not agree with our comments to delete this separate affiliation category, it is not clear why "geographic affiliation" is not included in the summary process for determining affiliation.

The institution must provide a clear statement in its request to consult that sensitive information will not be requested; however, if sensitive information is provided, that it will be protected from disclosure. *The revisions in the attached redlined document address this.*

Finally, please note that we have specific concerns with the Secretary's determination to allow scientific study without first undertaking consultation with Native Nations. *The revisions in the attached redlined document address this.*

10.10 Repatriation of human remains and associated funerary objects

Please see the attached redlined document for specific revisions related to these comments.

The institution must provide a clear statement in its request to consult that sensitive information will not be requested; however, if sensitive information is provided, that it will be protected from disclosure. *The revisions in the attached redlined document address this.*

Finally, please note that we have specific concerns with the Secretary's determination to allow scientific study without first undertaking consultation with Native Nations. *The revisions in the attached redlined document address this.*

10.11 Civil penalties

Within subsection (a), any allegation must include full contact information of the person making the allegation. This language may limit a person's desire to make an allegation if there are no provisions to maintain the individual's privacy or anonymity. We support changes to the language that would allow allegations to be made anonymously (to support potential whistle blowers within an institution), or at least maintained as confidential information that would not be shared with the museum or the public.

Furthermore, we have understood that the National NAGPRA Program and the new civil penalties investigator supports the investigation of allegations from Native Nations who may have minimal information to support an allegation. However, the proposed rulemaking does not reflect that intent and may be contrary to advancing racial equity in agency actions and programs, in accordance with the Executive Order 13985.

We suggest the following changes to ensure confidentiality of an alleging party, and to allow allegations to be made with minimal information:

(a) File an allegation. Any person may file an allegation of failure to comply by sending a written allegation to the Manager, National NAGPRA Program. **In order to expedite an investigation for the Secretary to review as provided for in part (b) of this part, each allegation:**

- (1) **Should Must** include the full name, mailing address, telephone number, and (if available) email address of the person alleging the failure to comply; **This personal information shall be maintained as confidential information, unless the alleging party affirmatively states otherwise in the allegation;**
- (2) **Should Must** identify the specific provision or provisions of the Act or this subpart that the museum is alleged to have violated;
- (3) **Should Must** enumerate the separate violations alleged, including facts to support the number of separate violations. The number of separate violations is determined by establishing relevant factors such as:
 - (i) The number of lineal descendants, Indian Tribes, or Native Hawaiian organizations named in the allegation and determined to be aggrieved by the failure to comply; or
 - (ii) The number of individuals or the number of funerary objects, sacred objects, or objects of cultural patrimony involved in the failure to comply;
- (4) Should include information showing that the museum has possession or control of the Native American cultural items involved in the alleged failure to comply; and
- (5) Should include information showing that the museum receives Federal funds.

10.12 Review Committee

We believe that the proposed rulemaking limits the responsibilities of the Review Committee required by the Act. The Act mandates that the Review Committee be responsible for: "monitoring the inventory and identification process conducted under sections 3003 and 3004 of this title to ensure a fair, objective consideration and assessment of all available relevant information and evidence." 25 U.S.C. 3006(c)(2). The rulemaking includes no information about how the Review Committee will undertake this enumerated responsibility, other than when there is a dispute or inquiry coming to them; the regulations provide no affirmative or proactive responsibility to ensure that oversight of repatriation process is occurring by the Review Committee. This absence of affirmative monitoring responsibilities

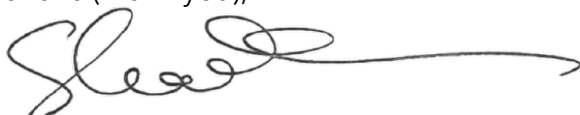
Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029
(240) 314-7155 general@Indian-Affairs.org

by the Review Committee is an example of Native Nations being positively burdened by the Act because there is no responsible party overseeing the activities under the repatriation provisions and is contrary to advancing racial equity in agency actions and programs, in accordance with the Executive Order 13985.

Thank you for your attention and time. We truly do appreciate your efforts to make NAGPRA equitable and less burdensome for Native Nations. If you have any questions or concerns, the Association may be reached at (240) 314-7155, or to me directly at Shannon@Indian-Affairs.org.

Yakoke (thank you),

A handwritten signature in black ink, appearing to read 'Shannon', with a long horizontal flourish extending to the right.

Shannon O'Loughlin, Choctaw
CEO & Attorney

BOARD OF DIRECTORS

Frank Ettawageshik (Odawa), President
Jonathan Perry (Wampanoag), Vice-President
Joseph Daniels, Sr. (Potawatomi), Treasurer
Alfred R. Ketzler, Sr. (Athabascan)
John Echohawk (Pawnee)
Bradford R. Keeler (Cherokee)
Sandy White Hawk (Lakota)
Rory Wheeler (Seneca)
Lisa "Tiger" Martin (Muscogee)

Donate at www.Indian-Affairs.org

6030 Daybreak Circle, Suite A150-217, Clarksville, MD 21029
(240) 314-7155 general@Indian-Affairs.org

Association on American Indian Affairs
Redlined revisions in line with narrative comments.

Please excuse formatting difficulties.

§ 10.3 Determining Cultural and Geographical Affiliation

Throughout this part, cultural affiliation ensures that disposition or repatriation of human remains or cultural items is based on a reasonable connection to an Indian Tribe or Native Hawaiian organization. ~~Affiliation is established by identifying the cultural and geographical affiliation of the human remains or cultural items using this section.~~

(a) *Cultural affiliation.* Cultural affiliation is identified by reasonably tracing a relationship of shared group identity between an Indian Tribe or Native Hawaiian organization and an identifiable earlier group connected to the human remains or cultural items. Cultural affiliation must be reasonable and is established through consultation with an Indian Tribe or Native Hawaiian organization by a simple preponderance of the evidence given the information available, including the results of consultation. Cultural affiliation does not require exhaustive studies of the human remains or cultural items or continuity through time. Cultural affiliation is not precluded solely because of reasonable gaps in the information. For example, cultural affiliation is reasonable where there is a relationship between an Indian Tribe(s) or Native Hawaiian organization(s) and a geographic area connected to the human remains or cultural items and confirmed through consultation.

(1) Information. One or more of the following equally relevant types of information may be used to identify cultural affiliation:

- (i) Anthropological;
- (ii) Archaeological;
- (iii) Biological;
- (iv) Folkloric;
- (v) Geographical;
- (vi) Historical;
- (vii) Kinship;
- (viii) Linguistic;
- (ix) Oral Tradition~~al~~; or

(x) Other relevant information or expert opinion, including deference to Native American traditional knowledge which alone may be sufficient-reasonable to identify cultural affiliation.

(2) Criteria. Using only the information available and through consultation, each of the following criteria for cultural affiliation must be identified, with deference given to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations:

- (i) One or more earlier groups connected to the human remains or cultural items;
- (ii) One or more Indian Tribes or Native Hawaiian organizations; and
- (iii) A relationship of shared group identity between the earlier group and the Indian Tribe or Native Hawaiian organization reasonably traced through time.

(3) Multiple cultural affiliations. An identifiable earlier group may have a relationship to more than one Indian Tribe or Native Hawaiian organization based on the information available, including geography. As two or more earlier groups may be connected to human remains or

cultural items, a relationship may be reasonably traced to two or more Indian Tribes or Native Hawaiian organizations that do not themselves have a shared group identity.

~~(b) *Geographical affiliation.* Geographical affiliation is identified by reasonably tracing a relationship between an Indian Tribe or Native Hawaiian organization and a geographic area connected to the human remains or cultural items. Geographical affiliation is established by the information available, including the results of consultation.~~

~~(1) *Information.* Existing records, inventories, catalogues, relevant studies, or other pertinent data may be used to identify the:~~

~~(i) Geographic origin of the human remains or cultural items and~~

~~(ii) Basic facts surrounding the acquisition and accession of the human remains or cultural items.~~

~~(2) *Criteria.* Using the information available, each of the following criteria for geographical affiliation must be identified:~~

~~(i) A geographic area connected to the human remains or cultural items;~~

~~(ii) One or more Indian Tribes or Native Hawaiian organizations; and~~

~~(iii) A relationship between the geographic area and the Indian Tribe or Native Hawaiian organization, based on the identification of the geographic area as:~~

~~(A) The Tribal lands of the Indian Tribe or Native Hawaiian organization;~~

~~(B) The adjudicated aboriginal land of the Indian Tribe, or~~

~~(C) The acknowledged aboriginal land of the Indian Tribe.~~

~~(3) *Multiple geographical affiliations.* A geographic area may have a relationship to more than one Indian Tribe or Native Hawaiian organization. Information used for geographical affiliation may provide information sufficient to identify cultural affiliation under paragraph (a) of this section but must not be used to limit geographical affiliation.~~

~~(e)(b) *Multiple affiliations* Joint disposition or repatriation. When cultural affiliation of human remains or cultural items is established with two or more Indian Tribes or Native Hawaiian organizations, any of the Indian Tribes or Native Hawaiian organizations may submit a claim for disposition or a request for repatriation. Two or more Indian Tribes or Native Hawaiian organizations with affiliation may agree to joint disposition or joint repatriation of the human remains or cultural items.~~

(1) Single claims or requests. Claims or requests for joint disposition or joint repatriation of human remains or cultural items are considered a single claim or request and not competing claims or requests. Notices and statements for joint disposition or joint repatriation of human remains or cultural items required under this part must identify all joint requestors.

(2) Competing claims or requests. Under §§10.7, 10.9, and 10.10 of this part, when there are competing claims for disposition or competing requests for repatriation of human remains or cultural items, it may be necessary to determine the Indian Tribe or Native Hawaiian organization with the closest cultural affiliation under paragraph (d) of this section.

~~(d)(c) *Closest cultural affiliation.* When competing requestors are unable to agree on a joint disposition or joint repatriation, or are unable to come to a consensus on cultural affiliation, then each competing requestor must show by a preponderance of the evidence that it has a stronger relationship of shared group identity with the human remains or cultural items.~~

(1) The Indian Tribe with the closest affiliation, in the following order, is:

(i) The Indian Tribe whose cultural affiliation is clearly identified, based on the totality of information available.

(ii) The Indian Tribe whose cultural affiliation is not clearly identified but is reasonably identified based on by the geographical information and any information beyond the geographic area, for example, when the human remains or cultural items were buried or removed, or the types of associated funerary objects—available, including the circumstances surrounding the acquisition of the human remains or cultural items.

(iii) The Indian Tribe whose geographical affiliation is based on the Tribal lands of the Indian Tribe.

(iv) The Indian Tribe whose geographical affiliation is based on the adjudicated aboriginal land of the Indian Tribe.

(v) The Indian Tribe whose geographical affiliation is based on the acknowledged aboriginal land of the Indian Tribe.

[no further changes in this section]

Subpart C—REPATRIATION OF HUMAN REMAINS OR CULTURAL ITEMS BY MUSEUMS OR FEDERAL AGENCIES

§ 10.8 General.

Each museum and Federal agency that has possession or control of a holding or collection that may contain human remains, funerary objects, sacred objects, or objects of cultural patrimony must comply with the requirements of this subpart, regardless of the physical location of the holding or collection. Each museum and Federal agency must identify one or more authorized representatives who are responsible for carrying out the requirements of this subpart.

(a) *Museum holding or collection.* A museum must comply with this subpart for all holdings or collections under its possession or control that contain human remains or cultural items, including a new holding or collection, a holding or collection on loan or on exhibit, or a previously lost or previously unknown holding or collection.

~~(1) A museum must determine whether it has sufficient interest in a holding or collection to constitute possession or control on a case-by-case basis given the relevant information about the holding or collection.~~

~~(i) A museum may have custody of a holding or collection but not possession or control. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.~~

~~(ii) If a museum has custody of a holding or collection, the museum may be required to report the holding or collection under paragraphs (e) or (d) of this section.~~

~~(2)~~ (b) *Good faith.* Any museum that completes repatriation of human remains and cultural items or transfers or reinters human remains and associated funerary objects in good faith under this subpart shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of the Act or this part.

~~(b)(c)~~ *Federal agency holding or collection.* A Federal agency must comply with this subpart for all holdings or collections in its possession or control that contain human remains and cultural items, including a previously lost or previously unknown holding or collection. ~~A Federal agency must determine if a holding or collection:~~

~~(1) Was in its possession or control on or before November 16, 1990; or~~

~~(2) Came into its possession or control after November 16, 1990, and was removed from:~~

~~(i) An unknown location, or~~

~~(ii) Lands that are neither Federal nor Tribal lands as defined in this part.~~

~~(e) (d) Museums with possession or control~~custody~~ of a Federal agency holding or collection. No later than [395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL~~

REGISTER], each museum that has eustody~~possession or control~~ of a Federal agency holding or collection that contains Native American human remains or cultural items must submit a statement describing that holding or collection to the authorized representatives of the Federal agency most likely to have possession or control and to the Manager, National NAGPRA Program.

(1) No later than 120 days following receipt of a museum's statement, the Federal agency must respond to the museum and the Manager, National NAGPRA program, with a written acknowledgement of one of the following:

(i) the Federal agency has possession or control of the holding or collection and will undertake the repatriation provisions under Subpart C;

(ii) the Federal agency does not have possession or control of the holding or collection and will not undertake the repatriation provisions under Subpart C; or

(iii) the Federal agency and the museum have joint possession or control of the holding or collection and will undertake the repatriation provisions under Subpart C jointly and in consultation with potentially affiliated Indian Tribes or NHOs.

(2) Failure to issue such a determination by the deadline will constitute acknowledgement that the Federal agency has possession or control and will undertake the repatriation provisions under Subpart C. The Federal agency is ultimately responsible for the requirements of this subpart for all holdings or collections under its possession or control, regardless of the physical location of the holdings or collection.

~~(d) Museums with custody of other holdings or collections. No later than [395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], each museum that has custody of a holding or collection that contains Native American human remains or cultural items and for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control of the holding or collection, must submit a statement describing that holding or collection to the Manager, National NAGPRA Program.~~

~~(e) (e) Contesting actions on repatriation.~~ An affected party under §10.12(c)(1) of this part who wishes to contest actions made by museums or Federal agencies under this subpart is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. Informal negotiations may include requesting the assistance of the Manager, National NAGPRA Program, or the Review Committee under §10.12 of this part.

§ 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

Each museum and Federal agency that has possession or control of a holding or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony must follow the steps in this section. The purpose of this section is to provide general information about a holding or collection to lineal descendants, Indian Tribes, and Native

Hawaiian organizations to facilitate repatriation.

(a) *Step 1 – ~~Complete-Draft~~ a summary of a holding or collection.* Based on the information available, a museum or Federal agency must submit to the Manager, National NAGPRA Program, a summary describing its holding or collection that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony. The museum or Federal agency shall not make a determination about what items may fall into certain categories of cultural items and instead provide transparency about its collections. Depending on the scope of the holding or collection, a museum or Federal agency may organize its summary into sections based on geographic area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the summary is comprehensive and covers all holdings or collections relevant to this section.

(1) A summary must include:

(i) The estimated number and a general description of the holding or collection, including any potential unassociated funerary objects, sacred objects, and objects of cultural patrimony;

(ii) The location including the county and state where the potential unassociated funerary objects, sacred objects, and objects of cultural patrimony were removed, if known;

(iii) The acquisition history (provenance) of the potential unassociated funerary objects, sacred objects, and objects of cultural patrimony, if known;

(iv) Other information relevant for identifying:

(A) A lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation;

(B) Any object or item as an unassociated funerary object, sacred object, or object of cultural patrimony;

~~(B)~~(C) Whether any object or item may be on loan from a party or entity that is not a Federal agency or museum; and

(v) The presence of any potentially hazardous substances used to treat any of the unassociated funerary objects, sacred objects, or objects of cultural patrimony, if known.

(2) After [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, by the deadline in Table 1 of this section.

Table 1 to §10.9: Deadlines for completing a summary

If a museum or Federal agency...	...a summary must be submitted...
acquires possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony	6 months after acquiring possession or control of the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
locates previously lost or unknown unassociated funerary objects, sacred objects, or objects of cultural patrimony	6 months after locating the unassociated funerary objects, sacred objects, or objects of cultural patrimony.

<p>receives Federal funds for the first time after [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], and has possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony</p>	<p>3 years after receiving Federal funds for the first time after [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].</p>
--	--

(3) Prior to [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must have submitted a summary to the Manager, National NAGPRA Program:

(i) By November 16, 1993, for unassociated funerary objects, sacred objects, and objects of cultural patrimony subject to the Act;

(ii) By October 20, 2007, for unassociated funerary objects, sacred objects, and objects of cultural patrimony acquired or located after November 16, 1993;

(iii) By April 20, 2010, for unassociated funerary objects, sacred objects, and objects of cultural patrimony in the possession or control of a museum that received Federal funds for the first time after November 16, 1993;

(iv) Within six months of acquiring or locating unassociated funerary objects, sacred objects, and objects of cultural patrimony after October 20, 2007; or

(v) Within three years of receiving Federal funds for the first time after April 20, 2010.

(4) After [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], when a holding or collection previously included in a summary is transferred to a museum or Federal agency, ~~The~~the museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed summary. The museum or Federal agency must submit the previously completed summary to the Manager, National NAGPRA Program, no later than 30 days after acquiring the holding or collection. The museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, no later than the deadline in Table 1 of this section and must initiate consultation under paragraph (b) of this section.

(b) *Step 2 – Initiate consultation.* No later than 30 days after completing a draft summary, a museum or Federal agency must identify consulting parties based on information available and make a good-faith effort to invite the parties to consult.

(1) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(2) An invitation to consult must be in writing and must include:

(i) The summary described in paragraph (a)(1) of this section;

(ii) The names of all identified consulting parties; and

(iii) A proposed timeline and method for consultation.

(3) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted at any time before the publication of a notice of intended repatriation under paragraph (f) of this section.

(4) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must make a good-faith effort to invite the

party to consult and must send an invitation to consult under paragraph (b)(2) of this section. An invitation to consult must be sent to new consulting parties:

(i) No later than 10 days after identifying a new consulting party based on new information; or

(ii) No later than six months after the addition of an Indian Tribe pursuant to either-Tribal entity to the list of federally recognized Indian Tribes published in the *Federal Register* pursuant to the Act of November 2, 1994 (25 U.S.C. 5131), or when an Indian group becomes eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) *Step 3 – Consult with requesting parties.* No later than 10 days after receiving a written request to consult, a museum or Federal agency must respond in writing with a proposed timeline for consultation. Consultation on ~~an unassociated funerary object, sacred object, or object of cultural patrimony~~ the draft summary may continue until the museum or Federal agency sends a repatriation statement for that object to a requestor under paragraph (g) of this section.

(1) In the response to the requesting party, a museum or Federal agency must ask a requesting party for the following information, if not already provided:

(i) Recommendations on the proposed timeline and method for consultation;

~~(i)~~(ii) How it will not seek to obtain sensitive information, but if sensitive information is shared, how it will protect that information from disclosure to the general public to the extent consistent with applicable law; and

~~(ii)~~(iii) _____ The name, phone number, email address, or mailing address for any authorized representative, traditional religious leader, and known lineal descendant who should participate in consultation.

(2) The consultation process must seek consensus, deferring to the consulting lineal descendants, Indian Tribes and Native Hawaiian Organizations~~to the maximum extent possible~~, on determining:

(i) Lineal descendants;

~~(ii)~~ (ii) Indian Tribes or Native Hawaiian ~~organizations~~ Organizations with cultural affiliation;

~~(ii)~~ (3) The consultation process must give preference to the customs and traditions as the Tribe(s) understand them on determining:

~~(iii)~~ (i) The types of objects that ~~might be~~ are considered by the Indian Tribes or Native Hawaiian Organizations to be unassociated funerary objects, sacred objects, or objects of cultural patrimony; and

~~(iv)~~ (ii) The appropriate treatment, care, and handling of unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(3) The museum or Federal agency must prepare a record of consultation that includes the effort made to seek consensus regarding the types of objects and cultural affiliation. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the museum or Federal agency must record the concurrence, disagreement, or nonresponse of the requesting parties.

(4) At any time before a museum or Federal agency sends a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section, the museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to the holding or collection. A museum or Federal agency must provide access to the additional

information in a reasonable manner and for the limited purpose of determining affiliation and acquisition history of the unassociated funerary object, sacred object, or object of cultural patrimony.

(d) *Step 4 – Receive and consider a request for repatriation.* After a summary is ~~completed~~drafted and submitted to the Manager, National NAGPRA Program, any lineal descendant, Indian Tribe, or Native Hawaiian ~~organization~~Organization may submit to the museum or Federal agency a written request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony.

(1) A request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for that unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section. A request for repatriation received by the museum or Federal agency before the deadline for ~~completing drafting~~ a summary is dated the same date as the deadline for ~~completing drafting~~ the summary.

(2) Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony are considered a single request and not competing requests.

(3) A request for repatriation must satisfy all the following criteria:

(i) Each unassociated funerary object, sacred object, or object of cultural patrimony being requested meets the definition of an unassociated funerary object, a sacred object, or an object of cultural patrimony as determined by the Indian Tribe or Native Hawaiian Organization;

(ii) The request is from a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation; and

(iii) The request includes information to support a finding that the museum or Federal agency does not have right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony. That information may be based solely on the definition of the cultural item as provided in this part.

(e) *Step 5 – Respond to a request for repatriation.* No later than 60 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor. Using all information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request for repatriation satisfies the criteria under paragraph (d) of this section. In the written response, the museum or Federal agency must state one of the following:

(1) The request meets the criteria under paragraph (d) of this section. The museum or Federal agency will submit a notice of intended repatriation under paragraph (f) of this section.

(2) The request does not meet the criteria under paragraph (d) of this section. The museum or Federal agency must provide a detailed explanation why the request does not meet the criteria and an opportunity for the requestor to provide additional information to meet the criteria. The request may not meet the criteria if the unassociated funerary object, sacred object or object of cultural patrimony is on loan to the museum by a person or entity that is not a federal agency or museum; the loan or other agreement should be provided in the response.

(3) The request meets the criteria under paragraph (d)(3)(i) and (ii) of this section, but the museum or Federal agency asserts a right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony and refuses to complete repatriation of the requested object to the requestor. The museum or Federal agency must provide information to prove that the museum or Federal agency has a right of possession to the unassociated funerary

object, sacred object, or object of cultural patrimony.

(4) The museum or Federal agency has received competing requests for repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony that meet the criteria and must determine the most appropriate requestor using the procedures and timelines under paragraph (h) of this section.

(f) *Step 6 – Submit a notice of intended repatriation.* No later than 30 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must submit a notice of intended repatriation to the Manager, National NAGPRA Program, for publication in the *Federal Register*. The museum or Federal agency may include in a single notice all unassociated funerary objects, sacred objects, or objects of cultural patrimony with the same requestor.

(1) A notice of intended repatriation must conform to the mandatory format of the *Federal Register* and include:

(i) The number of unassociated funerary object, sacred object, or object of cultural patrimony and a brief description of each object (counted separately or by lot);

(ii) The county and state where the unassociated funerary object, sacred object, or object of cultural patrimony were removed, if known;

(iii) The acquisition history (provenance) of the unassociated funerary object, sacred object, or object of cultural patrimony, including the circumstances surrounding its acquisition, if known;

(iv) The identity of each unassociated funerary object, sacred object, or object of cultural patrimony specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony, and a brief abstract of the information used to make that identification;

(v) The lineal descendant, Indian Tribe, or Native Hawaiian organization requesting repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony and a brief abstract of the information showing the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation;

(vi) Information about the presence of any potentially hazardous substances used to treat the unassociated funerary object, sacred object, or object of cultural patrimony, if known;

(vii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(viii) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(2) No later than 15 days after receiving a notice of intended repatriation, the Manager, National NAGPRA Program, will:

(i) Approve for publication in the *Federal Register* a notice of intended repatriation that conforms to the requirements under paragraph (f)(1) of this section; or

(ii) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (f)(1) of this section.

(3) If the number or identity of unassociated funerary objects, sacred objects, or objects of cultural patrimony stated in a published notice of intended repatriation changes before the museum or Federal agency sends a repatriation statement under paragraph (g) of this section, the museum or Federal agency must submit a correction notice to the Manager, National NAGPRA

Program. A museum or Federal agency is not required to submit a correction notice if there are additional pieces belonging to an unassociated funerary object, sacred object, or object of cultural patrimony previously identified in a notice and repatriation is to the same requestor. No later than 10 days after determining the new number or new identity of the unassociated funerary object, sacred object, or object of cultural patrimony, the museum or Federal agency must submit a correction notice containing, as applicable:

(i) The corrected number of [the](#) unassociated funerary object, sacred object, or object of cultural patrimony and corrected brief description of each object;

(ii) The corrected identity of the unassociated funerary objects, sacred objects, or objects of cultural patrimony specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony, and corrected brief abstract of the information used to make that identification;

(iii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(iv) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(4) At any time before sending a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony under paragraph (g) of this section, the museum or Federal agency may receive additional, competing requests for repatriation of that object that meet the criteria under paragraph (d) of this section. The museum or Federal agency must determine the most appropriate requestor the procedures and timelines under paragraph (h) of this section.

(g) *Step 7 – Repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony.* No earlier than 30 days and no later than 90 days after publication of a notice of intended repatriation, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. The repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested unassociated funerary object, sacred object, or object of cultural patrimony. In the case of joint requests for repatriation, the repatriation statement must be sent to and must identify all requestors.

(1) Before sending the repatriation statement, the museum or Federal agency must consult with the requestor on the care, custody, and physical transfer of the unassociated funerary object, sacred object, or object of cultural patrimony,

(2) After sending the repatriation statement, the museum or Federal agency must:

(i) Document any physical transfer of the unassociated funerary object, sacred object, or object of cultural patrimony by recording the contents, recipient, and method of delivery, and

(ii) Protect sensitive information, as identified by the requestor, from disclosure to the general public ~~to the extent consistent with applicable law.~~

(3) After the repatriation statement is sent, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the unassociated funerary object, sacred object, or object of cultural patrimony.

~~(3)~~(4) The museum or Federal agency must provide a final statement of physical repatriation to the Manager, National NAGPRA Program, within 30 days after the physical repatriation to the culturally affiliated Indian Tribe(s) or NHO(s), completing the repatriation

process.

(h) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony under paragraph (g) of this section, a museum or Federal agency may receive additional, competing requests for repatriation of that object that meet the criteria under paragraph (d) of this section. The museum or Federal agency must determine the most appropriate requestor using this paragraph.

(1) For an unassociated funerary object or sacred object, in the following priority order, the most appropriate requestor is:

(i) The lineal descendant, if any, or

(ii) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to ~~the priority order at~~ §10.3(d) of this part.

(2) For an object of cultural patrimony, the most appropriate requestor is the Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to ~~the priority order at~~ §10.3(d) of this part.

(3) No later than 10 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request was received and request any additional information that the competing requestors may wish to submit within 45 days of receiving the written letter. The museum or Federal agency must further inform the competing requestors that they may initiate a joint request for repatriation so that the museum or Federal agency is not responsible to choose between competing requests.-

(4) No later than 120 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

(i) The most appropriate requestor has been determined and the competing requests were received before the publication of a notice of intended repatriation. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) Submit a notice of intended repatriation in accordance with paragraph (f) of this section no later than 30 days after sending the determination, and

(C) No earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section.

(ii) The most appropriate requestor has been determined and a notice of intended repatriation was previously published. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section.

(iii) The most appropriate requestor cannot be determined, and the repatriation is stayed under paragraph (i) of this section. The museum or Federal agency must explain why the most appropriate requestor could not be determined.

(i) *Stay of repatriation.* Repatriation under paragraph (g) of this section is stayed if:

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final

resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the written statement, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section, unless a court of competent jurisdiction directs otherwise.

(2) The museum or Federal agency has received competing requests for repatriation and, after complying with paragraph (h) of this section, cannot determine the most appropriate requestor. When a most appropriate requestor is determined by an agreement between the parties, binding arbitration, or means of resolution other than through a court of competent jurisdiction, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the determination, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section.

(3) Before the publication of a notice of intended repatriation under paragraph (f) of this section, the museum or Federal agency has both requested and received the Secretary's written concurrence that the unassociated funerary object, sacred object, or object of cultural patrimony is indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States.

(i) To request the Secretary's concurrence, the museum or Federal agency must send to the Manager, National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

(A) Be on the letterhead of the requesting museum or Federal agency and be signed by an authorized representative;

(B) Describe the specific scientific study, the date on which the study ~~commenced~~will begin, and how the study would be of major benefit to the people of the United States;

(C) Explain why retention of the unassociated funerary object, sacred object, or object of cultural patrimony is indispensable for completion of the study;

~~(D)~~(D) Include information about consultation with culturally affiliated Indian Tribes or NHOs, including how the museum or Federal agency developed consensus and deferred to the Indian Tribes or NHOs to the maximum extent possible;

~~(E)~~(E) Describe the steps required to complete the study, including any destructive analysis, and provide a completion schedule and completion date;

~~(F)~~(F) Provide the position titles of the persons responsible for each step in the schedule;
and

~~(G)~~(G) Affirm that the study has in place the requisite funding.

(ii) If, after consultation with the affected Tribe(s) or NHO(s), the Secretary concurs with the request, the Secretary will send a written

concurrence and specify the date by which the scientific study must be completed.

(iii) No later than 30 days after the completion date in the Secretary's concurrence, the museum or Federal agency must submit a notice of intended repatriation in accordance with paragraph (f) of this section.

(iv) No earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section.

§ 10.10 Repatriation of human remains and associated funerary objects.

Each museum and Federal agency that has possession or control of a holding or collection that contains human remains or associated funerary objects must follow the steps in this section. The purpose of this section is to provide determinations, following consultation, about human remains and associated funerary objects to lineal descendants, Indian Tribes, and Native Hawaiian organizations to facilitate repatriation.

(a) *Step 1 – Compile an itemized list of human remains and associated funerary objects.* Based on information available, a museum or Federal agency must compile a simple itemized list of the human remains and associated funerary objects in its holding or collection. Depending on the scope of the holding or collection, a museum or Federal agency may organize its inventory into sections based on geographic area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the itemized list is comprehensive and covers all holdings or collections relevant to this section. The itemized list must include:

(1) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one;

(2) The number of associated funerary objects and types of objects (counted separately or by lot);

(3) The county and state where the human remains and associated funerary objects were

removed, if known;

(4) The acquisition history (provenance) of the human remains and associated funerary objects, if known;

(5) Other information relevant for identifying a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural ~~or geographical~~ affiliation;

~~(5)~~(6) Whether any human remains or associated funerary object may be on loan from a party or entity that is not a Federal agency or museum; and

~~(6)~~(7) The presence of any potentially hazardous substances used to treat any of the human remains or associated funerary objects, if known.

(b) *Step 2 – Initiate consultation.* Based on information available, a museum or Federal agency must identify consulting parties and make a good-faith effort to invite the parties to consult.

(1) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(2) An invitation to consult must be in writing and must include:

(i) The simple itemized list described in paragraph (a) of this section;

(ii) The names of all identified consulting parties; and

(iii) A proposed timeline and method for consultation.

(3) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted at any time before the publication of a notice of inventory completion under paragraph (e) of this section.

(4) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must make a good-faith effort to invite the party to consult and must send an invitation to consult under paragraph (b)(2) of this section. An invitation to consult must be sent to new consulting parties:

(i) No later than 10 days after identifying a new consulting party based on new information; or

(ii) No later than two years after the addition of an Indian Tribe ~~entity pursuant to either~~ the list of federally recognized Indian Tribes published in the *Federal Register* pursuant to the Act of November 2, 1994 (25 U.S.C. 5131), or when an Indian group becomes eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) *Step 3 – Consult with requesting parties.* No later than 10 days after receiving a written request to consult, a museum or Federal agency must respond in writing with a proposed timeline for consultation. Consultation on human remains and associated funerary objects may continue until the museum or Federal agency sends a repatriation statement for those human remains and associated funerary objects to a requestor under paragraph (h) of this section.

(1) In the response to the requesting party, a museum or Federal agency must ask a requesting party for the following information, if not already provided:

(i) Recommendations on the proposed timeline and method for consultation;

~~(i)~~(ii) How it will not seek to obtain sensitive information, but if sensitive information is shared, how it will protect that information from disclosure to the general public to the extent consistent with applicable law; and

~~(ii)~~(iii) _____ The name, phone number, email address, or mailing address for any authorized representative, traditional religious leaders, and known lineal descendant who should participate in consultation.

(2) The consultation process must seek consensus, deferring to the consulting lineal descendants, Tribes and Native Hawaiian organizations to the maximum extent possible, on determining:

(i) Lineal descendants;

(ii) Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation;

~~(ii)~~(3) The consultation process must give preference to the customs and traditions as the Tribe(s) understand them on determining:

~~(iii)~~ (i) The types of objects that might be associated funerary objects, including any objects that were made exclusively for burial purposes or to contain human remains; and

~~(iv)~~ (ii) The appropriate treatment, care, and handling of human remains and associated funerary objects.

(3) The museum or Federal agency must prepare a record of consultation that includes the effort made to seek consensus regarding the types of objects that may be associated funerary objects and cultural affiliation. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the museum or Federal agency must record the concurrence, disagreement, or nonresponse of the requesting parties.

(4) At any time before the museum or Federal agency sends a repatriation statement for human remains and associated funerary objects to a requestor under paragraph (h) of this section, a museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to those human remains and associated funerary objects. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining affiliation and acquisition history of the human remains and associated funerary objects.

(d) *Step 4 – Complete an inventory of human remains and associated funerary objects.* Based on information available and the results of consultation, a museum or Federal agency must submit to all consulting parties and the Manager, National NAGPRA Program, an inventory of all human remains and associated funerary objects in its holding or collection.

(1) An inventory must include:

(i) The names of all consulting parties and an abstract of the results of consultation;

(ii) The information from the simple itemized list compiled under paragraph (a) of this section;

(iii) For each entry in the itemized list, a determination of one or more of the following:

(A) There is a known lineal descendant,

(B) There is a connection between the human remains and associated funerary objects and an Indian Tribe or Native Hawaiian organization through cultural affiliation,

~~(C) There is a connection between the human remains and associated funerary objects and an Indian Tribe or Native Hawaiian organization through geographical affiliation, or~~

~~(D)~~(C) _____ There is no connection between the human remains and associated funerary objects and any Indian Tribe or Native Hawaiian organization; and

(iv) An abstract of the information supporting that determination including:

(A) The lineal descendant or the Indian Tribe or Native Hawaiian organization with cultural ~~or geographical~~ affiliation, or

(B) An explanation why no Indian Tribes or Native Hawaiian organizations with cultural ~~or geographical~~ affiliation could be reasonably identified.

(2) After [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, by the deadline in Table 1 of this section.

Table 1 to §10.10: Deadlines for completing an inventory

If a museum or Federal agency...	an inventory must be submitted...
acquires possession or control of human remains or associated funerary objects	2 years after acquiring possession or control of human remains or associated funerary objects.
locates previously lost or unknown human remains or associated funerary objects	2 years after locating the human remains or associated funerary objects.
receives Federal funds for the first time after [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], and has possession or control of human remains or associated funerary objects	5 years after receiving Federal funds for the first time after [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

(3) Prior to [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must have submitted an inventory to all consulting parties and the Manager, National NAGPRA Program:

(i) By November 16, 1995, for human remains or associated funerary objects subject to the Act;

(ii) By April 20, 2009, for human remains or associated funerary objects acquired or located after November 16, 1995;

(iii) By April 20, 2012, for human remains or associated funerary objects in the possession or control of a museum that received Federal funds for the first time after November 16, 1995;

(iv) Within two years of acquiring or locating the human remains or associated funerary objects after April 20, 2009; or

(v) Within five years of receiving Federal funds for the first time after April 20, 2012.

(4) No later than [760 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], for any human remains or associated funerary objects listed in an inventory but not published in a notice of inventory completion prior to [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], a museum or Federal agency must:

(i) Initiate consultation as described under paragraph (b) of this section;

(ii) Consult with requesting parties as described under paragraph (c) of this section;

(iii) Update its inventory to include the requirements described under paragraph (d)(1) of

this section and ensure the inventory is comprehensive and covers all holdings or collections relevant to this section; and

(iv) Submit an updated inventory to all consulting parties and the Manager, National NAGPRA Program.

(5) Any museum may request an extension to complete or update its inventory if it has made a good faith effort but will be unable to do so by the appropriate deadline. A request for an extension must be submitted to the Manager, National NAGPRA Program, before the appropriate deadline. The Manager, National NAGPRA Program will publish in the *Federal Register* a list of all museums who request an extension and the Secretary's determination on the request. A request for an extension must include:

(i) Information showing the initiation of consultation and any requests to consult;

(ii) The names of all consulting parties and an abstract of the results of consultation;

(iii) The estimated number of the human remains and associated funerary objects in the holding or collection; and

(iv) A written plan for completing or updating the inventory, which includes, at minimum:

(A) The specific steps required to complete or update the inventory;

(B) A schedule for completing each step and estimated inventory completion or update date;

(C) Position titles of the persons responsible for each step in the schedule; and

(D) A proposal to obtain any requisite funding needed to complete or update the inventory.

(6) After [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], when a holding or collection previously included in an inventory

is transferred to a museum or Federal ~~Agency~~agency, subject to the limitations in 18 U.S.C. 1170 (a), the museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed or updated inventory. The museum or Federal agency must submit the previously completed or updated inventory to the Manager, National NAGPRA Program no later than 30 days after acquiring the holding or collection and must initiate consultation under paragraph (b) of this section. The museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, no later than the deadline in Table 1 of this section.

(e) *Step 5 – Submit a notice of inventory completion.* No later than six months after completing or updating an inventory under paragraph (d) of this section, a museum or Federal agency must submit a notice of inventory completion for human remains and associated funerary objects with a known lineal descendant or a connection to an Indian Tribe or Native Hawaiian organization with cultural ~~or geographical~~affiliation. The museum or Federal agency may include in a single notice all human remains and associated funerary objects having the same lineal descendant or the same Indian Tribes or Native Hawaiian organizations with cultural ~~or geographical~~affiliation.

(1) The notice of inventory completion must be sent to the:

(i) Lineal descendants and Indian Tribes or Native Hawaiian organizations identified in the inventory, and

(ii) Manager, National NAGPRA Program, for publication in the *Federal Register*.

(2) A notice of inventory completion must conform to the mandatory format of the *Federal Register* and include:

(i) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one.

(ii) The number of associated funerary objects and types of objects (counted separately or by lot);

(iii) The county and state where the human remains and associated funerary objects were removed, if known;

(iv) The acquisition history (provenance) of the human remains and associated funerary objects, including the circumstances surrounding their acquisition, if known;

(v) The lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural ~~or geographical~~affiliation and a brief abstract of the information used to make that identification;

(vi) When cultural affiliation has been determined, a statement ~~whether that~~ cultural affiliation was ~~clearly~~identified ~~or was~~based on the totality of the circumstances ~~surrounding acquisition history of the human remains and associated funerary objects~~;

(vii) Information about the presence of any potentially hazardous substances used to treat the human remains or associated funerary objects, if known;

(viii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(ix) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to a requestor.

(3) No later than 15 days after receiving a notice of inventory completion, the Manager, National NAGPRA Program, will:

(i) Approve for publication in the *Federal Register* a notice of inventory completion that conforms to the requirements under paragraph (e)(2) of this section; or

(ii) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (e)(2) of this section.

(4) If the number of individuals or the number of associated funerary objects stated in a published notice of inventory completion changes before the museum or Federal agency sends a repatriation statement under paragraph (h) of this section, the museum or Federal agency must submit a correction notice to the Manager, National NAGPRA Program. A museum or Federal agency is not required to publish a correction notice if there are additional pieces belonging to human remains or associated funerary objects previously identified in a notice and repatriation is to the same requestor. No later than 10 days after determining the new number of individuals or associated funerary objects, the museum or Federal agency must submit a correction notice containing, as applicable:

(i) The corrected number of individuals;

(ii) The corrected number of associated funerary objects and types of objects,

(iii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation, and

(iv) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(f) *Step 6 – Receive and consider a request for repatriation.* After publication of a notice of inventory completion in the *Federal Register*, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of human remains and associated funerary objects.

(1) A request for repatriation of human remains and associated funerary objects must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for those human remains and associated funerary objects under paragraph (h) of this section. Any request for repatriation received by the museum or Federal agency no later than 30 days after publication of a notice must be considered. A request for repatriation received by the museum or Federal agency before the publication of the notice of inventory completion is dated the same date the notice was published.

(2) Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests.

(3) A request for repatriation must satisfy one of the following criteria:

(i) The request is from a lineal descendant, Indian Tribe, or Native Hawaiian organization identified in the notice of inventory completion, or

(ii) The request is not from a lineal descendant, Indian Tribe, or Native Hawaiian organization identified in the notice of inventory completion, and shows, through consultation, collaboration and consensus, a reasonable relationship to establish by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural ~~or geographical~~ affiliation.

(g) *Step 7 – Respond to a request for repatriation.* No earlier than 30 days after publication of a notice of inventory completion but no later than 30 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor with a copy to any other party identified in the notice of inventory completion. Using all information available, including relevant records, catalogs, existing studies, ~~and~~ the results of consultation and deference to Indian Tribes and Native Hawaiian Organizations, a museum or Federal agency must determine if the request satisfies the criteria under paragraph (f) of this section.

(1) In the written response, the museum or Federal agency must state one of the following:

(i) The request meets the criteria under paragraph (f) of this section. The museum or Federal agency will send a repatriation statement to the requestor under paragraph (h) of this section, unless the museum or Federal agency receives additional, competing requests for repatriation.

(ii) The request does not meet the criteria under paragraph (f) of this section. The museum or Federal agency must provide a detailed explanation why the request does not meet the criteria, and an opportunity for the requestor to provide additional information to meet the criteria.

(iii) The museum or Federal agency has received competing requests for repatriation that meet the criteria and must determine the most appropriate requestor using the procedures and timelines under paragraph (i) of this section.

(2) At any time before sending a repatriation statement for human remains and associated funerary objects under paragraph (h) of this section, the museum or Federal agency may receive additional, competing requests for repatriation of those human remains and associated funerary objects that meet the criteria under paragraph (f) of this section. The museum or Federal agency must determine the most appropriate requestor the procedures and timelines under paragraph (i) of this section.

(h) *Step 8 – Repatriation of the human remains and associated funerary objects.* No later than 90 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. The repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested human remains and associated funerary objects. In the case of joint requests for repatriation, the repatriation statement must be sent to and must identify all requestors.

(1) Before sending the repatriation statement, the museum or Federal agency must consult with the requestor on the care, custody, and physical transfer of the human remains and associated funerary objects.

(2) After sending the repatriation statement, the museum or Federal agency must:

(i) Document any physical transfer of the human remains and associated funerary objects by recording the contents, recipient, and method of delivery, and

(ii) Protect sensitive information, as identified by the requestor, from disclosure to the general public to the extent consistent with applicable law.

(3) After the repatriation statement is sent, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the human remains and associated funerary objects.

~~(3)~~(4) The museum or Federal agency must provide a final statement of physical repatriation to the Manager, National NAGPRA Program, within 30 days after the physical repatriation to the culturally affiliated Indian Tribe(s) or NHO(s), completing the repatriation process.

(i) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for human remains and associated funerary objects under paragraph (h) of this section, a museum or Federal agency may receive additional, competing requests for repatriation of those human remains and associated funerary objects that meets the criteria under paragraph (f) of this section. The museum or Federal agency must determine the most appropriate requestor using this paragraph.

(1) In the following priority order, the most appropriate requestor is:

(i) The known lineal descendant, if any; or

(ii) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to ~~the priority order at~~ §10.3(d) of this part.

(2) No later than 10 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request for repatriation was received and request any additional information that the competing requestors may wish to submit within 45 days of receiving the written letter. The museum or Federal agency must further inform the competing requestors that they may initiate a joint request for repatriation so that the museum or Federal agency is not responsible to choose between competing requests.

(3) No later than 120 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

(i) The most appropriate requestor has been determined. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (h) of this section.

(ii) The most appropriate requestor cannot be determined, and the repatriation is stayed under paragraph (j) of this section. The museum or Federal agency must explain why the most appropriate requestor could not be determined.

(j) *Stay of repatriation.* Repatriation under paragraph (h) of this section is stayed if:

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final

resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the written statement, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section, unless a court of competent jurisdiction directs otherwise.

(2) The museum or Federal agency has received competing requests for repatriation and, after complying with paragraph (i) of this section, cannot determine the most appropriate requestor. When a most appropriate requestor is determined by an agreement between the parties, binding arbitration, or means of resolution other than through a court of competent jurisdiction, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the determination, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section.

(3) Before the publication of a notice of inventory completion under paragraph (e) of this section, the museum or Federal agency has both requested and received the Secretary's written concurrence that the human remains and associated funerary objects are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States.

(i) To request the Secretary's concurrence, the museum or Federal agency must send to the Manager, National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

(A) Be on the letterhead of the requesting museum or Federal agency and be signed by an authorized representative;

(B) Describe the specific scientific study, the date on which the study ~~commenced~~will begin, and how the study would be of major benefit to the people of the United States;

(C) Explain why retention of the human remains and associated funerary objects is indispensable for completion of the study;

~~(D)~~(D) Include information about consultation with culturally affiliated Indian Tribe or NHO, including how the museum or Federal agency developed consensus and deferred to the Indian Tribes or NHOs to the maximum extent possible;

~~(D)~~(E) Describe the steps required to complete the study, including any destructive analysis, and provide a completion schedule and completion date;

~~(E)~~(F) Provide the position titles of the persons responsible for each step in the schedule; and

~~(F)~~(G) Affirm that the study has in place the requisite funding.

(ii) If, after consultation with the affected Tribe(s) or NHO(s), the Secretary concurs with the request, the Secretary will send a written concurrence and specify the date by which the scientific study must be completed.

(iii) No later than 30 days after the completion date in the Secretary's concurrence, the museum or Federal agency must submit a notice of intended repatriation in accordance with paragraph (e) of this section.

(iv) No earlier than 30 days after publication of the notice of inventory completion and no later than 90 days after responding to a request for repatriation, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section.

(k) *Transfer or reinter human remains and associated funerary objects.* For human remains and associated funerary objects with no connection to an Indian Tribe or Native Hawaiian organization determined in the inventory, a museum or Federal agency, at its discretion, may agree to transfer or decide to reinter the human remains and associated funerary objects. The museum or Federal agency must ensure it has initiated consultation under paragraph (b) of this section, if any.

(1) *Step 1 – Agree to transfer or decide to reinter.* Subject to the requirements in paragraph (k)(2) of this section, a museum or Federal agency may:

(i) Agree in writing to transfer the human remains and associated funerary objects to a requestor that agrees to treat the human remains and associated funerary objects according to the requestor's laws and customs. Human remains and associated funerary objects must be requested in writing and may only be requested by:

(A) An Indian Tribe or Native Hawaiian organization, or

(B) An Indian group that is not federally recognized but has a relationship to the human remains and associated funerary objects.

(ii) Decide in writing to reinter the human remains and associated funerary objects according to applicable laws and policies.

(2) *Step 2 – Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains and associated funerary objects, the museum or Federal agency must submit a notice of proposed transfer or reinterment to the Manager, National NAGPRA Program, for publication in the *Federal Register*.

(i) A notice of proposed transfer or reinterment must conform to the mandatory format of the *Federal Register* and include:

(A) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one.;

(B) The number of associated funerary objects and type of objects (counted separately or by lot);

(C) The county and state where the human remains and associated funerary objects were removed, if known;

(D) The acquisition history (provenance) of the human remains and associated funerary objects, including the circumstances surround their acquisition, [if known](#);

(E) The names of all consulting parties and an abstract of the results of consultation;

(F) A brief abstract of the information that explains why no Indian Tribes or Native Hawaiian organizations with cultural ~~or geographical~~ affiliation could be reasonably identified;

(G) Information about the presence of any potentially hazardous substances used to treat the human remains and associated funerary objects, if known;

(H) The Indian Tribe, Native Hawaiian organization, or Indian group requesting the human remains and associated funerary objects or a statement that the museum or Federal agency will reinter the human remains and associated funerary objects;

(I) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(J) The date (to be calculated by the *Federal Register* 30 days from the date of publication) after which the museum or Federal agency may proceed with the transfer or reinterment of the human remains and associated funerary objects.

(ii) No later than 15 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, will:

(A) Approve for publication in the *Federal Register* a notice of proposed transfer or reinterment that conforms to the requirements under paragraph (k)(2)(i) of this section; or

(B) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (k)(2)(i) of this section.

(iii) After publication of a notice, if the museum or Federal agency receives a request for repatriation of the human remains and associated funerary objects before transfer or reinterment, the museum or Federal agency must evaluate whether the request meets the criteria under paragraph (f) of this section.

(A) If the request for repatriation meets the criteria under paragraph (f) of this section, the museum or Federal agency must respond in writing under paragraph (g) of this section and proceed with repatriation under paragraph (h) of this section.

(B) If the request does not meet the criteria under paragraph (f) of this section, the museum or Federal agency must respond in writing under paragraph (g) of this section and proceed with transfer or reinterment under paragraph (k)(3) of this section.

(3) *Step 3 – Transfer or reinter the human remains and associated funerary objects.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the museum or Federal agency must transfer or reinter the human remains and associated funerary objects. After transferring or reinterring, the museum or Federal agency must:

(i) Document the transfer of the human remains and associated funerary objects by recording the contents, recipient, and method of delivery,

(ii) Document the reinterment by recording the contents of the reinterment,

(iii) Protect sensitive information from disclosure to the general public to the extent consistent with applicable law.

(4) After transfer or reinterment occurs, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the human remains and associated funerary objects.