

**Native American Graves Protection and Repatriation Review Committee
Department of the Interior
c/o National NAGPRA Program
National Park Service
Washington, DC 20240**

7 June 2022

The Honorable Deb Haaland
Secretary of the Interior
Department of the Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Haaland,

One of the duties and functions of the Native American Graves Protection and Repatriation Act (NAGPRA) Review Committee is to consult with the Secretary of the Interior on the development of regulations to carry out the law (25 U.S.C. 3006 (c)(7)). The Department of the Interior currently is considering revisions to the existing regulations that implement NAGPRA (43 CFR 10). In July, 2021 the Department released a draft of proposed revisions to the existing regulations, referred to in this letter as the "July 2021 draft." There is a more up-to-date version of the draft proposed regulation revisions that is under review at the Office of Management and Budget, however, the Review Committee has not had access to that version. In attachments to this letter, the Committee provides our partial recommendations based upon our review and discussions regarding the July 2021 draft.

On 14 March 2022 the Review Committee provided a set of general recommendations to the Secretary concerning the July 2021 draft. With this letter, we include attachments, which provide additional specific recommendations regarding two sections of the July 2021 draft, Section 10.1, "Introduction" and Section 10.10 (d) and (e), "New NAGPRA Inventories." We note that the sections on which our comments are based are only a portion of the draft proposed revisions. The Review Committee intends to continue its review and additional recommendations at future meetings.

A broader sense of the general and specific concerns and questions that Committee members have concerning the draft proposed changes are encapsulated in a third attached document, which the Committee compiled in February. This document contains comments on sections of the July 2021 draft by individual members. It serves as a starting point and organizational framework for the Committee's discussions and recommendations on the draft proposed revisions ("Native American Graves Protection and Repatriation Review Committee

Compilation of Members' Recommendations and Questions Regarding the July 2021 Draft Proposed NAGPRA Rule, February 11, 2022").

Like you, Madame Secretary, the Review Committee members seek ways in which the implementation of NAGPRA can be improved. It is likely that improvements will require substantial new resources (e.g., funds and personnel) to undertake new inventorying procedures, including increased consultation among Tribes, Native Hawaiian organizations, museums, and Federal agencies. For many years, the Review Committee has reported annually to Congress about the need for additional resources to improve the implementation of NAGPRA. The Committee's report to Congress includes such recommendations and was completed in November, 2021, although we understand that the report has not yet been conveyed by the Department to the Congress.

It is expected that substantial resources (funds and personnel) will be needed to undertake the new inventorying procedures, including the increased consultation between Tribes and Native Hawaiian organizations and museums and Federal agencies, as well as other activities described in the July 2021 draft revisions. The Review Committee hopes that you and your senior management team at the Department of the Interior will consider such new needs as you plan and decide upon funding and programs in future budgets.

Whatever procedures are required by new regulations, they should be achievable. It would be detrimental to all involved in NAGPRA compliance and implementation if new requirements are set without corresponding resources to achieve them. Allowing such a situation to develop runs counter to the overall objectives of NAGPRA to correct past wrongs and provide opportunities for the development and expansion of beneficial, positive, and productive relationships among Indian tribes, Native Hawaiian organizations, museums, national scientific organizations, and federal agencies.

The Review Committee also wants to recognize the participation of Assistant Secretary for Fish and Wildlife and Parks Shannon Estenoz and Assistant Secretary -- Indian Affairs Bryan Newland at its 3 May meeting. They provided a clear status report and comments on the importance of effective implementation of NAGPRA. They expressed your intent, which they fully supported, to continue focusing on this matter. All the committee members appreciated the opportunity to discuss our support for this effort, as well as our concerns directly with the Assistant Secretaries. We look forward to continuing to assist in the development of means to improve the implementation of NAGPRA.

Best regards,



Francis P. McManamon, Ph.D.
Chair, NAGPRA Review Committee

NAGPRA Review Committee members: C. Timothy McKeown, Shelby Tisdale (and members whose terms expired on 10 May 2022: Barnaby Lewis, John Beaver, and Honor Keeler; and on 20 August 2021, Armand Minthorn.)

cc, with attachments: Assistant Secretary Shannon Estenoz
Assistant Secretary Bryan Newland
Director, National Park Service Charles F. Sams, III
Associate Director, Cultural Resources, Partnerships, and Science Joy Beasley

**NAGPRA Review Committee's specific recommendations regarding Section 10.1
the July 2021 draft proposed changes to NAGPRA regulations
7 June 2022**

Subpart A – General

§ 10.1 Introduction.

(a) Purpose: The Review Committee finds the changes at §10.1 (a) in the July 2021 draft to the "Purpose" section inadequate. The Review Committee recommend changing the "Purpose" as proposed in the July 2021 draft proposed regulations to better reflect the intent of the law. We recommend using the text from House Report 101-877, p. 8 where the purpose of the Act is described by the Congress, with slight textual modifications as shown:

These regulations provide processes to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian, and Native Hawaiian lands; and for Federal agencies and museums receiving federal funds to inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects.

(b) Applicability: The Congress clearly requires that museums and Federal agencies prepare summaries and inventories of all cultural items in their “possession or control.” Removing the possession requirement here is contrary to that purpose and is a clear abuse of discretion by the Department. We recommend that the Department stick to the precise statutory language unless there is some ambiguity, which we do not think exists here, or it yields an unconstitutional result, which again we do not think applies here.

(b)(2) U.S. Territories: We note that the following sentence has been removed from 10.1 (b)(2) “These regulations apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States.” At our 21 July 2021 meeting the Department explained that “this is a paragraph that we often have questions from museums about, and in the draft, it has been removed.” We question whether removing the sentence and addressing the matter of U.S. Territories elsewhere in the draft proposed rule might be interpreted that the Department has changed its position.

(c) The Review Committee finds the new "Duty of Care" definition proposed at §10.1 (c) of the July 2021 draft confusing. The Committee recommendations using the following definition instead:

Duty of care. Through meaningful consultation with tribes and Native Hawaiian organizations, Federal agencies, museums, universities, and repositories shall provide standards of care based upon the free, prior, and informed consent of tribes and Native

Hawaiian organizations for human remains and cultural items.¹ Museums and Federal agencies have an obligation to adhere to a standard of reasonable care while performing any act that would foreseeably harm any cultural item in their possession or control. This duty includes taking affirmative steps to verify the location and condition of all cultural items in the control of the museum or Federal agency, and consulting with any lineal descendants and any culturally or geographically affiliated Indian tribes or Native Hawaiian organizations to determine the standard of care they consider reasonable.

(d) Delivery of written documents. We note that the last sentence of (d)(2) states that any change of physical or electronic address will be noticed in the Federal Register within 5 business days. Our experience in terms of meeting notices, solicitation of nominations of new members, and general publication of any notice indicates this deadline is highly unrealistic.

(e) Deadlines and timelines. This section calculates deadlines according to calendar days but elsewhere in the draft business days are used. The statute only refers to days. We recommend revising the draft proposal to adopt a single standard and use it throughout. We recommend change the phrase “date certain” to “certain date.”

(g) Judicial jurisdiction. The proposal highlights that the United States district courts have jurisdiction over any action by any person alleging a violation of the Act or this part as reflected at 25 U.S.C. 3013, but does not reflect the statute’s recognition of the U.S. Court of Federal Claims in resolving specific matters as reflected at 25 U.S.C. 3001 (13). We request that this section be rewritten as follows:

(g) Judicial jurisdiction. The United States district courts have jurisdiction over any action by any person alleging a violation of the Act or this part, and shall have the authority to issue such orders as may be necessary to enforce its provisions, including but not limited to the collection of civil penalties. The United States Court of Federal Claims has jurisdiction to determine if use of the term “right of possession” in a specific situation will result in a Fifth Amendment taking by the United States, in which event the “right of possession” shall be as provided under otherwise applicable property law.

(h) Final Agency Action: 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

¹ One Review Committee member objected to the requirement of “consent” by tribes or Native Hawaiian organization to the standards of curatorial treatment for Native American human remains and other cultural items cared for by Federal agencies, museums, universities, or other repositories. Such a unilaterally-imposed requirement might not be appropriate or reasonable, and in some circumstances might violate existing binding administrative agreements, legal obligations, and/or professional standards of the curating organization.

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 in the proposal 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. We also note that in reviewing the Code of Federal Regulations irrevocable waivers typically attached only to affirmative actions by a party and not to mere inaction.

(i) Information Collections. It is not clear who “you” is in the second sentence of this section. We recommend revising it to read: “A Federal agency may not conduct or sponsor, and no one is required to respond to, the collection of information under this part unless the Federal agency provides a currently valid OMB control number.”

**NAGPRA Review Committee specific recommendations on Section 10.10(d) and (e),
"Updating NAGPRA Inventories (July 2021 draft)"**

7 June 2022

The July 2021 draft proposed revision of Section 10.10 requires museums and Federal agencies with collections covered by NAGPRA to:

...complete an inventory... [the purpose of which] is to provide determinations, following consultation, about [Native American] human remains and associated funerary objects to lineal descendants, Indian Tribes, and Native Hawaiian organizations. (July 2021 Draft, Section 10.10, first paragraph)

The Review Committee has recommendations on six specific aspects of this part of the draft proposed revisions.

1. The Review Committee agrees that NAGPRA inventories are important documents and key to implementation of the law. There should be a schedule, with deadlines, for the Federal agencies and museums for the inventory process. Factors that should be considered in determining the schedule and deadlines include:

- the number of tribes and Native Hawaiian organizations that must be consulted at the initiation of the inventory process,
- the number of Native American human remains and associated funerary objects for which information must be checked,
- the funding that federal agencies responsible for implementing NAGPRA are able to provide to Tribes, Native Hawaiian organizations, Federal agencies, museums, and scientific organizations that are responsible for the physical care of the human remains and associated funerary objects.

The July 2021 draft revisions require completion of NAGPRA inventories within two years of the date when the revisions become final. In some cases, this may be sufficient time for the Indian tribes and Native Hawaiian organizations and the museums and Federal agencies to comply with this requirement to accomplish all the necessary new activities. In others it might not be. The schedule for completion of these activities should be considered in light of additional information from museums, federal agencies, and national scientific organizations obtained in meetings described in recommendation #3.

2. The draft proposed regulations anticipates that some Federal agencies and museums will not be able to complete the inventory process within the two-year schedule. Procedures for applying for an extension of this deadline are described at Section 10.10(d)(5). The Review Committee recommends that the regulations require each application for an extension be reviewed and approved by the Assistant Secretary for Fish, Wildlife, and Parks and the Assistant Secretary for Indian Affairs.

3. There is a need for a careful, well-informed, and accurate description and assessment of the likely real time and cost requirements for a successful outcome based on the proposed changes and additions to the NAGPRA requirements. Along with the ongoing consultation with Indian tribes and Native Hawaiian organizations, the Department of the Interior should undertake meetings with representatives of museums, Federal agencies, national scientific organizations to accurately and in detail describe and

assess the specific activities needed to contact Tribes and Native Hawaiian organizations, engage in consultation, gather information for and prepare the NAGPRA inventories, including the development of realistic financial, scheduling, and timeline information.

4. Consultation must be part of this process. "Consultation" for the updating of NAGPRA inventories "... means a process involving the exchange of information, open discussion, and joint deliberations with respect to potential issues, changes, or actions by all interested parties (Section 10.2, Definitions, of the July 2021 text of the draft proposed revisions to the NAGPRA regs). The committee supports this regulatory clarification.

5. Research as part of the new inventory process must focus on "...existing museum records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographic origins, cultural affiliation, and basic facts surrounding the acquisition and access of Native American human remains and associated funerary objects...[the requirement for such investigations] shall not be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects...(25 USC 3003, Section 5(b)(2) NAGPRA). The committee supports this regulatory clarification.

6. It is expected that substantial resources (funds and personnel) will be needed to undertake the new inventorying procedures, including the increased consultation among tribes, museums, and Federal agencies. A significant percentage of the funds to pay for these activities should be provided by the federal government using the existing NAGPRA grants program for tribes and museums and increasing base budgets for NAGPRA implementation in Federal agencies or new programs that accomplish the same objectives.