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

General Topics of Concern

Frank McManamon has three general areas of concern about this draft of revised NAGPRA regs.

General Concern 1: The process that the RevComm is being asked by the Department to follow is too short for adequate review and detailed, thoughtful comment on such a complicated, lengthy, and extensive set of changes. The nature of the current review process is not consistent with the statutory function of the Review Committee to consult "…with the Secretary in the development of regulations to carry out this Act." (25 USC 3006, Section 8(c)(7). [McManamon]

General Concern 2: Some of the new terms and procedures introduced seem to overstep the requirements set in the law.

- "Geographical affiliation geographically affiliated" I see several problems or questions regarding adding these concepts or terms to the NAGPRA regs:
  - it assigns a higher importance or priority to the present or past geographic location of a tribe (or NHO) than is assigned to the other kinds of information identified in the related to establishing cultural affiliation in the law (25 USC 3005, Section 7a(4)). a more important consideration for affiliating the tribe(s) with cultural items for repatriation.
  - It is not clear if the "geographic location" refers to historical, ancient, modern, or any of the locations of the tribe(s).
  - It is not clear about what geographical information is to be determinative regarding affiliation, potentially going well beyond the decisions from ICC and Court of Claims cases, which are based on detailed research and evaluation and legal review and verification evidence? What specific public sources exist for the categories shown under "Acknowledged aboriginal land"? Are there historical, legal, or scientific assessment/analyses that affirm the accuracy of these sources? Are museums and public agencies or tribes responsible for conducting such research? Or will the Congress or National NAGRPA program be responsible for doing so? [McManamon]

General Concern 3: New (i.e., "updated to the effective date of the rule" according to the National NAGPRA July "Overview of Changes") requirements and timelines (in Subpart C) for compliance would be placed upon museums and agencies if the draft revised regulations were implemented. These are beyond a reasonable timeframe for these organizations to be able to comply in good faith and following the legal requirements. Agencies and museums many times have expressed to the National NAGPRA program the need for additional funds to implement

NAGPRA. The new requirements in the draft proposed revisions to the regulations make this need even greater.

In a letter, dated 28 January 2022, to the National Park Service Director Charles F. Sams III the President and CEO of the American Alliance of Museums, Laura L. Lott emphasized that the AA"… are committed in both the letter and spirit of NAGPRA." She pledged to work together to increase "… understanding between museums, Indian Tribes, and Native Hawaiian organizations…to promote understanding in American society." Ms. Lott noted in her letter that in order for museums to "…expeditiously and properly repatriate remains under any new regulations…" funding sufficient to undertake new requirements for repatriation will require additional staff and other funding. She requested that the NPS and Biden Administration seek Congressional approval of new funding to support these needed museum activities. Coincidentally, at the 3 February Oversight Hearing of the Senate Committee on Indian Affairs, the topic of funding needed by museums and agencies to comply with repatriation requirements of NAGPRA came up during the questioning by committee members. Dr. Anna Ortiz of the General Accountability Office, commented that in the 2010 GAO investigation of NAGPRA implementation agencies responsible for NAGPRA compliance generally reported substantial underfunding of what they needed for compliance. [McManamon]

I remind RevComm members that the committee included in its recent annual reports to Congress, including the current draft report under review by the Department, recommendations to Congress for increases in the NAGPRA grants program and for federal agency NAGPRA-compliance actions and programs to enhance compliance with the law. We should refrain from supporting new or increased compliance requirements without the simultaneous provision of funding to museums, agencies, and tribes to meet these requirements in a timely and appropriate manner. [McManamon]

Tribes and NHOs have not had the opportunity for adequate, robust, and meaningful tribal consultations. There is a significant issue of notice regarding the first round of tribal consultations. Tribes have expressed that their tribal leadership and/or THPO/repatriation offices did not receive notice or did not receive it within a reasonable time to provide comments. Furthermore, consultations took place during the COVID-19 pandemic when resources within tribes were stretched thin and significant losses of tribal members occurred. Some tribes and others have expressed that consultations should happen on a one-on-one basis, or regionally. Recommendations: 1) The National NAGPRA Program should develop a listserv or other form of notification to ensure all Tribes and NHOs and their THPO/repatriation departments are updated on upcoming meetings, notices, events, new policies and procedures, and the NAGPRA draft regulation process, and also have the opportunity to participate in all meetings of the National NAGPRA Review Committee. Communication with tribes and notifications systems with Tribes and NHOs have been developed in other agencies in furtherance of the government-to-government relationship the federal government has with Tribes. This list should be updated every 6 months to ensure it remains current. 2) The National NAGPRA Program and the Department of the Interior should conduct meaningful and robust tribal consultations pertaining to the draft NAGPRA regulations. This should include at least one more round of tribal consultations before the draft NAGPRA regulations are opened for public comment. It is recommended that tribal consultations take place directly with tribal governments and NHOs, involving more than a mere letter. [Keeler]

The Department of the Interior and the National NAGPRA Program should provide opportunities for spiritual and ceremonial leaders to comment on the draft NAGPRA regulations. NAGPRA clearly incorporates the viewpoints and participation of traditional Native American religious leaders throughout the law. Therefore, opportunities to consult over the draft NAGPRA regulations should include them, as well. They were an integral and important part of the drafting of NAGPRA and its establishment as federal law. [Keeler]

There are significant changes in the definitions in the draft NAGPRA regulations and the introduction of new definitions. These should all be carefully considered with a study that fully investigates the overlap and effect of these changes on other federal laws, such as the Archaeological Resources Protection Act (ARPA), National Historic Preservation Act (NHPA), National Environmental Policy Act (NEPA), and other federal laws. This is especially important to consider given the newly introduced definitions of "ARPA Indian lands", "ARPA Public Lands", and "Indian group" as such definitions or lack of adequate definitions may have detrimental effects. Adequate tribal consultation should occur for input on all definitions, most especially in the case of the introduction of new terms or modified terms. [Keeler]

The National NAGPRA Program should contact each tribe that has submitted comments on the draft NAGPRA regulations to ask them whether they would like to submit these to the National NAGPRA Review Committee, which will be submitting recommendations to the Secretary of the Interior. In addition, the National NAGPRA Program should contact each tribe and THPO/Repatriation office to give them the opportunity to submit comments to the Review Committee. This aligns with the obligations required through Executive Orders E.O. 13175 and E.O. 13084. E.O. 13084 states that "Each agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." (E.O. 13084, Section 3(a)). In addition, Sec. 5 of E.O. 13084 states that "On issues relating to tribal self-government, trust resources, or treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." Executive Order 13175 further states that "Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." (E.O. 13175, Sec. 5(a). Thus, the National NAGPRA Program and the Review Committee is required to provide meaningful tribal consultation. It is also imperative that the Review Committee use "consensual mechanisms for developing regulations". [Keeler]

The draft NAGPRA regulations may not be released for public comment until Tribes, NHOs, and museums have an opportunity to submit comments to the Review Committee. The Review Committee has a statutory obligation under NAGPRA to consult with "Indian tribes and Native Hawaiian organizations and museums within the scope of the work of the committee affecting such tribes and organizations" and to consult with "the Secretary of the Interior in the development of regulations". [Keeler]

I continue to maintain that we go through the draft NAGPRA regulations line-by-line to ensure that we are thorough in our review. I also maintain that we must ensure that the National NAGPRA Program notify Tribes and NHOs of the Review Committee's review of the draft

NAGPRA regulations and provide them with the opportunity to submit comments to the National NAGPRA Review Committee before we proceed further. [Keeler]

There is great concern over whether investigations for failure to comply are occurring in a timely manner and whether prosecutions for these NAGPRA violations are proceeding forward. Information pertaining to civil penalties, investigations, and prosecutions, including any backlogs, should be submitted to the NAGPRA Review Committee so that we will be informed of successes or failures in the current regulations and how they may be revised. It is imperative we are provided with this information so that we will be able to fulfill our obligations to provide recommendations to the Secretary of the Interior on the regulations. The NAGPRA Review Committee does not condone a hierarchy of enforcement in federal laws that unjustly places laws that pertain to Tribes and Native Hawaiian Organizations at the bottom of enforcement interests. [Keeler]

A draft Preamble should be included for review by the NAGPRA Review Committee. [Keeler]

The draft NAGPRA regulations should acknowledge and incorporate tribal laws where applicable. [Keeler]

The committee thanks Assistant Secretaries Newland and Estenoz for holding tribal consultation on the draft proposed regulations and for making the transcripts of these sessions available to the public. We have repeatedly requested copies of the written comments that were submitted as part of that consultation, but our requests have thus far been denied. It is very difficult to consult on this draft proposal when the Department is withholding records that are necessary for our deliberations. We again request copies of those comments so that we can have a full understanding of tribal concerns. In her testimony to the Senate Indian Affairs Committee on February 2, 2022, NPS Associate Director Joy Beasely stated that the Department would provide tribes with written responses all issues raised in the tribal consultations. We request a copy of that document to help us in carrying out our statutory responsibility to consult in the development of NAGPRA regulations. [McKeown].

I will be making any of my comments and suggestions directly during the public meetings followed by written comments as needed to complete our process. [Beaver]

Subpart A – General

§ 10.1 Introduction.

10.1 Introduction (a) Purpose: The new "Purpose" text deletes reference to the kinds of individuals and organizations to which disposition or repatriation may be made under the law, which is included in the section in the current regs. Why drop this? The original Purpose text should be retained since the initial procedure and important subsequent actions require: "....a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated." If desirable, it is possible to add at the end of the existing Purpose text part of the revised draft text: "These regulations

provide a systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony…" [McManamon]

10.1 (a)

- Once these proposed changes to the NAGPRA regulations are finalized they will guide NAGPRA compliance going forward and the current regulations will no longer be referred to. It is important that the purpose state at least that “These regulations carry out the provisions of the Native American Graves Protections and Repatriation Act of 1990 (Pub. L. 101-601: 25 U.S.C. 3001-3013) of November 16, 1990” or something along this line that refers to the Act. I am concerned that as the next generation of museum and federal agency employees come along it will be important that they be familiar with the Act as well. Having it referenced in the introduction will make it readily visible to those beginning their work with NAGPRA compliance.
- As is, this sentence appears to be incomplete. Disposition and repatriation to whom? There needs to be additional language that refers to the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants, Indian tribes and Native Hawaiian Organizations. [Tisdale]

10.1 Introduction (c) Duty of Care: Which sections specifically in 36 CFR 79 are being referred to here by the terms "care for and manage"? The 36 CFR 79 regs cover methods to secure curatorial services, methods to fund curatorial services, terms to include in contracts for curatorial services, standards for repositories to meet, use of collections, and inspections and inventories of collections. If all of the 36 CFR 79 requirements are being imposed on museums, including for items not from archaeological contexts or not from collections of federal agencies, this seems a substantial burden and requirement not described in NAGPRA.

1. Were in these draft revised regulations is there a directive for museums to comply with 36 CFR 79? What is the legal or administrative theory that makes it possible for this new draft revised regulation to impose new requirements on museums?
2. What specifically is meant by "safeguard and preserve..."? These terms are not defined in the proposed revised regulations.
3. Where in 36 CFR 79 is the term "cultural items" used? It is not in the 2012 version.
4. As part of collections the care for and management of Federal archaeological collections under 36 CFR 79, allows for traditional religious, , educational, and scientific uses of the objects covered by this regulation. At least some museums and agencies that hold NAGPRA-related cultural items do not allow these kinds of uses for these items that they control. This seems to create potential for conflict.
5. 36 CFR 79 relates to the treatment of "federal archaeological collections." Remains or items covered by NAGPRA may not be in archaeological collections. [McManamon]

10.1 (c) Duty of care This only refers to Federal agencies and should include museums in the first line as well. The last sentence refers to museums but not Federal agencies that have

collection repositories. For consistency I recommend that museums and Federal agencies be noted in both the first and last sentences. [Tisdale]

10.1 Introduction (d) Delivery of written material and (e) Deadlines and timelines: This subsection and the following maybe over specific and end up limiting the ability of all organizations involved to comply or modify delivery and submission as administrative or technology changes occur. Placing these kinds of requirements in regulation may make it difficult to modify the specific due dates and delivery instructions that may change due to more general administrative changes or program reorganization.

10.1 (e) This should read “certain date” not “date certain.” [Tisdale]

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. [McKeown]

10.1 Introduction, (i) Information collection: Does OMB need to review, approve, and issued a new Control number for the additional information collection being required of museums and agencies by the revisions? New information being required would include providing National NAGPRA program with information about repatriation or disposition actions conducted and new information regarding research, consultations, and repatriations for cultural items for which cultural affiliation cannot be determined. [McManamon]

10.1 (i) I am not clear who “you” is referring to in the last sentence. A need for clarification here? [Tisdale]

§ 10.2 Definitions for this part.

10.2 The definitions should apply to all parts not just this one. It is easier to have one place to go to find a definition for a term. [Tisdale]

10.2 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. [McKeown]

10.2 acknowledged aboriginal land. 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;" [McKeown]

10.2 Definitions for this part, "Acknowledged aboriginal land": (see also FPM General Concern #2) "Acknowledged aboriginal land" is a new term. This seems to substantially increase the lands covered by text in the statute itself. Regulations must follow the letter of the law when that legal text is not vague, or ambiguous or when the legal text does not direct the creation of a new definition. This new term and its use in the regulations seems like overreach by the drafters. The first three kinds of sources for identifying "acknowledged aboriginal land" are drawn from the current NAGPRA regs (Sec. 10.11(b)(2)(i), which requires museums or agencies to consult about "culturally unidentifiable" human remains and associated funerary objects in their collections. The other two kinds of sources are new, one is treaties, but prior to the establishment of the US government or prior to the land becoming incorporated in the U.S. The other is a "…federal or foreign government document providing clear and convincing information." Examining the five kinds of sources to be used to describe "acknowledged aboriginal land," raises questions of what standards would be used to determine whether a particular source was reliable evidence or not. The Indian Claims Commission heard claims of Indian tribes, bands, etc. from 1946 to 1978 to determine the strength of evidence to support tribal claims for recovery, Does the DoI intend to replicate a rigorous, transparent process to determine the accuracy and legitimacy of evidence in the five kinds of sources summarized in this draft category? [McManamon]

10.2 Cultural items (or objects?) refers to objects in the definition. Use one or the other for consistency. Also, I am sure that I am not the only one to find it offensive to list Native American human remains as items or objects. Human remains are defined elsewhere. The use of cultural item and cultural object are used interchangeably throughout this document. One term needs to be decided upon and used consistently. [Tisdale]

10.2 Control and custody. 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. One solution would be to define "possession" as you have proposed to define "custody," and then implement the reporting requirements for cultural items in the possession of a museum or Federal agency as we propose in revised language for [McKeown]

10.2 Custody refers to “cultural” items or objects. Again, it would help to use one term throughout the document. Also, this would apply to Native American humans remains. [Tisdale]

10.2 Definitions for this part, Ahupua'a: This term is not in NAGPRA. Why is it added? Is there a legally and publicly defined set of boundaries for these geographic units in Hawaii? Who recommended its addition? [McManamon]

10.2 Definitions for this part, ARPA Public lands: Why is this different from "Federal lands" definition also in these regs? Why is the additional term needed and who has recommended that it be added? Does this text capture all Federal land not mentioned in the specific statements aout the NPS, NWS, and NForests. E.g., BLM lands, DoD lands, other smaller agencies' lands? [McManamon]

10.2 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. [McKeown]

10.2 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. [McKeown]

10.2 Definitions for this part, Cultural affiliation or culturally affiliated: This definition is slightly different from the existing definition, "(e)(1) What is cultural affiliation? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion." What are the ramifications of this change. Who requested it? [McManamon]

10.2 Disposition statement – Subpart B § 10.7 Disposition there are references to a disposition statement. It would be helpful to include a definition as to what this statement is and what should be included in the statement. [Tisdale]

10.2 Definitions for this part, Geographic affiliation or geographically affiliated: (See also FPM General Concern #2) How much does this expand the terms in the law? "Geographical" is five times the law, once as one of the ten kinds of information or data to be used in determining "cultural affiliation" (25 USC 3005, Section 7(e)(4)). Adding this definition and using it as the justification for repatriation of remains or cultural items that are not otherwise affiliated with the claimant seems to be beyond what was envisioned for the intent of the law. [McManamon]

10.2 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. [McKeown]

10.2 Definitions for this part, Holding or collection: Seems to need "Native American" as a descriptor before "...objects, items, ... Or, use the term "cultural items." [McManamon]

10.2 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.” [McKeown]

10.2 Lineal descendant. The Secretary’s Boarding School Initiative has highlighted a concern related to the current regulatory definition of “lineal descendant.” The NAGPRA statute stipulates that lineal descendants have a right to claim Native American human remains and associated funerary objects but does not define the term. The implementing regulations define lineal descendant as: “an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations” 43 CFR 10.2 (b)(1). Most dispositions and repatriations to lineal descendants have been to the biological descendants of the known ancestor, while most of the children buried in boarding school cemeteries died before having children of their own. We recommend adding the text to the regulatory definition to clarify that an individual tracing his or her ancestry to a sibling or other family member of a known Native American individual may also take custody of the remains.

10.2 Native American. 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.” [McKeown]

10.2 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. [McKeown]

10.2 Repatriation or repatriate – change to human remains and cultural objects. [Tisdale]

10.2 Repatriation statement is used throughout Subpart C. It would be helpful to include a definition for what this statement is and what should be included in the statement. [Tisdale]

10.2 We object to the use of the term “sets of human remains” since it reifies the perspective that these deceased 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.” [McKeown]

10.2 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.”[1] 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. [McKeown]

§ 10.3 Cultural Affiliation.

10.3 The first sentence should be changed to …Native American human remains and/or cultural object(s)/ item(s). [Tisdale]

10.3 Cultural Affiliation: In the current regulations at 10.2 [Definitions] ((e)(1) the definition of cultural affiliations is: "...What is cultural affiliation? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion." Why is this definition changed in the draft proposed regulations?

[1] 60 FR 62148, Dec. 4, 1995.

Who requested this change. In what ways will this change whether cultural items are determined to be "culturally affiliated" or not?

10.3 Cultural Affiliation, (b) Criteria for cultural affiliation: The phrase "including the results of consultation" is included in the sentence: "A cultural affiliation determination must be reasonably established by a simple preponderance of the evidence given available information about the cultural item…" Explain (1) why this phrase was added, (2) does this phrase refer strictly to information from tribes and NHos that is obtained as part of consultation, (2) what additional evidence would be included in consultation that is not already referenced in one of the other categories of information used to determine cultural affiliation, (3) how should this "consultation" evidence would be evaluated and used, and (4) whether the consultation referenced, if it included only tribes and NHo representatives would be mirrored by discussions with museums and non-tribal archaeologists, and other educators, scientists, and researchers. The penultimate sentence of this section of the proposed revisions reads: "Cultural affiliation does not require exhaustive studies of the cultural items and must not be precluded solely because of reasonable gaps in the available information." It would be prudent to include a sentence about the necessary evaluation of evidence from the different kinds of information available. For example, in the Kennewick Man federal case the Department of the Interior and Corps of Engineers determined that the ancient human remains that were the subject of the case were "Native American" and therefore subject to NAGPRA. The research done to try and determine what cultural affiliation the remains had with a contemporary tribe included archaeological, physical anthropological, linguistic, historical, geographic, and oral historical information. Based upon his evaluation of the evidence, the Secretary of the Interior advised the Corps of Engineers that the remains were culturally affiliated with the claimant tribes and recommended the disposition of the remains to the claimant tribes. The District Court judge disagreed that the evidence was sufficient to affirm either that the remains were Native American or that a relationship of shared group identity and cultural affiliation existed between the remains and the tribes. On appeal, the 9th Circuit Court affirmed the District Court opinion, pointing out that in his review of the evidence, the Secretary had overlooked archaeological and historical evidence for a lack of connection between the remains and the claimant tribes. The 9th Circuit opinion also noted that the Secretary had relied mainly upon geographic and oral traditional evidence which in this case the Court found unpersuasive. The point of this example is that evidence needs to be evaluated for its authenticity, reliability, and accuracy in addition to its availability. A cautionary statement to this effect would add to the usefulness of these draft proposed revisions. [McManamon]

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. [McKeown]

10.4 (b) 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.[2] 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 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” [McKeown]

10.4 (b) Comprehensive agreement Change may to shall or must. The term may sound like this is an option and not a requirement. [Tisdale]

10.4 General, (c) Coordination with other laws: This section should include a statement that compliance with the Archaeological Resources Protection Act (ARPA) is required and refer to Section 10.6 of these regulations which describe the requirements that any excavation or removal of Native American human remains or other cultural items be done sensitively and in compliance with ARPA. [McManamon]

10.4 (c) Coordination with other laws Again change may to shall or must for the same reason as stated above. [Tisdale]

§ 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 buy 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

[2] 43 CFR 10.5 (f).

conveyed. We request that this second cell be changed to read “Federal agency with primary management authority.” [McKeown]

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.*” [McKeown]

10.5 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.[3] The draft proposal removes this requirement and allows the appropriate official to take actions regarding the discovered cultural items, including stabilizing or covering 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.[4] We request that these requirements be added back into the proposal [McKeown]

§ 10.6 Excavation.

10.6 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.”[5] ARPA use of the phrase “excavated or removed” recognizes that not all archaeological resources are buried in

[3] 43 CFR 10.4 (d)(iii) and (d)(iv).
[4] 43 CFR 10.2 (c)(2) and 10.5 (e).
[5] 25 U.S.C. 3002 (c).

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. [McKeown]

10.6 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.[6] 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 Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86-3. [McKeown]

10.6 Excavation, (3) Step 3: There should be a "Step 4" added. This step should include conducting the excavation or removal in a sensitive manner that also ensures careful, detailed, archeological recording of the remains or cultural items and subsequent professional analysis, reporting, and data curation. [McManamon]

§ 10.7 Disposition.

Subsection § 10.7 (a) starts with the startling statement that "consultation on cultural items <u>may</u> 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 …"[7] 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 <u>is</u> required to determine the

[6] 43 CFR 10.3 (b)(1).
[7] 43 CFR 10.5 (b).

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." [McKeown]

10.7 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). [McKeown]

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. [McKeown]

10.7 (d)(2)(ii) 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…" [McKeown]

10.7 (e)(3)(ii) 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…" [McKeown]

10.7 Disposition, (e) Unclaimed cultural items from Federal lands or from Tribal lands controlled by DHHL: In the statute, 25 USC 3002, Section 3(b), "Unclaimed Native American Remains and Objects," requires that disposition of unclaimed "Native American human remains and objects" be in accordance with regulations "...promulgated by the Secretary in consultation with ...[the Review Committee], Native American groups, representatives of the museum and scientific community." Please identify and describe the dates and nature of the consultation that has occurred on this topic with the Review Committee and the museum and scientific communities regarding the text of these draft proposed regulations. [McManamon]

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 human 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."[8]
- "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."[9]

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. [McKeown]

10.8 General, (a) Museum holding or collection: Considering the number of museums that have complied with the summary and inventory requirements (in 1993 and 1995, respectively), how many museums have updated these documents with new information from a new holding or collection, from a previously lost or unknown holding or collection? What is the National NAGPRA program's estimate of the number of museums that have yet to produce required updates? [McManamon]

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." [McKeown]

[8] 25 U.S.C. 3003 (a).
[9] 25 U.S.C. 3004 (a).

10.8 General, (c) Museums with Federal agency holding or collection: This is a new requirement for museums. Doesn't this duplicate Notices of Inventory Completion (NIC) or Summaries that museums or agencies already have completed and submitted? What information must each statement contain? How many instances of situations like this have been identified? What specific problems have these situations created? How will having these new statements improve the existing situations? [McManamon]

10.8 General, (d) Informal conflict resolution: This subsection seems out of place. If so, it might cause confusion. What existing or anticipated need does it meet? Who requested this addition? [McManamon]

10.8 (e) 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. [McKeown]

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

10.9 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). [McKeown]

10.9 Summary, (a) Step 1 (1)(v): This seems to be a new kind of information not included in the description of possible summary contents in the current regulations. Does this mean that there will be a new requirement for all museums and agencies? Would all summaries already submitted need to be updated and resubmitted with this information? [McManamon]

10.9 Summary, (a) Step 1 (3): Why are these subsections added since the deadlines for each requirement has passed?? How many summaries already received would fit into each of these categories? What is your estimate of how many museums would now have to meet these expired deadlines? [McManamon]

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.” [McKeown]

10.9 Summary, (b) Step 2 (1)(iii): This a use of the new term and concept and a new requirement for museums and agencies, Are the museums and agencies who completed and distributed Summaries already required to evaluate evidence for "geographic affiliation" and undertake a new distribution of information and consultation? [McManamon]

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.” [McKeown]

10.9 (f)(2) 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…” [McKeown]

10.9 Summary, (g) Step 7: This is a new requirement. Are museums and agencies responsible for creating and submitting to National NAGPRA statements for all completed repatriations of the cultural items covered by each summary? [McManamon]

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. [McKeown]

§ 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.” [McKeown]

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.” [McKeown]

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.” [McKeown]

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. [McKeown]

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." [McKeown]

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. [McKeown]

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…" [McKeown]

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 which is not required under the statute. We support this change but recognize that it represents a shift change in the Department's position. Prior to the passage of NAGPRA, the Department of Justice raised a number of scenarios in which requiring private museums to repatriate certain cultural items might constitute a taking of private property absent the payment of just compensation. NAGPRA itself acknowledges this possibility by authorizing the United States Court of Claims to deal with such situations. 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 that prior to publication of the proposed rule the Department fully comply with the requirements of Executive Order 12630 by providing documentation to the Office of Management and Budget for their review and that in the preamble to the proposed rule the Department fully explains how this proposed regulatory restriction on the use of private property is not disproportionate. [McKeown]

10.10 Inventory, (k) Transfer or reinter…: This seems to be a new alternative and not in the statute. [McManamon]

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. [McKeown]

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…" [McKeown]

§ 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." [McKeown]

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. [McKeown]

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…" [McKeown]

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 nonecomomic 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." [McKeown]

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. [McKeown]

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 …" [McKeown]

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 museum and scientific organizations that can submit nominations. National museum and scientific organizations are free to set their own restricts on their own nomination process, but it is not the place of the Department to unilaterally restrict this professional discourse by regulation. The net result of both these proposed changes is to restrict the range of nominations from which the Secretary may appoint members. 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). [McKeown]

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. [McKeown]

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 later). The review committee approved its report to Congress for FY 2019 on October 19, 2019, but the National Park Service did not submit it to Congress until November 2021 (25 months later).. The review committee approved its report to Congress FY FY2020-2021 on November 12, 2021, but as of today the National Park Service still has not submitted it to the Congress (three 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." [McKeown]