

Testimony

To

United States Senate Committee on Indian Affairs

Oversight Hearing Entitled

“The Long Journey Home: Advancing the Native American Graves  
Protection and Repatriation Act’s Promise After 30 Years of Practice.”

By

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President, Sealaska Heritage Institute

Washington, D.C.

February 2, 2022

*Aan yatgu sáani.* Most Noble Chair Senator Schatz and other committee members; and if I may, including our own Alaska Senator Murkowski, or as she is known to us, Aanshawátk'i, Lady of the Land, of the Deisheetaan clan, I am honored to have this opportunity to speak to you today.

In honor of my ancestors, and in accordance with our cultural protocols, may I tell you who I am in Tlingit:

*Lingít x'eináx Yeidiklats'okw ka Kaaháni ax saayí.*

*Shangukeidi ka Cháak' naa xat sitee.*

*Kawdliyaayi Hít áyá xát.*

*Lukaax.ádi dachxaank áyá xát.*

My Tlingit names are Yeidiklats'okw and Kaaháni.

I am of the Shangukeidi clan and the Eagle moiety.

I am from the House Lowered from the Sun in Klukwan, Alaska.

I am a Grandchild of the Lukaax.ádi clan.

In English, I am known as Rosita Worl and I serve as president of the Sealaska Heritage Institute.

I was privileged to serve on the NAGPRA Review Committee for 13 years, from 2000 to 2013, including serving as its Chair. From my own work with NAGPRA and from the multitude of voices I heard from Native Americans across the country and from the Hawaiians during my twelve-year tenure, I came to appreciate that NAGPRA is one of the most significant legislative acts in our history. Congress recognized the significance of tangible and intangible cultural property held by Native Americans; the traumatic harm that had come in the expropriation of cultural and sacred objects and ancestral human remains from Native American homelands; and the need to return those sacred objects and ancestral remains to their original owners and descendants.

First, I would like to go on record as supporting Representative Haaland's proposed legislation H.R. 8298: To amend NAGPRA to move the enforcement office to the Bureau of Indian Affairs; to increase the civil monetary penalties for failure to follow the processes established by that Act; and to protect confidential information.

### **Draft Proposed Rules**

We have had the opportunity to review the National Association of Tribal Historic Preservation Officers (NATHPO) letter of September 10, 2021, on the Draft Proposed Rules to Assistant Secretary Indian Affairs Newland and Assistant Secretary Estenoz for Fish and Wildlife and Parks (attached as Appendix B). We would like to go on record as supporting the NATHPO Officers position on the Draft Proposed Rules. However, we would like to emphasize the following points:

## § 10.5 Discovery

Subsections 10.5 (b) and (c) give the impression that all or most discoveries occur as the result of intentional ground disturbances. These sections must also acknowledge and consider that often discoveries result from unintentional ground disturbances caused by natural forces (storms and floods) and unanticipated outcomes of human activity (for example, cleaning out culverts, or the discovery of illegal and unauthorized excavations of Indian graves). In the early 2000s, a national park in Pennsylvania experienced all of these events that required a response on the part of park officials.

We strongly object to the removal of the requirement by the federal official to notify and initiate consultations with any known lineal descendant and likely culturally affiliated Indian Tribes or Native Hawaiian Organizations within three working days of receipt of a written confirmation of a discovery. The draft proposal authorizes the appropriate official to take specific actions regarding the discovered cultural items, including stabilizing or covering them, evaluating the potential need for further excavation, and certifying that the ground-disturbing activity may proceed *with no input from lineal descendants or affiliated tribes*. This flies in the face of the purpose of NAGPRA, which is to provide for the meaningful participation of lineal descendants and Indian tribes in the identification and disposition of their cultural items. Timeliness is also crucial; such notification must occur within a tight time frame because an immediate response is often necessary and appropriate to ensure the protection and respectful treatment of the cultural item(s).

We strongly and respectfully request that the proposed rule reinstate the requirement for a written Plan of Action that has been removed from this section. A Plan of Action, developed in consultation with lineal descendants and Indian Tribes, will specify the appropriate response to a discovery including the best methods and means for stabilizing and protecting cultural items *in situ*, how to treat any items that have been recovered after exposure, what steps will be taken to evaluate the potential need for further excavation, and how the decision will be made to certify, in the case of intentional excavations, that ground-disturbing activities may continue. As written (Subsections 10.5 (c), (d) and (e)), these duties are the responsibility of the appropriate federal official.

We emphasize that the written Plan of Action is a crucial document memorializing a consultation process that must be made part of the discovery procedure for the responsible federal official. In our view, the requirement for a comprehensive agreement (§ 10.4 (b)) is duplicative and could be dropped in favor of highlighting and foregrounding the Plan of Action developed through tribal consultations and in response to specific discovery situations that are or may be encountered. Consultation best practices are that such discussions take place early in the process and that they be comprehensive of situations at hand. There is no reason to have a comprehensive agreement AND a plan of action. In practice, a comprehensive agreement looks like a plan of action.

## § 10.8 General

We concur with *all* of the NATHPO comments about this section and provide this commentary: The elimination of the words “or possession” in the phrase, “in the possession or control over

holdings or collections” of Native American cultural items departs from statutory language and oversimplifies and obscures a problem inherent to the NAGPRA process necessary for the completion of inventories and summaries. It seems that this draft rule attempts to correct this issue by including a definition of “control” which does not succeed in correcting the problem. The issue is that museums and repositories sometimes have collections in their possession that can be traced to other institutions and individuals (such as federal agencies, states, universities, contractors, and others) that deposited them in the holding museum, but do not exercise control over them. This has caused problems during implementation in that the museum or institution in possession of the items claims no responsibility for carrying out the inventory and summary provisions of NAGPRA, while the entity responsible for the deposit claims they are not responsible either. Sometimes the collections have been in the possession of the holding institution so long that which institution has “control” is in doubt. This problem was reported during the first years of NAGPRA implementation and remains at issue. For this reason, we strongly recommend that the draft rule retain the statutory language.

We further point out that subsections § 10.8 (b-d) attempt to resolve this issue for federal agencies but do not provide a solution for collections in other types of museums and repositories, or that cannot be tracked back to a federal agency. The need for § 10.8 (d) **Informal conflict resolution** indicates that this is a continuing problem. What is to suggest that an informal process will resolve the issue that has not been resolved in 50 years?

Finally, as stated in the NATHPO letter, we also point out that the vague requirement of a “statement” in § 10.8 (c) does not satisfy the statutory requirement for a summary or inventory which should be reported to the affiliated tribes and the National NAGPRA program. We refer you to the NATHPO letter for their comment on this topic.

**§ 10.9 (i)(3):** This subsection appears to extend the scientific study exemption that in the statute only applies to Native American human remains to unassociated funerary objects, sacred objects, and objects of cultural patrimony. This proposal is inconsistent with the statute and adverse to tribal interests. We request that 10.9 (i)(3) be deleted in its entirety.

**§ 10.10 (c)(3):** We request the insertion of these sentences at the end of this paragraph:

“Upon receiving a request to consult regarding human remains and associated funerary objects by an Indian tribe or Native Hawaiian organization, the museum or federal agency must immediately stop any ongoing scientific study of such human remains and associated funerary objects and refrain from authorizing the initiation of new scientific study of such remains or associated funerary objects or other means of acquiring or preserving additional scientific study information from such remains and objects. The continuation of existing scientific study or data collection or the initiation of new studies shall be a topic of consultation with the requesting Indian tribe or Native Hawaiian organization, and the restrictions noted in the previous sentence may be modified with the mutual consent of the consulting parties.”

§ 10.10 (h) requires a museum or federal agency to send a written repatriation statement that conveys control of human remains and associated funerary objects to a requesting lineal descendant, Indian Tribe, or Native Hawaiian organization. Significantly, this requirement includes funerary objects that are associated with human remains which are associated with the requesting party through geographical association. We support this change.

§ 10.11 (b)(2) requires the Secretary, after reviewing all relevant information, to determine if each alleged failure to comply is substantiated or not, and to determine if a civil penalty is an appropriate remedy. We strongly support this change.

§ 10.11 (g) We request that the second sentence of §10.11 (g) be revised to read: “The daily penalty amount shall not exceed \$1,408 per day for each failure to comply, subject to ...”

§ 10.12 Review Committee We support the recommendations of NATHPO.

### **Recommendations:**

I respectfully offer the following recommendations for your consideration:

- 1) Clarify that Alaska Native Corporations are eligible to participate in the Native American Graves Protection and Repatriation Programs (See Appendix A).
- 2) Allow for the reburial of ancestral human remains at the site from where they were taken. Tribal officials have expressed the wish to rebury remains as close as possible to their original resting place rather than remove them to the present location of the tribe. This preference results from the historical situation that many tribes have experienced, that of forced removal from their original homeland. There is a strong belief that a tribe’s health and well-being is dependent on how well their ancestors have been treated, and taking remains away from their original homeland is another significant form of displacement and disturbance.
- 3) Amend NAGPRA to require Review Committee Findings in Disputes as mandatory rather than advisory. Museums are not compelled to observe the findings of the Review Committee, which calls into question the effectiveness of these proceedings. Tribes go to a great deal of effort and expense to bring a case before the Committee, without any guarantee that the Committee’s Findings will be acted upon. In our experience (two cases), the museums either ignored the Committee’s findings or altered them to suit their purposes. This provision (Sec. 8) is useful for authorizing an opportunity for a tribe to present its case to qualified experts, but ultimately the value of the effort is in question.
- 4) Provide a discrete category of funding to support disputes. Disputes are very expensive undertakings that require an outlay of significant financial resources in staff time, preparation of statements by knowledgeable tribal experts, fees for academic experts in a

number of fields, lawyer fees, and travel expenses for all participants. Thus, tribes must commit a substantial financial sum to organize, prepare for, and participate in a dispute hearing in the form of time and expertise. This is an unfunded mandate, and while the process may be beneficial for the repatriation process, it places a large burden on tribes that do not have such funding available in their ongoing operational budgets.

- 5) Increase NAGPRA funding for tribes and museums. This issue has been a regular and ongoing concern of tribes and museums since the passage of NAGPRA, and it is a regular recommendation of the NAGPRA Review Committee in their annual reports to Congress. We support the statements of the Committee on behalf of participating tribes and museums, and request that additional funding be provided to support the participating institutions.

Thank you for this opportunity to comment and share our views and recommendations.

## Appendix A

Alaska Native Corporations (ANCs) were established under the Alaska Native Claims Settlement Act of 1971 that settled the aboriginal land claims of Alaska Natives. ANCs participated equally with tribes in NAGPRA since its inception. In some regions tribes did not have the capacity or resources to go through the arduous NAGPRA process to repatriate important cultural objects or to bring costly disputes to the Review Committee. Many ANCs or their non-profit counterparts, such as my organization, the Sealaska Heritage Institute, assisted Tribes and clans with the repatriation of cultural and sacred objects or initiated repatriation claims themselves.

In 2010, the U.S. Government Accountability Office (GAO) published a report that recommended that the National NAGPRA office reassess whether ANCs should be considered as eligible entities for the purposes of carrying out NAGPRA<sup>1</sup>. ANCs were subsequently advised that they would no longer be considered tribes for purposes of NAGPRA. In Southeast Alaska, repatriation claims all but came to a standstill but for one tribe and disputes were no longer brought to the Review Committee because of the significant expense.

In a report commissioned by an ANC, Sealaska Corporation, ANCs are defined as tribes for special statutory purposes in over 117 legislative acts<sup>2</sup>. Additionally, the recent Supreme Court held in Yellen v. Chehalis Confederated Tribes of Chehalis Reservation that ANCSA corporations shall continue to be defined and included as an ‘Indian tribe’ under the Indian Self Determination and Educational Assistance Act (ISDA).

We believe that the GAO and Solicitor’s Office analyses are flawed and extremely detrimental to the implementation of NAGPRA in Alaska. However, the matter can easily be resolved by amending NAGPRA to clarify that ANCs qualify as “Tribes” for purposes of NAGPRA, and therefore could be treated as they were prior to publication of the GAO report. An amendment to NAGPRA would have no impact on BIA’s broader policy with respect to Native Corporations as Tribes, and makes sense as a matter of good public policy.

Additional reasons to include the ANCSA corporations include the following:

1. ANCSA corporations are specifically recognized as Indian tribes under the National Historic Preservation Act, the single most comprehensive historic preservation act in U.S. law. Originally passed in 1966, this law was amended to include ANCSA corporations in the definition of Indian tribe. Under this law, ANCSA corporations are authorized to participate in

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<sup>1</sup> The GAO report suggests that “National NAGPRA’s inclusion of ANCSA corporations in its list of Indian tribes does not appear to be consistent with Interior’s legal and policy positions regarding the status of Alaska Native villages and ANCSA corporations” because ANCSA Corporations “are not on BIA’s list of federally recognized Indian tribes or the modified ANCSA list of Alaska Native villages.” A Solicitors Opinion also determined that ANCSA Corporations should not be eligible to participate in NAGPRA.

<sup>2</sup> Simpson, Tillinghast, Sorenson & Lorensen. 1997. Definition of “Tribe” in the United States Codes. File No. 600-1261. Juneau, Alaska.

Sec. 106 consultations as Indian tribes regarding the preservation of historic sites that may be affected by projects funded or permitted by federal agencies.

2. ANCSA specifically authorized the conveyance of cemetery and historic sites to Alaska Native Regional Corporations (Sec. 14(h)(1)). Such conveyances were made with deed covenants that ensure the sole primary and dominant uses of the land are as cemetery sites and historical places, and specifically protect the places from the adverse effects of development. These preservation covenants draw on language taken from National Historic Preservation Act regulations to ensure that regional corporations do not adversely affect the historic integrity of cemetery sites or historic places. Thus, under ANCSA, Alaska Native Regional Corporations are charged with specific historic preservation responsibilities, with which the addition of NAGPRA responsibilities would be consistent.

3. NAGPRA procedures require Indian tribes to engage in a long and arduous process of interaction with numerous museums and other federally-funded repositories involving the presentation and exchange of specific historical and cultural information in written and oral forms, consultations, reviews of collections of objects and human remains, detailed examinations of collection records, travel from the tribal community to the museum and return, and many other actions usually extending over long periods of time. The vast majority of Alaskan tribes are isolated and very small in population and operate with a correspondingly low level of funding and staff. For example, over 50% of the 229 Alaska tribes have under 500 members, with 91 having less than 100 members. These tribes face a myriad of issues and operate the same number of programs as larger tribes, but have a low level of funding and staff. Also, NAGPRA grants are an important source of funding for tribes but are relatively small for the amount of work that goes into preparing a grant application. The need for technical assistance is high and only a few tribes can participate in NAGPRA without the collaboration and assistance (technical and economic) provided by ANCSA corporations.

The following is an amendment to accomplish this legislative clarification:

**AMENDMENT TO CLARIFY THAT ALASKA NATIVE CORPORATIONS ARE ELIGIBLE TO PARTICIPATE IN NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) PROGRAMS**

To accomplish the formal inclusion of ANCSA corporations as tribes for purposes of NAGPRA, the following language should be added amending Section 2(7) of NAGPRA:

**SEC. \_\_.** TECHNICAL CORRECTIONS.—

\* \* \*

(1) NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION.—Section 2(7) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001(7), is amended to read:

“(7) ‘Indian tribe’ means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village, Regional Corporation, or Village Corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) [43 U.S.C. 1601 et seq.], which is



recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”

Compare the definition of Indian Tribe from the National Historic Preservation Act, as amended:

§ 300309. Indian tribe. In this division, the term “Indian tribe” means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

## Appendix B



**NATIONAL ASSOCIATION  
OF TRIBAL HISTORIC  
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September 10, 2021

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Dear Assistant Secretary Newland and Assistant Secretary Estenoz,

The National Association of Tribal Historic Preservation Officers (NATHPO) is a national organization of Tribal government officials who implement federal and tribal preservation laws. Our membership is limited to federally recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian and Alaska Native cultures, heritage, and practices. The repatriation of Native ancestors, funerary objects, sacred objects, and objects of cultural patrimony is of critical importance to our members.

Thank you for your leadership on behalf of the Department of the Interior to conduct tribal consultation on the draft proposal to revise regulations implementing the Native American Graves Protection and Repatriation Act.<sup>1</sup> We understand that this draft was under development for some time during the previous administration based on a listening session over a decade ago and appreciate your wisdom in engaging in fresh government-to-government consultation with Indian Tribes and Native Hawaiian organizations prior to proceeding to the regular notice and public comment process. We also appreciate the virtual listening sessions that occurred in July and August and the extended comment period on this lengthy and highly technical document.

We respectfully request that you provide us with the draft Preamble that accompanies this document and a red line markup of the changes from the current regulations so we can better understand the reason behind some of the proposed changes. With that in mind, we are able to provide you with our comments, to date, of the draft. Our comments follow the outline of the department's draft.

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<sup>1</sup> 43 CFR 10.

## **Subpart A – General**

### **§ 10.1 Introduction.**

Subsection 10.1 (h) of the draft identifies three classes of final agency action. Final determination making the regulations inapplicable and final denial of a claim for disposition or a request for repatriation are reasonably transparent actions where it is presumed that the Federal agency would have notified the claimant that the claim was denied. It is less clear where final agency action would attach for final disposition or repatriation determinations since the various notices published in the Federal Register are still appealable, but the final disposition/repatriate statement is only sent to the claimant and the National Park Service. We request that all statements of disposition or repatriation be published in the Federal Register, or at a minimum published on the National NAGPRA Program website to provide parties with notification that a final agency action has occurred.

### **§ 10.2 Definitions for this part.**

In several places you have combined the noun and verb/participial phrase form of a term into one definition (cultural affiliation/culturally affiliated; discovery/discovered; excavation/excavated; geographical affiliation/geographically affiliated; repatriation/repatriate) but then say that they mean the definition of the noun. We do not object to combining the terms but request for clarity sake that in these instances you replace word “means” with “refers to” in these definitions so that it covers both the noun and verb/participial phrase forms.

The first subpoint in the definition of “acknowledged aboriginal land” includes “a treaty sent by the President to the United States Congress Senate for ratification.” Transmission from the President to the Senate is just one of several decision points along the path of a treaty. In order to interpret this provision in a way that is most beneficial to tribes we request you revise the first subpoint to read “a treaty signed by the U.S. Commissioner or representative and one or more tribal representatives;”

We understand the purpose of defining the terms “control” and “custody” here to distinguish whether a museum or Federal agency has sufficient legal interest to independently direct, manage, oversee, or restrict the use of a cultural item and to convey legal interest. However, we must point out that this proposed new scheme is inconsistent with the statute’s clear language requiring museums and Federal agencies to provide Indian Tribes and Native Hawaiian organizations with summaries and inventories of cultural items in their “possession or control.” While your proposed scheme would definitely be more convenient for museums and Federal agencies to implement, it will systematically deprive Indian Tribes and Native Hawaiian organizations of information on holdings or collections in a museum or Federal agency’s possession but not in their control. It is also inconsistent with the clear Congressional language and constitutes an abuse of executive discretion. We request that you revise Subpart C to focus on Native American collections or holdings in the possession or control of museums and Federal agencies, as intended by Congress.

We strongly object to the definitions of the terms “ARPA Indian lands” and “ARPA Public Lands” for reasons we will explain in § 10.6. and request that they be deleted here.

We welcome inclusion of the definition of “consultation” drawn from the House Committee on Interior and Insular Affairs Report on the bill that became NAGPRA. H.Rept 101-877, at 16. We look forward to the next phase of “joint deliberations” in our government-to-government consultation on this draft proposal prior to its publication for public comment.

We are generally leery of laundry list type definitions like that proposed for “holding or collection,” primarily because something will inevitably have been left out.

The proposed definition of “human remains” includes one exemption and two instructions that are not in the statute. We request that the exemption be revised to read: “(1) This term does not include human remains or portions of human remains that, after consultation with culturally or geographically affiliated Indian tribes or Native Hawaiian organizations are determined by the preponderance of evidence to have been freely given or naturally shed by the individual from whose body they were obtained.” We request that the two instructions currently numbered as (2) and (3) be combined under one subheading reading “(2) For purposes of determining cultural or geographic affiliation: (i) Human remains incorporated into a funerary object, sacred object, or object of cultural patrimony are considered part of the cultural item rather than as separate human remains; and (ii) Human remains incorporated into an object or item that is not a funerary object, sacred object, or object of cultural patrimony are considered human remains.”

We welcome the revision of the definition of “Native American,” with one slight correction. We recommend that the first subpart be revised to read: “(1) A tribe included Indian Tribes, as well as Indian groups that are not federally recognized.”

The definition of “receives Federal funds” represents a significant expansion of what constitutes a museum to include institutions that receive Federal financial “assistance,” including use of “Federal facilities, property, or services, or other arrangement involving transfer of anything of value for a public purpose authorized by a law of the United States Government.” While we welcome the expansion of NAGPRA’s requirements to these additional institutions we are concerned that you have not provided an explanation as to why the change is being made three decades after enactment of the statute and what the implications are. We reiterate our request for the draft preamble that accompanies this document so we can better understand the full implications of the proposed change.

We object to the use of the term “sets of human remains” since it reifies the perspective that these individuals are mere curatorial curiosities to be collected instead of the remains of our ancestors and request that instead they be referred to here and throughout the draft as “remains of an individual of Native American ancestry.”

We object to the definition of a “summary” as “a written description of a holding or collection that contains an unassociated funerary object, sacred object, or object of cultural patrimony” since it implies that a museum or Federal agency can make such a determination prior to initiation of consultation with lineal descendants, Indian Tribes, and Native Hawaiian organizations. The preamble to the current regulations explains this distinction succinctly. “The statutory language is unclear whether summaries should include only those unassociated funerary objects, sacred objects, or objects of culturally affiliated with a particular Indian Tribe or Native Hawaiian

organization, or the entire collection which may include these cultural items. The legislative history and statutory language do make it clear that the summary is intended as an initial step in bringing an Indian Tribe and Native Hawaiian organization into consultation with a museum or Federal agency. Consultation between a museum or Federal agency and an Indian Tribe or Native Hawaiian organization is not required until after completion of the summary. Identification of specific sacred objects or objects of cultural patrimony must be done in consultation with Indian Tribe representatives and traditional religious leaders since few, if any, museums or Federal agencies have the necessary personnel to make such identifications. Further, identification of specific unassociated funerary objects, sacred objects, and objects of cultural patrimony would require a museum or Federal agency to complete an item-by-item listing first. The drafters opted for the more general approach to completing summaries of collections that may include unassociated funerary objects, sacred objects, or objects of cultural patrimony rather than the itemized list required for the inventories in hopes of enhancing the dialogue between museums, Federal agencies, Indian Tribes, and Native Hawaiian organizations required under the Act.”<sup>2</sup> We request that the summary be defined as “a written description of a hold or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony” and that this phrase be used throughout the draft.

### **§ 10.3 Cultural Affiliation.**

No requested changes at this time.

## **Subpart B – Federal or Tribal Lands after November 16, 1990**

### **§ 10.4 General.**

Subsection 10.4 (b)(1) of the draft specifies the requirements and processes related to establishment of a written comprehensive agreement for land managing activities that are likely to result in the discovery or excavation of cultural items. We note that § 10.5 (d) of the draft allows the comprehensive agreement to serve in lieu of the excavation procedures at § 10.6.

The common meaning of the term “agreement” is a negotiated and binding arrangement between parties as to a course of action, and the current regulations echo this common meaning by saying that “whenever possible, Federal agencies should enter into comprehensive agreements with Indian tribes and Native Hawaiian organizations that are affiliated with human remains, funerary objects, sacred objects, or objects of cultural patrimony and have claimed, or are likely to claim, those human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands.”<sup>3</sup>

We are dismayed to see that the draft proposal changes that current regulatory requirement so that only the official of the Federal agency or DHHL is required to sign the comprehensive agreement. § 10.4 (b)(1)(ii). Only afterward is the Federal agency or DHHL required to provide a copy of the signed agreement to all consulting parties. § 10.4 (b)(2)(i). Such an arrangement as

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<sup>2</sup> 60 FR 62148, Dec. 4, 1995.

<sup>3</sup> 43 CFR 10.5 (f).

proposed does not constitute a binding arrangement between parties and should not be provided any deference in complying with the regular requirements for discoveries or excavations of cultural items. We support the idea of developing such binding agreements, but only with the concurrence of all consulting parties. We request that you change text at § 10.4 (b)(1) to state “The written comprehensive agreement must: ... (ii) Be signed by an official for the Federal agency or DHHL and all consulting parties, and”

### **§ 10.5 Discovery.**

Table 1 to § 10.5 lists the appropriate official to report a discovery on various types of Federal or tribal lands. The table states that for “Federal lands in Alaska selected but not yet conveyed to Alaska Native Corporations or groups” the appropriate official is the representative of the Bureau of Land Management, and the additional point of contact is the “Alaska Native Corporation or group.” We are unclear to what you are referring with the term “or group” in the first and third cell.” The Alaska Native Claims Settlement Act only established regional and village Alaska Native Corporations. “Alaska Native Group” is not a thing under ANCSA. We request the term be deleted here. Secondly, identification of the Bureau of Land Management as the “Federal agency with primary management authority” for all Federal lands in Alaska selected but not yet conveyed to Alaska Native Corporations is an error. While most selected but not yet conveyed lands are BLM lands, not all are. The Forest Service manages large tracts land that have been selected by Alaska Native Corporations but not yet conveyed. The U.S. Fish and Wildlife Service may also manage small tracts of land that were selected but not yet conveyed. We request that this second cell be changed to read “Federal agency with primary management authority.”

Subsection 10.5 (c) of the draft outlines the requirements that the appropriate official must take to respond to a discovery of cultural items on Federal land, including ensuring that a reasonable effort has been made to secure and protect the cultural items and that any ground-disturbing activity in the area of the discovery has stopped. Use of the term “ground-disturbing activity” in this requirement seems to refer to the requirements in § 10.5 (b) which focus on the immediate cessation of intentional ground-disturbing activities such as construction, mining, logging, or agriculture. Left unaddressed is the common situation where the ground-disturbing activity is unintentional, such as natural erosion or wildfires which cannot be stopped solely by regulatory edict. We request that you change the first sentence of this subsection to state: “*No later than 5 business days after receiving written documentation of a discovery, the appropriate official must ensure that a reasonable effort has been made to secure and protect the cultural items and that any ground-disturbing activity in the area of the discovery has stopped or, for unintentional ground-disturbances, adequately mitigated so as to prevent additional damage to the cultural item.*”

There is also an important requirement in the current regulations that the draft proposal removes. Under the current regulations, the responsible Federal agency official is required to notify any known lineal descendant and likely affiliated Indian Tribes or Native Hawaiian organizations within three working days of receipt of written confirmation of a discovery and to initiate consultation.<sup>4</sup> The draft proposal removes this requirement and allows the appropriate official to take actions regarding the discovered cultural items, including stabilizing or covering

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<sup>4</sup> 43 CFR 10.4 (d)(iii) and (d)(iv).

them, § 10.5 (c)(1), evaluating the potential need for excavating them, § 10.5 (d), and certifying that the ground-disturbing activity may proceed, § 10.5 (e), with no input from the lineal descendants and affiliated Indian Tribes and Native Hawaiian organizations. We strongly object to the removal of the consultation requirement and request the current regulatory consultation requirement be retained as the first point under § 10.5 (c). We also request that the certification that an activity may resume required at § 10.5 (d) be provided to all consulting parties at the same time it is sent to the person responsible for the ground-disturbing activity. This will provide effective notice to the consulting parties so they may decide whether they wish to challenge the appropriate official's decision to allow the ground-disturbing activity to proceed. Lastly, the draft proposal removes the requirement that following consultation the Federal agency official must complete a written plan of action and execute the actions called for in it.<sup>5</sup> We request that these requirements be added back into the proposal

### **§ 10.6 Excavation.**

NAGPRA requires that “the intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if (1) such items are excavated or removed pursuant to a permit issued under section 470cc of title 16 which shall be consistent with this chapter.”<sup>6</sup> ARPA use of the phrase “excavated or removed” recognizes that not all archaeological resources are buried in the ground, some are sitting on the surface, some are sitting on a shelf in a traditional religious leader's home. The draft proposal completely ignores the statutory requirements regarding removal of cultural items and focuses exclusively on excavations. We request that the draft proposal be revised to specifically address the removal of cultural items from Federal and Tribal lands outside of excavations as required by the Act.

Congress clearly directs that the provisions of ARPA must be interpreted from 1990 onward to apply to all Federal and Indian lands in a manner consistent with NAGPRA. The opening paragraph of § 10.6 seems to reverse the clear Congressional direction by trying to make NAGPRA consistent with ARPA instead of making ARPA consistent with NAGPRA. The draft states that “a permit under Section 4 of ARPA (16 U.S.C. 470cc) is required when the excavation is on Federal lands or Tribal lands that are also ARPA Indian lands or ARPA Public lands...” and fails to address other lands covered by the statute, specifically private lands within the exterior boundary of any Indian reservation and lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86-3. Restricting applicability of the ARPA requirements arbitrarily and capriciously narrows the clear language of statute and is clearly an abuse of administrative discretion. The current regulations include a section specifically designed to accommodate Congressional intent by addressing the required permitting requirements.<sup>7</sup> We request that the second sentence of the opening paragraph of § 10.6 be deleted in its entirety and that the provisions addressing the applicability to ARPA's excavation and removal section be added to address private lands within the exterior boundary of any Indian reservation and lands administered for the benefit of Native

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<sup>5</sup> 43 CFR 10.2 (c)(2) and 10.5 (e).

<sup>6</sup> 25 U.S.C. 3002 (c).

<sup>7</sup> 43 CFR 10.3 (b)(1).

Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86-3.

### **§ 10.7 Disposition.**

Subsection § 10.7 (a) starts with the startling statement that “consultation on cultural items may be required to determine the disposition of cultural items...” Under the current regulations, upon receiving notice of, or otherwise becoming aware of, an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands, the responsible Federal agency official must ... take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony ...”<sup>8</sup> It is hard for us to image any situation in which the appropriate official should not be required to consult on such an important matter as the disposition of cultural items. We request that the first sentence of § 10.7 (a) be revised to read: “Consultation on cultural items is required to determine the disposition of a cultural item and may continue until the appropriate official sends a disposition statement for the cultural items under paragraph (d) of this section.”

We are shocked that to see that § 10.7 (b) and § 10.7 (c) of the draft have removed the current requirement for publication of a notice of intended disposition to ensure due process. Identifying all lineal descendants and selecting the most appropriate individual descendant is a notoriously difficult task since, unlike with Indian Tribes, there is no set list equivalent to the list of Federally recognized Tribes from which to begin the search. In determining probate, the Office of Hearings and Appeals relies on a highly trained administrative law judge and public notice at least 21 days prior to any probate proceedings. It is unconscionable that the draft would propose to eliminate the notice of intended disposition when the same type of task for our precious ancestors is being done by a land manager unfamiliar with this complicated process. We request the current notice requirements be retained in § 10.7 (b) and § 10.7 (c).

Section 10.7 (d)(2) of the draft would change the publication of notices of intended disposition from local newspapers to the Federal Register. We acknowledge that the Federal Register is easier to access and monitor than the myriad of local newspapers but are concerned that the time between submission and publication can be a matter of months or years, instead of mere days when local newspapers are used. We request that the change to the Federal Register only be made if it can be assured that the time between submission to publication is reduced to a reasonable period, such as 30 days.

In order to ensure expedient publication of notices of intended disposition in the Federal Register, we request that § 10.7 (d)(2)(ii) be changed to read “Within 14 days of receipt, the Manager, National NAGPRA Program, will...”

In order to ensure expedient publication of notices of proposed transfer or reinterment in the Federal Register, we request that § 10.7 (e)(3)(ii) be changed to read “Within 14 days of receipt, the Manager, National NAGPRA Program, will...”

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<sup>8</sup> 43 CFR 10.5 (b).



## Subpart C – Museum or Federal Agency Holdings or Collections

### § 10.8 General.

Section 10.8 of the drafts starts with another startling statement: “Each museum and Federal agency that has control of a holding or collection that contains museum remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony must comply with the requirements of this subpart, regardless of physical location of the holding or collection.” The statement in the draft clearly contrasts with the statutory requirements:

- “Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.”<sup>9</sup>
- “Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum.”<sup>10</sup>

Eliminating the concept “possession” arbitrarily and capriciously narrows the clear language of the inventory and summary provisions of the statute and is clearly an abuse of administrative discretion. This improper reduction is clearly adverse to the interests of lineal descendants, Indian Tribes, and Native Hawaiian organizations seeking to repatriate cultural items. We request that the draft be revised to address cultural items in the possession or control of a museum or Federal agency as required by the Act.

Subsection 10.8 (c) proposes a new regulatory requirement that no later than 395 days of the publication of the final rule in the Federal Register, each museum must submit a statement describing Federal agency holdings or collections in its custody to the controlling agency and to the National Park Service. We agree in general with this requirement but request several clarifications. It is unclear exactly what form or how much detail this statement will include. We request that the vague requirement of a “statement,” that each museum must provide a summary of Federal agency holdings and collections that meets the requirements of § 10.9 (a)(1) and an itemized list of human remains and associated funerary objects that meets the requirements of § 10.10 (a). We also request that museums and Federal agencies also be required to submit summaries and itemized lists of human remains and associated funerary objects in their possession that are under control of other institutions such as state agencies or other institutions that receive Federal assistance as proposed in § 10.2 (a) Receives Federal Funds. Lastly, the draft proposal leaves culturally and geographically affiliated Indian Tribes and Native Hawaiian organizations completely in the dark. We request inserting the following sentence after the phrase “Manager, National NAGPRA Program”: “The National NAGPRA Program will publish all summaries and itemized lists of human remains received under this requirement on its Web site within 30 days of receipt.”

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<sup>9</sup> 25 U.S.C. 3003 (a).

<sup>10</sup> 25 U.S.C. 3004 (a).

One critical element of the Act that applies to the repatriation of cultural items from museum holdings or collections is the availability of Federal grants. Consistent with 25 U.S.C. 3003 (b)(2) and 3008, we request addition of a new subsection as §10.8 (e) to read as follows:

The Secretary may make grants to Indian Tribes and Native Hawaiian organizations for the purpose of assisting in the repatriation of cultural items, and to museums for the purpose of assisting in conducting the inventories and identification required by this section. Such grants may not be used for the initiation of new scientific studies of human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

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

The introductory paragraph of this section and § 10.9 (a) repeatedly refers to a “summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony” when the summary is of holdings and collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony.” The distinction is important, since the statute requires the summary to be completed before the initiation of consultation with lineal descendants, Indian Tribes, and Native Hawaiian organizations, and it is only after such consultation that specific unassociated funerary objects, sacred objects, and objects of cultural patrimony may be identified. It is critical that lineal descendants know about the holdings and collections as a whole prior to consultation. We request that you make this important change throughout the introductory paragraph and § 10.9 (a).

Subsection 10.9 (b)(1)(i) identifies consulting parties to include “Any known lineal descendant.” Since this identification is necessarily done prior to the initiation of consultation, we request that this be changed to “Any likely lineal descendants.”

Subsection 10.9 (b)(3) stipulates that “A written request to consult may be submitted at any time before the publication of a notice of intent to repatriate under paragraph (f) of this section.” The notice of intent to repatriate ensures that any and all possible consulting parties are aware of an impending repatriation. Using the notice as a cut off to further consultation is certainly at odds with that purpose. We request that the provision be revised to read: “A written request to consult may be submitted at any time before the issuance of a repatriation statement under paragraph (g) of this section.”

In order to ensure expedient publication of notices of repatriation in the Federal Register, we request that § 10.9 (f)(2) be changed to read “Within 14 days of receipt, the Manager, National NAGPRA Program, will...”

Subsection 10.9 (i)(3) seems to extend the scientific study exemption that in the statute only applies to Native American human remains to unassociated funerary objects, sacred objects, and objects of cultural patrimony. This proposal is inconsistent with the statute and adverse to tribal interests. We request that 10.9 (i)(3) be deleted in its entirety.

**§ 10.10 Inventory of human remains and associated funerary objects.**

We object to use of the term “sets of human remains” throughout this section and request that it be changed throughout to “remains of an individual of Native American ancestry.”

Subsection 10.10.10 (b)(1)(i) identifies consulting parties to include “Any known lineal descendant.” Since this identification is necessarily done prior to the initiation of consultation, we request that this be changed to “Any likely lineal descendants.”

Subsection 10.10 (b)(3) stipulates that “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.” The notice of inventory completion ensures that any and all possible consulting parties are aware of an impending repatriation. Using the notice as a cut off for further consultation is certainly at odds with that purpose. We request that the provision be revised to read: “A written request to consult may be submitted at any time before the issuance of a repatriation statement under paragraph (g) of this section.”

Subsection 10.10 (c)(3) reiterates the statutory requirement that a museum or Federal agency must, upon request from a consulting party, provide access to records, catalogues, relevant studies, or other pertinent data related to human remains and associated funerary objects without including the statutory restriction at 25 U.S.C. 3003 (b)(2). We request that you insert the following sentence at the end of that paragraph: “Nothing in these regulations may be construed to be an authorization for the initiation of new scientific studies of human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.”

We welcome the provisions at § 10.10. (d)(4) requiring museums and Federal agencies to consult with Indian Tribes and Native Hawaiian organizations and update their inventories of any Native American human remains and associated funerary objects for which a notice of inventory completion has not been published when new regulations are published as final. We request inserting the following point at the end of this subsection: “(v) The National NAGPRA Program will publish all updated inventories on its Web site within 30 days of receipt.”

In § 10.10 (d)(6), it is unclear exactly what limitations 18 U.S.C. 1170 (a) places on the requirement in the proposal allowing a museum or Federal agency that acquires human remains or associated funerary objects from another museum or Federal agency to rely upon the latter’s inventory for purposes of compliance. We reiterate our request for the draft preamble that accompanies this document so we can better understand the full implications of the proposed change.

In order to ensure expedient publication of notices of inventory completion in the Federal Register, we request that § 10.10 (e)(3)(ii) be changed to read “Within 14 days of receipt, the Manager, National NAGPRA Program, will...”

Subsection 10.10 (h) requires a museum or Federal agency to send a written repatriation statement that conveys control of human remains and associated funerary objects to a requesting lineal descendant, Indian Tribe, or Native Hawaiian organization. Significantly, this

requirement includes funerary objects that are associated with human remains which are associated with the requesting party through geographical association. We support this change but recognize that it represents a significant change in the Department's position. The preamble to the current regulations outlines the Department's position in 2010:

Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. In section 8(c)(5) of the Act (25 U.S.C. 3006 (c)(5)), Congress assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress did not indicate the same intent regarding culturally unidentifiable associated funerary objects. Mandatory disposition for this category of items raises right of possession and takings issues that are not clearly resolved in the statute or the legislative history. American common law generally recognizes that human remains cannot be owned. The common law regarding associated funerary objects that are not culturally identifiable is not well established. According to the committee report accompanying the Senate NAGPRA bill, the Senate Committee on Indian Affairs intended that the legal framework regarding right of possession would operate in a manner consistent with general property law (S. Report 101-473 at 8). Considering the lack of precedent in the common law and Congress' direction to develop a process only with respect to culturally unidentifiable human remains, the Secretary does not consider it appropriate to make the provision to transfer culturally unidentifiable associated funerary objects mandatory. 75 FR 12398 (March 15, 2010).

While we support the proposed change, we request to see the draft preamble and filings related to Executive Order 12360 in order to verify that the Department has thoroughly researched this matter prior to changing its position.

Subsection 10.10 (k) outlines requirements for a museum or Federal agency to voluntarily transfer or reinter human remains and associated funerary objects with no connection to a present-day Indian Tribe or Native Hawaiian organization. Subsection 10.10 (k)(2) lists the required contents of the notice of proposed transfer or reinterment. We request that for reinterments of human remains and associated funerary objects according to applicable laws and policies, the notice specifically identify those laws and policies.

In order to ensure expedient publication of notices of proposed transfer or reinterment in the Federal Register, we request that § 10.10 (k)(2)(ii) be changed to read "Within 14 days of receipt, the Manager, National NAGPRA Program, will..."

### **§ 10.11 Civil penalties.**

The second sentence of the first paragraph of §10.11 states that this section does not apply to Federal agencies. We request that you insert the following sentence following that sentence: "Allegations that a Federal agency has failed to comply with the requirements of the Act or this

subpart should be referred to the appropriate bureau Office of the Inspector General or to the Department of Justice.”

Subsection 10.11 (a)(1) requires that any person filing an allegation include their full name, mailing address, telephone number, and (if available) email address. Individuals in a position to make well founded allegations of failure to comply are often current or former employees of the non-compliant museums and have a well-founded fear of retaliation if their personal information is divulged. The proposed requirement in the draft places more scrutiny on the person making the allegation than on the non-compliant museum and seems to be specifically designed to limit the number of allegations that the National Park Service will accept. We request at a minimum that the word “must” in this requirement be replaced with “should.” We also request that you consider establishing an online system for individuals to submit anonymous allegations, perhaps administered through the Department Office of the Inspector General.

In §10.11 (b), the Manager, National NAGPRA Program, is required to designate an official of the Department of the Interior to review and, if appropriate, investigate all allegations. As is clear from the Departmental Manual, delegations and designations within the Department come from the Secretary down, not from a mid-level manager up. We request that this requirement be changed to read “The Secretary must designate an official of the Department of the Interior...”

Subsection 10.11 (b)(1) outlines the duties of the designated investigator. These investigations seem to be limited to only those necessary to determine whether a specific alleged failure to comply is substantiated and not to also investigate other failures to comply that may be discovered. The investigator should also be charged with determining the economic and noneconomic damages suffered by the aggrieved lineal descendants, Indian Tribes, or Native Hawaiian organizations. We request that the last sentence be revised to read: “The official shall conduct any investigation that is necessary to determine an alleged or discovered failure to comply is substantiated, and the economic and noneconomic damages suffered by the aggrieved lineal descendants, Indian Tribes, or Native Hawaiian organizations.”

Subsection 10.11 (b)(2) requires the Secretary, after reviewing all relevant information, to determine if each alleged failure to comply is substantiated or not, and to determine if a civil penalty is an appropriate remedy. We strongly support this change. The current regulations authorize but do not compel the Assistant Secretary for Fish and Wildlife and Parks to make such decisions. However, this approach has been very problematic. The National NAGPRA Program Annual Report for FY2017 indicated that allegations of failure to comply had been received against 115 museums and of those fewer than half had been investigated. Allegations were substantiated against 22 museums and of those only half had been assessed a civil penalty. Since FY2018, the National NAGPRA Program has refused to provide information on the total number of allegations, but it appears that no new penalties have been assessed. It appears that museums that fail to comply are being given a pass by the Department. We believe that taking these decisions out of the hands of the Assistant Secretary and returning them to the Secretary will greatly enhance the enforcement of Act.

Subsection 10.11 (g) outlines the contents of the notice of assessment that the Secretary serves on a museum that has failed to comply with the Act. We request that the second sentence of

§10.11 (g) be revised to read: “The daily penalty amount shall not exceed \$1,408 per day for each failure to comply, subject to ...”

## **Subpart D – Review Committee**

### **§ 10.12 Review Committee.**

Subsection 10.12 (b) of the draft suppresses the range of nominations from which the Secretary may appoint members to the review committee. Subsection 10.12 (b)(1) establishes the absurd result that Native Hawaiian organizations may nominate traditional religious leaders from Indian Tribes, but not their own Native Hawaiian traditional religious leaders. This absurd interpretation hinges on the term “Indian,” undefined in the Act and an inherently ambiguous reference to national origin or ethnicity which raises Constitutional issues. Nominations of Native Hawaiian traditional religious leaders were historically referred to the Secretary. Subsection 10.12 (b)(2) places numerous restrictions on the type of national museums and scientific organizations that can submit nominations. The net result is that the range of nominations from which the Secretary may appoint members is significantly reduced. We request that § 10.12 (b) be deleted in its entirety in favor of the clear language already in the statute at 25 U.S.C. 3006 (b)(1).

Subsection 10.12 (c) of the draft is titled “informal conflict resolution” but combines two of the review committee’s statutory responsibilities. 25 U.S.C. 3006 (c)(3) of the statute establishes the review committee’s responsibility for, upon the request of any affected party, reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items. 25 U.S.C. 3006 (c)(4) of the statute establishes the review committee’s responsibility for facilitating the resolution of any dispute among Indian Tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable. These separate functions were previously addressed by separate procedures documents developed by the review committee and signed by the committee chair and the Designed Federal Official. Subsection 10.12 (c) of the draft combines these two separate functions into one subsection on “questions or conflicts,” and confuses several aspects of the statutory language. We request that the statutory language distinguishing between these two distinct tasks be retained.

One issue that is not addressed in the draft relates to the review committee’s responsibility to submit an annual report to the Congress on the progress made and any barriers encountered in implementing the Act during the previous year. While the review committee has regularly prepared and approved an annual report, barriers have been encountered in having the National Park Service submit the report to the Congress. The review committee approved its report to Congress for FY 2018 on April 22, 2019, but the National Park Service did not submit it to the Congress until January 2020 (nine months). The review committee approved its report to Congress for FY 2019 on October 19, 2019, but as of this writing the National Park Service has still not submitted it to the Congress (22 months and counting). In order to make the review committee’s reports to the Congress regular and timely, we request adding the following subsection: “Annual Report to the Congress. The Review Committee shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing the Act section during the previous year. The reporting period shall be the Federal fiscal year

from October 1-September 30, and the report shall be submitted to the Congress no later than December 31 of the following fiscal year.”

## **Current Organizational Placement of the NAGPRA Program**

### ***Background***

In your letter July 8, 2021, you requested input on whether the current organizational placement of the NAGPRA program (i.e., within the National Park Service) is working well, or if placement within the Office of the Assistant Secretary - Indian Affairs, or elsewhere, would be preferable? Why or why not?

The Native American Graves Protection and Repatriation Act (NAGPRA) was signed into law on November 16, 1990,<sup>11</sup> and was subsequently classified in the United States Code under Title 18, Chapter 53 (Crimes and Criminal Procedures/Indians),<sup>12</sup> and Title 25 (Indians).<sup>13</sup> Federal Courts have generally considered NAGPRA “Indian law” for purposes of statutory interpretation.

NAGPRA delegates certain responsibilities to the Secretary of the Interior, including:

- Establishing a seven-person review committee to monitor and review the inventory, summary, and repatriation provisions;<sup>14</sup> ensuring that members of the committee have reasonable access to Native American cultural items and associated scientific and historical documents;<sup>15</sup> establishing such rules and regulations for the committee as may be necessary, and providing reasonable administrative and staff support necessary for the deliberations of the committee;<sup>16</sup>
- Promulgating regulations, in consultation with the review committee, to carry out the disposition of Native American cultural items excavated or discovered on Federal lands after 1990 that are not claimed by an affiliated Indian tribe or Native Hawaiian organization;<sup>17</sup> and
- Publishing in the Federal Register notices submitted by museums and Federal agencies describing Native American human remains and associated funerary objects that have been determined to be culturally affiliated with an Indian Tribe or Native Hawaiian organization.<sup>18</sup>

NAGPRA also authorizes the Secretary to carry out certain discretionary duties, including:

- Extending the deadline for any museum that makes a good faith effort to complete its inventory of Native American human remains and associated funerary objects;<sup>19</sup>
- Making grants to assist museums, Indian Tribes, and Native Hawaiian organizations in conducting summary, inventory, and repatriation activities;<sup>20</sup>

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<sup>11</sup> PL 101-601, 104 Stat. 3048.

<sup>12</sup> 18 U.S.C. 1170.

<sup>13</sup> 25 U.S.C. 3001 et seq.

<sup>14</sup> 25 U.S.C. 3006 (a).

<sup>15</sup> 25 U.S.C. 3006 (f).

<sup>16</sup> 25 U.S.C. 3006 (g).

<sup>17</sup> 25 U.S.C. 3002 (b).

<sup>18</sup> 25 U.S.C. 3003 (d)(3).

<sup>19</sup> 25 U.S.C. 3003 (c).

<sup>20</sup> 25 U.S.C. 3008.

- Assessing a civil penalty on any museum that fails to comply with the requirements of the Act;<sup>21</sup> and
- Accepting responsibility for the certification and disposition duties related to the inadvertent discovery of Native American cultural items on lands control by another Department or agency.<sup>22</sup>

In 1991, Secretary Manuel Lujan chartered the Native American Graves Protection and Repatriation Review Committee and signed a Secretarial Order delegating the majority of his responsibilities to the Departmental Consulting Archeologist in the National Park Service.<sup>23</sup> These delegations were eventually codified in the Departmental Manual.<sup>24</sup>

Prior to passage of NAGPRA, the Departmental Consulting Archeologist's duties were limited to overseeing and coordinating the Department's archeological activities under the Antiquities Act and the Archaeological Resources Protection Act. He drafted most Departmental responses to the bill that would become NAGPRA. The Department declined to provide a witness for the hearing on the bill.<sup>25</sup> A letter signed by the Assistant Secretary for Fish and Wildlife and Parks to the sponsor made it clear that the Department opposed passage of the bill without extensive amendments.<sup>26</sup> None of the Department's objections were addressed when the bill was enacted.

Indian Tribes, Native Hawaiian organizations, and museums were critical of the Departmental Consulting Archeologist's implementation of his delegated implementation responsibilities, eventually resulting in two Senate hearings.<sup>27</sup> In 1999, the Assistant Secretary for Policy, Management and Budget submitted an options paper outlining seven possible administrative locations for the Department's NAGPRA responsibilities.<sup>28</sup> The Secretary's chief of staff decided to redelegate NAGPRA responsibilities to a new program within the National Park Service.<sup>29</sup>

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<sup>21</sup> 25 U.S.C. 3007 (a).

<sup>22</sup> 25 U.S.C. 3002 (d)(3).

<sup>23</sup> Charter: Native American Graves Protection and Repatriation Review Committee (signed and filed August 2, 1991). The specific Designated Federal Official was not identified, but the manager of the Archeological Assistance Division was the Departmental Consulting Archeologist. Secretarial Order 3149: Delegation of Authority-Native American Graves Protection and Repatriation Act (P.L. 101-601) Responsibilities (Oct. 16, 1991).

<sup>24</sup> Preservation of Historical Property, 519 DM 1 (Feb. 17, 1994) and Preservation of American Antiquities and Treatment and Disposition of Native American Cultural Items, 519 DM 2 (Feb. 17, 1994).

<sup>25</sup> Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearing on H.R. 1381-Native American Burial Site Preservation Act of 1989; H.R. 1646-Native American Grave and Burial Protection Act; and H.R. 5237-Native American Graves Protection and Repatriation Act. H.R. Hearing 101-62 (July 17, 1990).

<sup>26</sup> Letter from Deputy Assistant Secretary for Fish and Wildlife and Parks Scott Sewell to Representative Morris Udall (Oct. 2, 1990).

<sup>27</sup> Hearing before the Committee on Indian Affairs, United States Senate on the Native American Graves Protection and Repatriation Act. S. Hrg. 106-57 (April 20, 1999). Hearing before the Committee on Indian Affairs, United States Senate on the Native American Graves Protection and Repatriation Act. S. Hrg. 106-708 (July 25, 2000).

<sup>28</sup> Memorandum from Assistant Secretary for Policy, Management, and Budget John Berry to Secretary's Chief of Staff Ann Shields. Location of NAGPRA Responsibilities (May 4, 1999).

<sup>29</sup> Secretarial Order 3261: Realignment of Functions Relating to the Native American Graves Protection and Repatriation Act (May 23, 2005).



Following the 2009 decision in *Indian Educators Federation v. Kempthorne*,<sup>30</sup> the National Park Service determined that the National NAGPRA Program did not directly and primarily relate to the provision of services to American Indians, and thus that employment preference for American Indians does not apply. In the history of the National Park Service's implementation of the Secretary's NAGPRA responsibilities only one enrolled tribal member has been employed by the program.

In 2010, the Government Accountability Office issued a report evaluating the compliance of key federal agencies with NAGPRA.<sup>31</sup> The GAO specifically addressed the importance of the National Park Service making data regarding NAGPRA implementation available to Tribes, museums, federal agencies, and the general public.

The Congress again expressed concern with the National Park Service's implementation of NAGPRA in 2018 with introduction of a bipartisan bill to redelegate some of the Secretary's responsibilities to the Office of the Assistant Secretary for Indian Affairs.<sup>32</sup> A revised version of the 2018 bill was introduced in 2020 by Representative Haaland.<sup>33</sup> A new version of this bill is currently being prepared for introduction in the House.

Recent concern with the National Park Service's implementation of NAGPRA focuses on several specific issues:

- The National Park Service has shown a reluctance to investigate allegations of failure to comply that it receives;<sup>34</sup> investigations it does conduct are done without consultation with the affected Indian Tribes or Native Hawaiian organizations, and without oversight from the review committee, Congress, or the public; and for those allegations it does substantiate it tends to greatly mitigate the penalty amount assessed. Tribes see this as a bias towards protecting museums.
- The National Park Service attempted to subsume tribal and review committee consultation on proposed regulations into the regular notice and committee rulemaking provided to the public. It was only by appealing to the new political appointees within the Department that the current government-to-government tribal consultation was initiated. Tribes see this a violation of the special government-to-government relationship between the United States and Indian Tribes.<sup>35</sup> Review committee members see this as an abrogation of its statutory responsibility for "consulting with the Secretary in the development of regulations to carry out the Act."<sup>36</sup>
- The National Park Service failed to provide reasonable administrative and staff support necessary for the deliberations of the review committee. The National Park Service has still not sent the review committee's statutorily required annual report for FY2019 to the Congress 22 months and counting after it was finalized.

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<sup>30</sup> No. 04-cv-01215 (D.DC Mar. 31, 2008).

<sup>31</sup> Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied With The Act. GAO-10-768.

<sup>32</sup> H.R. 6647, 115th Cong. July 31, 2018. Sponsored by Rep. Rokita (R-IN), cosponsored by Rep. Cole (R-OK), McCollum (D-MN), Moore (D-WI), Young (R-AK), Mullin (R-OK), Walorski (R-IN).

<sup>33</sup> H.R. 8298, 116th Cong. Sept. 17, 2020. Sponsored by Rep. Haaland (D-NM), cosponsored by Rep. Cole (R-OK), McCollum (D-MN), Norton (D-NM), San Nicholas (D-GU).

<sup>34</sup> The FY2017 Program report indicates that allegations of failure to comply against 62 museums had not been investigated. Subsequent reports provide no indication that any additional investigations occurred since that time.

<sup>35</sup> *Wyoming v. U.S. Department of Interior*, 136 F. Supp. 3d 1317 (D. Wyo. 2015).

<sup>36</sup> 25 U.S.C. 3006 (c)(7).

- The National Park Service has drastically reduced the amount of information available to the public on its web page. Starting in FY2018, the program significantly reduced the information included in its annual report, particularly missing are data regarding the program budget and the processing of allegations of failure to comply. Reports for FY2019 or FY2020 were missing until April 21, 2021.<sup>37</sup> A revision of the inventory database has removed much of the detailed information relied upon by Indian Tribes, Native Hawaiian organizations, museums, federal agencies, and the review committee. Program data regarding inventories of Native American human remains and associated funerary objects appears to have been moved to a personal page controlled by one of the program staff.<sup>38</sup>
- The current Departmental Manual reveals a tangle of conflicting delegations with both Departmental Consulting Archeologist and the Manager of the National NAGPRA Program delegated to serve as the review committee's designated Federal official,<sup>39</sup> and general delegations to both the Departmental Consulting Archeologist and the Director of the National Park Service.<sup>40</sup>
- The draft proposed regulations which were circulated as part of government-to-government tribal consultation is replete with examples where terminology is changed contrary to legislative intent for the convenience of museums and Federal agencies and consultation with Indian Tribes and Native Hawaiian organizations is removed or diminished.

While we would not presume to offer an assessment of intent, this pattern of occurrences has nonetheless created opacity and systemic outcomes counter to the intent of NAGPRA.

### ***Analysis***

There are a number of possible locations where the NAGPRA Program might be situated to help resolve some of the problems encountered. We believe that the two primary factors that should be considered are: 1) the importance of asserting definitively that the primary beneficiaries of NAGPRA are the lineal descendants, Indian Tribes, and Native Hawaiian organizations seeking the return of their ancestors and cultural items; and 2) the dangers of maintaining the implementation program within a land managing and collection managing bureau which is required to also comply with the statutory provisions.

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<sup>37</sup> The FY2019 and FY2020 reports appear to be “copyrighted” and backdated. See 17 U.S.C. 105.

<sup>38</sup> <https://public.tableau.com/profile/melanie.obrien#!/> (accessed May 20, 2021).

<sup>39</sup> 519 DM 2 and 145 DM 5.2.

<sup>40</sup> 519 DM 2 and 245 DM 1.1.24.

Option	Pro	Con
Additional NAGPRA Program resources are needed in all scenarios		
National Park Service – National NAGPRA Program	<ul style="list-style-type: none"> <li>- Existing infrastructure for administrative staff</li> </ul>	<ul style="list-style-type: none"> <li>- Unresponsive to concerns expressed by tribes and review committee members</li> <li>- Perceived land management bias</li> <li>- Perceived collection management bias</li> </ul>
Bureau of Indian Affairs	<ul style="list-style-type: none"> <li>- Makes it clear that the Department considered NAGPRA primarily for the benefit of Indian Tribes.</li> </ul>	<ul style="list-style-type: none"> <li>- New infrastructure required</li> <li>- Brief disruption of activity due to relocation of office</li> <li>- Perceived land management bias</li> <li>- Perceived collection management bias</li> </ul>
Assistant Secretary – Indian Affairs	<ul style="list-style-type: none"> <li>- Elevating program to the Secretariate level demonstrates the Department’s heightened concern</li> <li>- Makes it clear that the Department considers NAGPRA primarily for the benefit of Indian Tribes</li> </ul>	<ul style="list-style-type: none"> <li>- New infrastructure required</li> <li>- Brief disruption of program activity due to relocation of office</li> </ul>

**Recommendation**

We support the redelegation of some of the Secretary’s NAGPRA responsibilities to the Office of the Assistant Secretary for Indian Affairs.

NATHPO appreciates the opportunity to work with the Administration to ensure that Tribal voices are heard and considered in the development of regulations, policies, and actions to support American Indian, Alaska Native, and Native Hawaiian cultures, heritage, and practices, including the basic human right of repatriating Native ancestors, funerary objects, sacred objects, and objects of cultural patrimony.

Sincerely,



Valerie J. Grussing, PhD  
Executive Director