Native American Graves Protection and Repatriation Review Committee
Recommendations regarding the
Proposed Rule 43 CFR 10
January 10, 2023

The Committee finds that overall, the revised draft of the regulations implementing the NAGPRA is an improvement and addresses numerous concerns and barriers to carrying out the NAGPRA process that have been expressed by Indian tribes and Native Hawaiian Organizations (NHOs), members of the NAGPRA Review Committee, museums and Federal agencies for years. The revised draft also provides clearer definitions and provides steps for completing summaries, consultation, inventories, disposition and repatriation as well as consulting with Indian tribes and NHOs on the sensitive and respectful care of collections held by museums and Federal agencies. It also specifically takes the burden off lineal descendants, Indian tribes and NHOs to initiate consultation regarding human remains and cultural items being held in collections and requires museums and Federal agencies who have access to and knowledge of their specific collections to initiate consultation with lineal descendants and potentially affiliated Indian Tribes and NHOs. This is a major shift in transparency on the part of museums and Federal agencies and will have a positive impact on the repatriation process in the future. Nevertheless, there are some issues regarding timelines, staffing and funding that need more scrutiny in these draft regulations if the NAGPRA is to be successful in the future.

Subpart A—GENERAL

§10.1 Introduction.

10.1 (a) states the purpose of the proposed rule. While we support the intent of the proposed text and believe it should be used elsewhere in the regulations, however, as this committee did in 2022, we recommend that the purpose stated here should adhere closely to that articulated by the Congress when they enacted the NAGPRA. We recommend making a clear distinction between the purpose stated by Congress and the interpretation of that purpose offered by the Secretary and recommend bifurcating this section to include a close paraphrase of the language used by the Congress to describe the purpose of the Act[1] in subsection (1) followed by the Department's interpretation of the purpose as subsection (2).

(a) Purpose. **(1) These regulations provide systematic 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. (2) ~~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 under~~**

[1] H.R. Rept. No. 101-87, at 8 (1990).

~~the Native American Graves Protection and Repatriation Act (Act) of November 16, 1990. The Act recognized the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in Native American human remains or cultural items subject to this part.~~ **Consistent with the Act's express language and Congress's intent in enacting the statute, these regulations require museums and Federal agencies to complete timely dispositions and repatriations through consultation and collaboration with lineal descendants, Indian Tribes, and Native Hawaiian organizations. In implementing this systematic process, museums and Federal agencies must defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.**

The requirement that museums and Federal agencies "defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations" is an important addition to implementing the NAGPRA and will assist during the consultation process. At the same time, it is critical that given the sensitive nature of this type of knowledge that it be protected from FOIA requests or other public scrutiny. Similar to the protections provided by attorney-client or doctor-patient privilege or confidentiality. This will enable the knowledge keepers in descendant communities to share this knowledge with museums and Federal agencies and inform the affiliation process as well as determinations regarding sacred objects and objects of cultural patrimony. We strongly support this requirement.

10.1 (d) of the proposed rule requires museums and Federal agencies to care for, safeguard, and preserve all human remains and other cultural items in their custody, including to the maximum extent possible: consult, collaborate, and obtain consent on the appropriate treatment, care, or handling of human remains or cultural items; incorporate and accommodate customs, traditions, and Native American traditional knowledge in practices or treatments of human remains or cultural items; and limit access to and research on human remains or cultural items. We strongly support inclusion of this subsection.

This revised definition of the duty of care is much improved and includes consultation, collaboration and consent on the appropriate care and preservation of human remains and cultural items in the custody or possession and control of a museum or Federal agency. The incorporation and accommodation of customs, traditions and Native American traditional knowledge into the collections policies and practices of the responsible staff is critical to appropriately and sensitively care for human remains and cultural items under their purview. Several museums have already done this and there are several models of collections policies regarding the traditional care of human remains and cultural items in collections. Also, limiting access to and research on human remains and cultural items is an important addition here as pointed out under Subpart C.

The Committee strongly supports the addition of the Duty of Care requirements.

10.1 (h) of the proposed rule highlights that the United States district courts have jurisdiction over any action by any person alleging a violation of the Act but does not reflect the statute's

recognition of the U.S. Court of Federal Claims role in resolving specific matters as reflected at 25 U.S.C. 3001 (13). We request that this section be rewritten as follows:

(h) Judicial jurisdiction. The United States district courts have jurisdiction over any action by any person alleging a violation of the Act, 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.

§10.2 Definitions for this part.

10.2 Acknowledged aboriginal land. Strong support for the addition of this provision. It helps to account for aboriginal lands defined through tribal accord and not adjudicated by the Indian Claims Commission, etc.

10.2 Ahupua'a. Committee member Ayau concurs with the use of this term "when determining the Native Hawaiian organization with the closest affiliation to human remains or cultural items." However, it needs to be made clearer that a Native Hawaiian organizations claim under NAGPRA for human remains and/or cultural items from the past has as much to do with lineal connection of ancestors who once resided in an ahupua'a and not the geographic location in and of itself. More puzzling is the definition, whose relevance to the task of helping determine closest affiliation to human remains or cultural items is confusing and included unnecessary wording. That ahupua'a is a traditional land division is sufficient.

10.2 ARPA Indian Lands. The term "individual Indians" is not defined. Recommend either defining or using "lineal descendants", which already has a definition under the Act. Not clear on the purpose for the inclusion of ARPA Indian Lands and request clarification.

10.2 ARPA Indian Lands and ARPA Public Lands. When read together, these two terms clearly narrow NAGPRA and limits its application to the detriment of the law and Native peoples, which is troubling. These two definitions need to be deleted in favor of the full application of ARPA. Making this distinction is unnecessary.

10.2 Consultation. Committee member Ayau has pointed out that "of all the words to describe 'consultation' with federally-funded museums and agencies involving NAGPRA repatriation claims, I would not have used the term 'consensus' to describe my 32 plus years of experience. Consultation was more about information exchange by museums or federal agencies for purposes of preparing and substantiating a claim for repatriation that meet the applicable legal standards. Some institutions simply opposed repatriation no matter what the historic record and Hawaiian cultural values, beliefs and practices established. Our job as a NAGPRA claimant was not to convince the museum or agency to agree with us, but to advocate for the return of the ancestral remains, funerary objects, sacred objects or cultural patrimony. If the museum opposed the repatriation claim, our responsibility was to convince the Review Committee, and if appealed, then the courts. Some would say, these were at times hostage negotiations for our

ancestors and I was not as interested in reaching an agreement as much as I was determined to convince museum and agency staff as to the humanity in the return of deceased ancestors. I support this new definition."

In all consultations, the Federal agency or museum must be transparent in identifying who will be making final determinations and having that person attend the consultation in good faith.

We recommend adding "between equal parties" to the definition to acknowledge that Tribes and Agencies come to the table to consult as equals. We request that the definition be rewritten to read as follows:

> **Consultation means a process between equal parties to seek consensus through the exchange of information, open discussion, and joint deliberations and by incorporating identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible. Consultation should be held between Tribes and museum or Federal agency decision makers.**

10.2 Cultural item. The NAGPRA defines the term "cultural item" to mean "human remains and" associated funerary objects, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.[2] Subsection 10.2 "cultural item" specifically excludes human remains from the definition. We agree with the concerns raised by many tribes objecting to considering human remains as cultural items, but also recognize that changing the statutory definition is a matter for Congress and beyond the Secretary regulatory discretion.

10.2 Disposition Statement. Agree with previous Committee recommendations for the necessity of a definition of this term.

10.2 Holding or Collection. Appreciate the inclusion of examples of what constitutes a collection under the Act, especially with regards to forensic acquisition which has been historically problematic.

10.2 Hui Malama I Na Kupuna O Hawai'i Nei. Committee member Ayau requests to repeal the definition of Hui Malama I Na Kupuna O Hawaii Nei and all references to the organization in the NAGPRA and the implementing regulations as a Native Hawaiian organization because in January 2015, the organization voluntarily and formally dissolved itself under Hawai'i State law. The organization was succeeded by the Native Hawaiian organization named Hui Iwi Kuamo'o whose leadership and membership is the same as the leadership of Hui Malama I Na Kupuna O Hawaii Nei and who formally established themselves as a nonprofit Native Hawaiian organization by incorporating under the laws of the State of Hawai'i by that name and registering as a Native Hawaiian organization with the Office of Native Hawaiian Relations.

10.2 Hui Iwi Kuamo'o. Committee member Ayau requests to add this new definition of Hui Iwi Kuamo'o to the NAGPRA and the implementing regulations as a Native Hawaiian organization in each instance where Hui Malama I Na Kupuna O Hawaii Nei is stated because it is the successor to the former Native Hawaiian organization explicitly identified in the NAGPRA and the implementing regulations. The proposed definition states,

[2] 25 U.S.C. 3001 (3).

Hui Iwi Kuamoʻo means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaiʻi by that name on July 21, 2022, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly repatriation, burial and reburial issues.

10.2 Human Remains.

We recommend revising the definition as follows:

> **Human remains means ~~the~~ any physical remains of the body of a Native American individual and includes ceremonially interred animal burials spiritually imbued with the character of Native Americans. The physical remains of the body of a person of Native American ancestry includes all substances derived from such remains, including but not limited to biological or medical samples taken for DNA extraction, radiocarbon dating, stable isotope analysis, and any derivatives thereof.**

We have a serious problem with the limiting language in this definition that states, "[T]he term does not include human remains or portions of human remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained." **This language is not in NAGPRA**. Human remains is human remains. For example, in the Hawaiian context, when a person gives their hair to be make the lei for a lei niho palaoa, they did not contemplate the item to be taken away from the chief and placed in a foreign land, placed on display or in storage, no longer adorning the chief or her/his descendants. In our view, human remains that are freely given or naturally shed come with the requirement of proper context and function, meaning that the remains always serve the purpose for which they were given or acquired after being naturally shed.

In addition, the definition of Human Remains should be expanded to include casts and 3-D scans. While researching a website that sold casts of human skeletal remains including Native American remains, the site identified a particular skull as being native Hawaiian. Upon closer inquiry I learned that the skull was casted from the actual skull a few years prior to its repatriation to Hui Mālama I Nā Kūpuna O Hawaiʻi Nei in 1991 by the San Diego Museum of Man (SDMM) pursuant to the NAGPRA. We learned that the SDMM had in fact allowed two Hawaiian skulls identified as 1951.056.0002 and 2309 to be casted. At no time did the SDMM disclose the prior casting to Hui Mālama. Upon insistence, the owners of the company agreed to remove the skull from their website and further sale but balked at the further insistence to remove ALL Native American skulls pointing out that this was the focus of their business. Another colleague and I followed up with the SDMM who confirmed this treatment, and provided us two reports documenting this pre-NAGPRA practice, which had post-NAPGRA impacts upon native Hawaiians without any formal disclosure by the museum. This immoral behavior needs to be addressed in the law. This recommendation is based on the humanitarian foundations of the NAGPRA of decency and respect for deceased Native Americans including native Hawaiians. The proposed definition is as follows:

> **Casts, 3-D scans, and all other digital data of Native American Human Remains means as part of its inventory process otherwise required by NAGPRA, all federally funded museums and agencies shall include references to all casts created from actual Native American human skeletal remains and any replicas from 3-D scans and all other digital data of Native American human remains, funerary objects, sacred objects or cultural patrimony. Where applicable, museums and federal agencies shall consult Tribes and Native Hawaiian organizations as to their proper treatment. No such casts, replicas or digital data**

scanned from Native American human remains, funerary objects, sacred objects or cultural patrimony shall be offered for sale or exchange without the free, prior and informed consent of the culturally affiliated Indian Tribe or Native Hawaiian organization. Failure to comply shall be deemed a violation of NAGPRA.

10.2 Human Remains. The proposed regulations exempt museums and Federal agencies from including in their inventories human remains or portions of human remains "that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained." This exemption is inconsistent with the statutory text which requires museums and Federal agencies to include all Native American human remains in their possession or control. Allowing museums and Federal agencies to predetermine if such remains were freely given or naturally shed and not report them in their inventories deprives Indian tribes and Native Hawaiian organizations with necessary information. Only after all such remains are listed in the inventory should a museum or Federal agency be allowed to prove, on the record, that they were obtained with the voluntary consent of an individual or group with authority to alienate them. We recommend that this exemption be deleted from the definition of human remains.

10.2 Native American. The committee is concerned with the recommendation to include Indian Groups that are not Federally recognized. The Act clearly defines an Indian Tribe as:

> any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Granting sovereign rights to non-sovereign groups would likely be a major overstep of the regulations and may contradict aspects of Federal Indian law or Federal Indian Trust Responsibility. Recommend thorough legal review and Tribal comment.

10.2 Native Hawaiian organization. Committee member Ayau requests to amend the definition of "Native Hawaiian Organization" in NAGPRA and the implementing regulations as follows. First, delete the reference to the "Office of Hawaiian Affairs" (OHA) and all references to the term in the NAGPRA and the implementing regulations as a Native Hawaiian Organization based upon the decision in *Rice v. Cayetano*, in which rancher Harold Rice sued the State of Hawai'i in 1996 claiming the elections where unconstitutional because they were limited to persons of Hawaiian descent. The case was appealed to the United States Supreme Court, 528 U.S. 495 (2000) who in 2000, ruled that the state could not restrict eligibility to vote in elections for the Board of Trustees of the OHA to persons of Native Hawaiian descent. In its analysis, the High Court essentially determined that the OHA is a State agency. As a result, OHA leadership is elected by a majority of non-Hawaiians. In addition, OHA has in the past and continues to receive federal funding. The legal problem created is that should OHA conduct repatriation under the NAGPRA and come into possession and control of cultural items subject to the NAGPRA, it would itself in turn by subject to NAGPRA claims by lineal descendants and Native Hawaiian organizations creating a double repatriation scenario. To correct this conundrum, the OHA must no longer be explicitly recognized as having legal standing to conduct repatriation.

Second, delete the reference to "Hui Malama I Na Kupuna O Hawai'i Nei" and all references to the term in the NAGPRA and its implementing regulations based upon the fact that in January 2015, the Executive Director voluntarily dissolved the non-profit organization at the direction of one of its founders. The work must continue she said, but under a new name, as she committed to put the original name to rest. The work of Hui Malama was taken up eventually by the Native Hawaiian Organization Hui Iwi Kuamo'o.

Third, insert the name Hui Iwi Kuamoʻo, a Native Hawaiian organization who has continued to conduct repatriations pursuant to the NAGPRA as the successor to Hui Malama I Na Kupuna O Hawaiʻi Nei.

Fourth, add a prohibition of any museum or government agency from asserting itself as a Native Hawaiian organization. During the tenure of William Brown as Director of the Bernice Pauahi Bishop Museum, he attempted to assert that the museum is a Native Hawaiian organization for purposes of NAGPRA. Apparently, his strategy to halt any further repatriations was based on the automatic creation of a competing claim whenever a NAGPRA claim was presented by a Native Hawaiian organization and that the museum could then exercise its authority under NAGPRA not to take any further action until the competing claims were resolved, effectively halting repatriation. Fortunately, the museum's board of director's opposed Brown's misguided attempt. The lesson from this episode requires the proposed prohibition.

Fifth, replace the term "indigenous" back to the term stated in NAGPRA of "aboriginal". Trying to make Hawaiians culturally like Native Americans is inappropriate because our connection to America is primarily a political one. For Hawaiians, our lineal/cultural ties are with the natives of the Moana Nui (Pacific Ocean) to the south as we represent the northern tip of the Polynesian triangle along with Aotearoa (New Zealand) and Rapa Nui.

Therefore, when considered together, the definition of ***Native Hawaiian organization*** should be amended as follows,

> ***Native Hawaiian organization*** **means any organization that:**
>
> **(1) Serves and represents the interests of Native Hawaiians, who are descendants of the aboriginal people who, before 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaiʻi;**
>
> **(2) Has as a primary and stated purpose the provision of services to Native Hawaiians; and**
>
> **(3) Has expertise in Native Hawaiian affairs, and includes but is not limited to:**
>
> (i) **Hui Iwi Kuamoʻo, incorporated under the laws of the State of Hawaiʻi on July 21, 2022 and successor to Hui Mālama I Nā Kūpuna O Hawaiʻi Nei;**
>
> (ii) **Native Hawaiian organizations (including ʻohana) who are registered with the Secretary's Office of Native Hawaiian Relations;**
>
> (iii) **Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations, as defined under 43 CFR 47.10; and**
>
> (iv) **does not include any agency, division or subdivision of the State of Hawaiʻi or the United States, or any private or public museum or institution of learning that receives federal funds.**

10.2 Office of Hawaiian Affairs. Committee member Ayau requests to repeal the definition of Office of Hawaiian Affairs (OHA) and all references to the term in the NAGPRA and the implementing regulations as a Native Hawaiian organization based upon the decision in *Rice v. Cayetano*, in which rancher Harold Rice sued the State of Hawaiʻi in 1996 claiming the elections where unconstitutional because they were limited to persons of Hawaiian descent. The case was appealed to the United States Supreme Court, 528 U.S. 495 (2000), who in 2000 ruled that the state could not restrict eligibility to vote in elections for the Board of Trustees of the OHA to persons of Native Hawaiian descent. In its analysis, the High Court essentially determined that the OHA is a State agency. As a result, OHA leadership is elected by a majority of non-Hawaiians. In addition, OHA has in the past and continues to receive federal funding. The legal conundrum created is that should OHA conduct repatriation under the NAGPRA and come into

possession and control of cultural items subject to the NAGPRA, it would itself in turn by subject to NAGPRA notification requirements and claims by lineal descendants and Native Hawaiian organizations creating a double repatriation scenario. To correct this conundrum, the Office of Hawaiian Affairs must no longer be explicitly recognized as having legal standing to conduct repatriation.

10.2 'Ohana. Committee member Ayau opines that the definition of 'ohana presents a conundrum because 'ohana in the Hawaiian language means family and a family is comprised of lineal descendants. However, the definition as presented states incorrectly that " *'Ohana (family)* means a group of people who are not lineal descendants…" This problem can best be cured by making the following revision,

> *'Ohana* (family) means a group of people who are not **asserting claims as** lineal descendant**s** but comprise a Native Hawaiian organization whose members have a familial or kinship relationship with each other.

10.2 "possession or control" in the proposed rule defines the phrase as "having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item." In the Act, when the terms "possession" and "control" are used together they are always linked by "or," which clearly indicates that Congress considered the terms to have distinct and different meanings. Neither term is defined in the Act, but the common meaning of possession be closer to new term defined in the proposed rule as "custody." In the Act, the phrase "possession or control" is only used to define the scope of cultural items to be included in the summaries and inventories provided by museums and Federal agencies to Indian tribes and Native Hawaiian organizations. Requiring museums and Federal agencies to provide information on all cultural items that they either have possession (have in their custody) or control (regardless of who has possession ensures that Indian tribes and Native Hawaiian organizations obtain a full range of information on all cultural items that may be repatriated. Importantly, the Act also provides museums and Federal agencies with a mechanism to exempt cultural items from repatriation if they can prove they have "right of possession." We request that the Department revise the regulation to establish separate definitions of control and possession to read as follows:

> **~~Possession or c~~Control means having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item. A museum or Federal agency may have possession or control regardless of whether the object or item is in its physical custody. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.**
>
> **~~Custody~~Possession means having an obligation to care for the object or item but not a sufficient interest in the object or item to constitute ~~possession or~~ control. In general, ~~custody~~possession through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute ~~possession or~~ control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.**

Defining these terms consistent with Congressional intent that they mean different things ensures that Indian tribes and Native Hawaiian organizations receive the fullest reporting of cultural items that they may be able to repatriate. We note that the proposed rule anticipates this situation by explicitly requiring museums to report collections from Federal lands that are in their possession. We also recommend that the phrase "sufficient legal interest" be defined to the average person can understand it.

10.2 Repatriation Statement. Agree with previous Committee recommendations for the need of a definition and/or template.

10.2 Right of Possession. Committee member Ayau maintained an ongoing objection to the inclusion of unassociated funerary objects as being subject to a private right of possession claim, which is to say he disagrees with the "[a]pplicable common law in the United States". To my mind, as long as an object is funerary, it cannot be owned by the living unless the person is a recognized lineal descendant, regardless of whether the human remains are no longer associated with the item. In other words, the item's funerary condition is permanent. It is also haumia (defiled) given its prior association with the dead. The proposed regulations should extend the qualification of right of possession that exists for human remains and associated funerary objects, to unassociated funerary objects.

10.2 Sacred Object. Committee member Ayau opines that this definition requires additional language to make the important distinction that some practices are religious in nature and some are familial spiritual practices and not organized amongst the large community or considered stately religions. For Hawaiians, these are ʻaumākua practices, which are ike pāpālua (spiritual communications) with deceased family members that were not considered part of the stately religion that was overthrown in circa 1819-1820 following the Battle of Kuamoʻo and the defeat of ʻaikapu (sacred eating). The simple revisions are as follows:

> *Sacred Object* means an object that is a specific ceremonial object needed by a traditional religious leader for the practice of traditional Native American religion **or family spiritual practice** by present day adherents, according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. While many items might be imbued with sacredness in a culture, this term is specifically limited to objects needed for the observance or renewal of Native American religious ceremonies.

§10.3 Cultural and geographical affiliation.

10.3 Cultural and Geographical Affiliation. Strongly support the revision of Cultural and Geographic Affiliation. Disagree with many of the objections raised by McManamon in previous Committee comments. In practice, evidence has always been evaluated by a preponderance of the evidence, and the revised regulations provide that guidance. The intent of the law was never to evaluate evidence based on any higher legal standard (i.e. beyond a reasonable doubt), which would create a significant, if not impossible burden on repatriation. Strongly support the addition of consultation language to this section as drafted.

10.3 (a). The revised statement that "Cultural affiliation does not require exhaustive studies of the human remains or cultural items or continuity through time. Cultural affiliation is not precluded solely because of reasonable gaps in the information" will make a difference in how museums and Federal agencies approach their documentation process going forward.

(1) This revision also requires that only one or more of the relevant types of information listed may be used to identify cultural affiliation.
(2) The list of specific criteria provides clarification in terms of how to identify the different types of cultural affiliations.

These are important steps in moving NAGPRA forward as some museums and Federal agencies have used the cultural affiliation process as a delaying tactic or flat refusal to repatriate human remains and cultural items. Also, the elimination of the term “culturally unidentifiable” from the regulations and the requirement for museums and Federal agencies to initiate consultation will move human remains from this designation into one of the other types of affiliation.

10.3 (b), (c), (d). The inclusion of additional types of affiliation – geographical, multiple and closest – and the types of criteria used to identify these types of affiliations provide clarity to some of the confusion in the past and the affiliation of the numerous ancestors currently documented as “culturally unidentifiable” in museums and Federal agencies.

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

§10.4 General.

10.4 (a). One major change in the proposed rule is to require Indian tribes to ensure compliance with the discovery, excavation, and disposition provisions of the Act on tribal lands in Alaska and the continental United States, including on private inholdings within the exterior boundary of a reservation. Under current regulations, the Secretary delegated responsibility for compliance with these provisions to the Bureau of Indian Affairs, particularly with issuances of permits under the Archaeological Resources Protection act, with tribal involvement being discretionary.[3] While we are not adverse to this change in principle, we feel that the proposed rule does not sufficiently address how the change will be implemented, particularly to ensure that all parties are aware that the responsibilities have changed. To address these concerns, we request inclusion of the following language under subsection 10.4 (a):

> **No later than [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], the Bureau of Indian Affairs will provide certified notification to all owners of private land located within the exterior boundary of an Indian reservation. The certified notice will include the name and contact information for the tribal official responsible for compliance with NAGPRA's discovery, excavation, and disposition provisions, or if the tribe has delegated this responsibility, the contact information for the responsible Bureau of Indian Affairs official.**

10.4 General. 10.4 reads that Tribes must complete their own Plan of Action for each individual project. Many Tribes have their own administrative process in place to account for individual projects and discoveries that do not include PoAs. Strongly recommend additional language that if a Tribe has procedures in place for their reservation lands that have been approved by the Tribe's THPO, Tribal Council, BIA, ACHP, etc., that they may be substituted as long as the Tribe itself is responsible for the ground disturbing activity.

10.4 (b) Plan of Action. Recommend adding provisions for training for federal officials responsible for carrying out these provisions, including NPS staff.

10.4 (c) Comprehensive Agreement. Recommend adding language that existing Tribal policies may be substituted for new comprehensive agreements as long as they meet all minimum requirements under 10.4(c).

10.4 (c) Comprehensive agreement. The regulations do not provide for a renewal of Comprehensive agreements. Recommend a renewal or reapproval period, or conditions that may trigger a revision of the agreement.

[3] 43 CFR 10 and 25 CFR 262.

§10.5 Discovery.

10.5, Table 1 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 conveyed. We request that this second cell be changed to read "Federal agency with primary management authority."

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

There is also an important requirement in the current regulations that the draft proposal removes. Under the current regulations, the responsible Federal agency official is required to notify any known lineal descendant and likely affiliated Indian Tribes or Native Hawaiian organizations within three working days of receipt of written confirmation of a discovery and to initiate consultation. 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. We request that these requirements be added back into the proposal.

10.5 (c). Respond to a discovery. Agree with previous Committee's request for language concerning unintentional ground-disturbances to be appropriately mitigated.

10.5(c), 10.6 (a), and 10.7(c). ***Tribal Lands of a Native Hawaiian organization.*** Committee member Ayau opines that the proposed regulations state in part, "This definition provides for an NHO to take on responsibility for the provisions of the Act from the State of Hawai'i DHHL. When an NHO has a lease or license from DHHL pursuant to the Hawaiian Homes Commission Act (HCCA), that NHO can elect to take on any of the responsibilities under Subpart B of the proposed regulations on its Tribal lands (see proposed §§ 10.5(c), 10.6 (a), and 10.7(c))."

While I tend to agree with this sharing of responsibility through this grant of authority, it naturally begs the question as to whom determines whether the NHO is qualified to do take on these significant responsibilities? The Hawaiian Home Lands Program is a housing program and qualified Hawaiians accept a lease for land for residential, agricultural or pastoral purposes based upon availability. This is to say that Hawaiians living on DHHL lands via a lease are not necessarily lineally descended from that area. Ergo, empowering them to speak for iwi that may not be related to is a concern. Is simply having your organization's name registered with the Office of Native Hawaiian Relations sufficient qualification? The law could be empowering unqualified NHOs to the detriment of the iwi kūpuna (ancestral Hawaiian skeletal remains).

For a powerful example of taking on such responsibilities without qualifications, one need look no further than the occupation at the caves in Wailupe, O'ahu over the past year where an ad hoc NHO decided to maintain around the clock vigil of a sealed burial cave where iwi kūpuna had been ceremonially reburied. The ad hoc NHO posted the location of the cave repeatedly in their pleas for support on social media including videos. The problem is they continually shared the location of the burial site which compromises its safety, especially since the group no longer occupies that space leaving open the possibility of future disturbance now that the general public and rest of the world knows exactly where this cave is located. We must learn from these examples and work not to repeat them.

A NHO being able to "elect" to take over these responsibilities has an upside when they are qualified. Ensuring they are qualified is the issue. Do they consult with and gain authorization or at least awareness from DHHL that they will be taking over DHHL's NAGPRA responsibilities? Consultation should be minimally required. Finally, there is something intrinsically awkward and dare I say wrong about using the term "tribe" or "tribal" to refer to Hawaiians. While we respect and honor our North American tribal relationships, our association with the United States is that it occupies our country, and not that we are culturally similar to North American peoples. Again, our lineal connections are to the south via the Moana Nui (Pacific Ocean).

10.5 (c)(3) Discoveries on DHHL Lands. Committee member Ayau opines that the proposed regulation provides that, "On Tribal lands of an NHO, the NHO may accept responsibility for discoveries on its Tribal lands otherwise DHHL is responsible for discoveries on Tribal lands in Hawai'i." The proposed regulation should indicate that an NHO that elects to accept responsibility for discoveries on its Tribal lands must first notify, consult and reach an agreement with DHHL for the transfer of such kuleana (responsibilities) so that DHHL is aware of the discovery and agrees to defer to the NHO. This could be the time and space where DHHL assesses whether the NHO is qualified to undertake these significant responsibilities.

§10.6 Excavation.

The NAGPRA states 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."[4] The proposed rule's use of earlier and more general statutes and regulations to erode Congress' later, specific, and clear intent is definitely a novel approach to statutory interpretation.

10.6 (a) Excavation on DHHL Lands. Committee member Ayau opines that the proposed regulation provides that, "Consistent with the Act, the proposed language in § 10.6(a), would require, on Tribal lands, an Indian Tribe or NHO to consent in writing to an excavation." And further, that "On Tribal lands of an NHO, the NHO may accept responsibility for excavations on its Tribal lands; otherwise DHHL is responsible for excavations on Tribal lands in Hawai'i." I completely support this proposed language. The proposed regulation should indicate that an NHO that elects to accept responsibility for discoveries on its Tribal lands must first notify, consult and reach an agreement with DHHL for the transfer of such kuleana (responsibilities) so that DHHL is aware of the excavation and agrees to defer to the NHO. This could be the time and space where DHHL assesses whether the NHO is qualified to undertake these significant responsibilities and assess their lineal connections to this ahupua'a.

§10.7 Disposition.

10.7 Disposition. Also applies to Subsection 10.7(d). Previous Committee comments objected to language stating consultation "may" be required, however the new regulations do not mention the need for consultation at all. The language has been changed to say that the agency official "must" determine disposition, but it does not state that disposition must be determined in consultation. Strongly recommend that language be added clearly stating "consultation" must be conducted to determine disposition.

10.7 (b) and 10.7 (c). We are shocked that to see that § 10.7 (b) and § 10.7 (c) of the proposed rule 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 ancestors is being done by a land manager unfamiliar with this complicated process. The proposed elimination of the notice requirement seems intended to reward the U.S. Army for ignoring the current requirement following excavation of marked graves at Carlisle, Pennsylvania. This notice requirement is equally important for cultural items removed or excavated from tribal lands since the Act gives lineal descendants priority for ownership or control, and without a notice they may have no reason to know that the human

[4] 25 U.S.C. 3002 (c).

remains and other cultural items of their ancestors have been excavated. Publication of these public notices prior to disposition is critical to ensure that the Act is being implemented in a fair and transparent manner. We request the current notice requirements be retained in § 10.7 (b) and § 10.7 (c).

10.7 (c) On Tribal Lands. Object to Tribes having to complete disposition statements concerning the discovery of their own ancestors on Tribal lands. Recommend providing provisions showing deference to Tribal law and/or policy in these circumstances.

10.7 (e)(2)(A). Strongly object to the disposition of unclaimed human remains to “Indian groups” which is not formally defined, and may contradict the Act, which was intended to apply to Federally recognized Tribes. Recommend thorough legal review and Tribal comment.

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

The goal of the NAGPRA is the repatriation of human remains, funerary objects, sacred objects and objects of cultural patrimony. The steps outlined in this revision are extremely helpful to museums, Federal agencies, Indian tribes, and Native Hawaiian organizations to achieve this goal, however, the timelines to carry out the work will be almost impossible to meet given the fact that most museums, Federal agencies, Indian tribes and Native Hawaiian organizations are understaffed and under resourced to meet these deadlines. The timelines outlined in the steps are also unrealistic given the new requirements leading to cultural and/or geographical affiliation, consultation, and repatriation. This will require additional hours to re-access the human remains and cultural items in collections and to consult with Indian Tribes and NHOs to determine the appropriate affiliation. Museums and Federal agencies working in regions with large numbers of Indian tribes the consultation process to determine cultural affiliation can take two to three years. In some cases, there may be claims by multiple Indian Tribes that will take time to conduct additional consultation. This can be, and often is, even more complex where large collections from multiple locations are concerned. Depending on the size of the collections the preparation of notices can take numerous hours to complete and there needs to be additional time allowed if revisions and/or additional information are required. Many of the suggested timelines and estimated hours to complete each step are unrealistic and will require ongoing extension requests, which will add to the burden of the National NAGPRA Program Office to field extension requests, additional grant requests from museums, Indian Tribes and NHOs, and to publish the additional notices in a timely manner. The ten to thirty-day timelines in some of the steps are problematic in that they do not take into consideration staff vacations, sick leave, holidays, and vacancies among Indian tribes, NHOs, museums and Federal agencies that are often unpredictable.

Given the new “geographical affiliation” requirement museums will be required to re-inventory their collections and engage in additional consultation that may change previous cultural affiliation determinations. Hopefully, this will clarify the human remains previously classified as culturally unidentifiable. However, this may create conflicting claims among Indian tribes, and this will require additional consultation and time to make determinations prior to submitting Notices. The staff time required to carry out this will differ among museums and Federal agencies depending on the number of human remains in the collections.

Consultation requires access to collections which may require staff time to retrieve collection records, human remains and cultural items so that they can be examined by the tribal representatives. There are also consultation costs including travel, lodging, and honoraria for tribal consultants whether on site or at tribal offices. Tribal consultants may involve more than one or two representatives and sometimes involve up to ten from a single Indian tribe participating in the consultation. These costs are not necessarily included in the annual budgets of Indian tribes, NHOs, museums or Federal agencies.

The estimates provided in the “Response to Review Committee Recommendations on 43 CFR Part 10 Native American Graves Protection and Repatriation Act Regulations, Prepared November 2022” are extremely low in terms of staff time required for each step of the process and the actual costs for consultation and the completion and submission of notices and

ultimately the repatriation of human remains and funerary objects that can number in the hundreds and in many cases thousands of individual sets of human remains and funerary objects. It also underestimates the time and costs involved in consultations and the number of lineal descendants and members of Indian tribes and NHOs that might be involved in determining the cultural and/or geographic affiliation of human remains, especially those that come from multiple areas, as well as the potential for competing claims. Possibly the American Alliance of Museums could conduct a survey of its members to determine a more realistic estimate of the time and costs involved in compliance with the new regulations on the part of museums and the Association on American Indian Affairs could survey Indian tribes and Native Hawaiian organizations in order to get a better estimate of their costs involved in consultation and completing the repatriation process.

Without a reasonable infusion of funding for new or additional summaries and inventories and for Indian tribes and Native Hawaiian organizations to address the huge influx of requests to consult the repatriation process will not succeed as hoped. Additional funding will be required through annual budget increases for Federal agencies and Indian Tribes and Native Hawaiian organizations and grants to museums through the National NAGPRA Program and other Federally funded endowments, etc.

§10.8 General.

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 consistent with our previous recommendation changing the term “custody” to “possession.”

10.8 (c). Agree with previous Committee recommendations to provide Tribes access to reported summary information online. There is an increasing need for a database of backlog summary, inventory, and other repatriation information that Tribes can freely access. While privacy and data protection are a major concern, information could be accessed through a secure registration system.

10.8 (d) 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 to the Manager, National NAGPRA Program describing holdings or collections for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control. We agree in general with this requirement but several requested changes. First, consistent with our previous recommendation, we request changing the term “custody” to “possession.” Second, we request that the statement be broadly construed to include all cultural items in the possession of the museum excepting those controlled by a Federal agency which are already addressed in Subsection 10.9 (c). Third, it is not clear from the subsection as written how the summary advances the identification of human remains and other cultural items that a lineal descendant, Indian tribe, or Native Hawaiian organization might wish to repatriation. We recommend revising the subsection as follows:

(d) Museums with ~~custody~~possession of other holdings or collections. No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], each museum that has custody of a holding or collection that contains Native American human remains or cultural items that are in the control another person, institution, State or local government, or ~~and~~ for which it cannot identify ~~any person, institution, State or local government agency, or Federal agency with possession or~~ who has control of the holding or collection, must submit a statement describing that holding or collection to the Manager, National NAGPRA Program. Within 30 days of receipt, the Manager, National NAGPRA Program, must post the summaries on the National NAGPRA Program website.

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 (f) 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.

Several tribes made a similar request in their comments on the draft proposed rule. The Department's response indicates that the Notice of Funding Opportunity for NAGPRA Consultation/Documentation Grants currently allows use of grants authorized under 25 U.S.C. 3008 for scientific study and destructive analysis,[5] in apparently violation of the NAGPRA's clear statutory restriction.

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

10.9 (b) Step 2—Initiate consultation and (c) Step 3—Consult with requesting parties
This places the burden of initiating consultation on the museums and Federal agencies which is an important and proactive step in moving toward the NAGPRA compliance and repatriation. In the past some museums use the excuse that they never heard from Indian tribes or NHOs to assume that there was no interest in consulting. Unfortunately, due to the lack of transparency and noncompliance on the part of some museums and Federal agencies, Indian tribes and NHOs were not informed of humans remains, funerary objects, potential sacred objects or objects of cultural patrimony held in these collections. This step makes it very clear that museums and Federal agencies are required to initiate this important and critical consultation process and to determine the appropriate affiliation of these ancestors and cultural items and to work toward their repatriation. We support these steps regarding consultation.

[5] Response to Tribal Consultation on revisions to 43 CFR Part 10, Native American Graves Protection and Repatriation Act Regulations, Prepared December 2021, Updated August 2022, at 42.

10.9 (b)(3). In concurrence with public comment, there is concern that Tribes must put in writing that they request to consult but will also be held to strict timelines. Consultation is a time consuming process, and if often exceeds the given timelines. Recommend more thorough review and further Tribal consultation that specifically addresses and makes clear these new requirements.

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

10.9 (i)(3), 10.10 (j)(3). Stay of repatriation. We recommend additional language giving Tribes the ability to consult over the value of scientific studies to help inform the decision of the Secretary. While the Secretary does have the express authority to act alone, providing a balanced argument to the Secretary seems within the spirit of the law. Additionally, recommend that the Secretary's written concurrence be provided to Tribes.

The consulting tribes must consent to scientific investigation for any purpose.

§10.10 Repatriation of human remains and associated funerary objects.

The Committee feels that the steps in this section are clear and include all human remains in museum and Federal agency holdings. Cultural and geographical determinations will be done based on collections records and the consultation process with potential lineal descendants, Indian tribes and Native Hawaiian organizations.

10.10 (a) Step 1. This subsection outlines the contents of the itemized list of human remains and associated funerary objects to be prepared by museums and Federal agencies. We request that the list be amended as follows:

> **(1) The number of individuals determined in a reasonable manner based on the information available, including remains identified in the museum or Federal agency's documentation that cannot be located or are known to have been destroyed. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one;**
> **(2) The number of associated funerary objects and types of objects (counted separately or by lot), including funerary objects identified in the museum or Federal agency's documentation that cannot be located or are known to have been destroyed;**

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 (h) of this section."

10.10 (c)(4) 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.**

Several tribes raised this issue in their comments on the draft proposed rule and we are incredulous that the Department has again chose to ignore this statutory restriction.

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.

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.

10.10 (k)(1)(i)(B). Strongly object to the transfer of human remains to non-federally recognized Indian groups. Same concerns as stated above. While this section may still preserve priority to federally recognized Tribes, it may be contradictory to the established government-to-government relationship federally recognized Tribes share with the United States. Recommend thorough legal review. Suggested revisions:

> **An Indian group that is not federally recognized but has a relationship to the human remains and associated funerary objects. Museums or Federal agencies must first submit in writing a request for review from the Repatriation Committee. The Review Committee will provide a consensus recommendation, which will be sent to the Secretary for final action.**

§10.11 Civil penalties.

10.11 Civil Penalties. We agree with previous Committee recommendations to establish a clear process for a Federal agency's failure to comply. It may be useful to consider: a) Who receives a federal agency's failure to comply? b) Who may also be reported for a violation on federal lands: the agency itself, or contractors/subcontractors, etc. c) How the report is investigated. d) -

What results a reporter may expect to receive from the investigation. e) A clear timeline of results. F) How the violation will be remedied, if one is identified through investigation.

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. Individuals in a position to make well founded allegations of failure to comply may also not be to receive mail, phone calls, or email in a confidential manner that protects them from retaliation. The proposed requirement places more scrutiny on the person making the allegation than on the non-compliant museum and seems to be specifically designed to chill the number of allegations that the Secretary will accept. We request at a minimum that the word “must” in this requirement be replaced with “should.” We are also concerned that the position to which allegations of failure to comply are directed, the Manager, National NAGPRA Program, is also responsible to managing millions of dollars of grants awarded directly to museums against which allegations may be made. To resolve this apparent conflict of interest, we request that the regulations establish an online system for individuals to submit anonymous allegations, perhaps administered through the Department Office of the Inspector General.

10.11 (a)(1). We agree with previous Committee recommendations regarding the need for anonymous reporting, for both Museums and Federal agencies.

10.11 (b) requires the Secretary to review all allegations within 90 days of receipt. We strongly support this requirement.

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

10.11 (g)(4). We agree with previous Committee recommendations that penalties should be assessed per day per violation.

Subpart D—REVIEW COMMITTEE

§10.12 Review Committee.

10.12 (a) requires that all findings and recommendations made by the Review Committee will be published in the Federal Register within 90 days of making the finding or recommendations. We recommend that subsection be revised to require publication the Committee's findings and recommendations in the Federal Register within 30 days of making the finding or recommendation.

10.12 (b)(1) Native Hawaiian Religious Leader Exclusion from Nomination to NAGPRA Review Committee. The National Park Service recently started interpreting NAGPRA's Review Committee provisions to specifically exclude nominations of Native Hawaiian traditional religious leaders by way of a draft proposed rule released on July 8, 2021, which would formalize this new interpretation. By way of background, on June 9, 2021, the National Park Service published a notice in the Federal Register soliciting nominations from Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders for one position on the review committee. The nominee must be a traditional Indian religious leader. Deadline for nominations is August 9, 2021. 25 U.S.C. 3006 (b)(1) Membership says

> "The Committee established under subsection (a) shall be composed of 7 members, (A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders…"

Committee member Ayau states that "I understood that from the committee appointments in 1992 until at least 2009, nominations of Native Hawaiian religious leaders were always accepted by the NPS and were forwarded to the Secretary along with rest of the nominations from which the Secretary would make his or her appointment. Use of the term "Indian" in the statutory language was considered problematic since: 1) as an undefined term, the common meaning would include both American Indians and persons from the country of India, both of which are categories based on national origin or cultural heritage which raise potential Constitutional issues; and 2) reliance on the term to narrow possible nominations produced an absurd result of Native Hawaiian organizations being able to nominate tribal religious leaders but not their own. This new and highly restrictive interpretations were developed sometime after 2009 but was not noticed or discussed with Native Hawaiian organizations or the public.

Which brings me to me. Last year, a number of Native Hawaiian organizations submitted nominations of myself for the position and have received emails from the NPS Program Manager which stated:

> The Department of the Interior has interpreted this provision based on the terminology within a few words of each other. Since Congress said 'traditional Native American religious leaders' could nominate, but the membership was specifically reserved for traditional Indian religious leaders.' Congress must have meant something by the difference. Under NAGPRA, 'Native American' includes Native Hawaiians, but 'Indian tribe' does not. Thus, a Native Hawaiian traditional religious leader could nominate someone for one of those slots, but a Native Hawaiian traditional religious leader could not serve as a traditional Indian religious leader. Therefore, I am unable to accept your nomination of Edward Halealoha Ayau for this position on the NAGPRA Review Committee.

The draft proposed regulations released with the July 8, 2021 letter to all tribal and Native Hawaiian organization leaders formalizes this new interpretation:

> (1) Three members are appointed from nominations submitted by Indian Tribes, Native

> Hawaiian organizations, and traditional religious leaders. At least two of these members must be traditional Indian religious leaders. A traditional Indian religious leader is a person who, based on the Indian Tribe's cultural, ceremonial, or religious practices, is recognized as being responsible for performing cultural duties or exercising a leadership role in that Indian Tribe.

I wish to raise this concern for future Native Hawaiians who should be allowed to serve as a traditional Native American religious leader. I would point out that one of the individuals who nominated me last year to the NAGPRA Review Committee as a traditional Native American religious leader, was none other than Walter Echo-Hawk, who had a large hand in helping craft and draft the NAGPRA. He was shocked by the new NPS interpretation. So was I. By these comments, I hope to point out the absurdity of this misinterpretation and hope that it improves."

One issue that is not addressed in the proposed rule 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's Report to Congress for FY2019 was finalized on October 3, 2019, but the Department did not send it to the Congress for 26 months. Similarly, the Committee's combined Report for FY2020 and FY2021 was withheld from the Congress for nearly seven months. 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.**

Information Collection Requirements

The preamble to the proposed rule asks four specific questions regarding the information collection requirements to which we offer the following comments and suggestions:

a. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

We believe that the collection of information outlined in the proposed regulation is necessary for the proper performance of the Secretary of the Interior's responsibilities under the Native American Graves Protection and Repatriation Act and that the collection of information will have practical utility.

b. The accuracy of the estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

We has reviewed the estimates of the burden for this collection of information provided by the National Park Service and believes they significantly under-estimate the actual costs.[6] The methodology used by the National Park Service identifies many separate information requests, but then systematically under-estimates the amount of time each typically take. There is no indication of what data was relied upon in coming up with these estimates. Similarly, the National Park Service's estimate excludes the burden on Indian tribes and Native Hawaiian organizations. In order to obtain the benefit outlined by the NAGPRA, that is the repatriation of their ancestral remains and cultural items, Indian tribes and Native Hawaiian organizations are compelled by the regulations to obtain, maintain, retain, report, or publicly disclose information to third party museums and Federal agencies. The burden to Indian tribes and Native Hawaiian organizations must be included.

One particular proposal where the costs are ignored is the proposal in Subpart B unilaterally transferring responsibility for complying with the excavation and discovery provisions of the Act on tribal lands from the Bureau of Indian Affairs to each individual tribe. Under the current regulations, compliance with the excavation and discovery provisions on tribal lands is assigned to the Bureau of Indian Affairs and is carried out by a network of Federal employees at the GS-12 level or higher at the agency, regional office, and headquarters office. Transferring these responsibilities from the Bureau of Indian Affairs to tribes means that each tribe will need to have at least one staff person dedicated to these duties, and some large reservations (particularly those with large numbers of private inholdings within the exterior boundaries of their reservations), will need several additional staff to fulfill these new responsibilities. The loaded rate (salary plus benefits) for one mid-range GS-12 is $115,000 per year, and there are currently nearly 400 Federally recognized Indian tribes with tribal trust lands that under the proposal will be unilaterally required to implement the Subpart B requirements. Please note that this proposed unilateral shift of responsibility is very different than the voluntary shift of responsibilities under the Indian Self-Determination and Education Assistance Act or the National Historic Preservation Act where tribes may apply to assume responsibilities fully knowing what resources will be made available. We request that the unilateral transfer of these responsibilities from the Bureau of Indian Affairs to the tribes proposed in Subpart B is not implemented until the necessary funding stream has been established, or the transfer is made voluntary.

[6] National Park Service, Cost-Benefit and Regulatory Flexibility Threshold Analyses: Native American Graves Protection and Repatriation Act Proposed Revisions. February 2022, Updated June-September 2022

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

We have provided our recommendations on ways to enhance the quality, utility, and clarity of the specific requirements above. However, we have noticed that in oral presentations National Park Service officials have consistently downplayed the importance of consultation and the need for accurate reporting that does not appear be consistent with the text of the proposed rule itself.

d. How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Under the proposed rule, all museums and Federal agencies will be required to complete a new or revised inventory of all human remains and associated funerary objects in their possession or control within 30 months of publication of the final rule. One of the most complex tasks required will be determining geographic territory based on an extensive list of government legal documents, including: treaties sent by the President to the United States Senate for ratification; Acts passed by Congress; Executive Orders; treaties between a foreign or colonial government and an Indian Tribe signed before the establishment of the United States Government or prior to the land becoming incorporated in the United States; other Federal documents or foreign government documents providing information that reasonably shows aboriginal occupation; or intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes. Reviewing and making determinations based on this plethora of legal documents is not the typical job of museum professionals and is best done by legal professionals of the actual parties involved in the agreements. One way to minimize the burden of the collection of information would be for the Department of the Interior, in consultation with Indian tribes, to prepare a single online source that will identify which tribes are geographically affiliated with specific locations. The Department of the Interior is the most logical place for this source to be located because of Secretary's responsibility for both implementing the NAGPRA and ensuring the government's trust responsibility for Indian tribes.